

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 3, 2018

TO: Jack Walsh, Regional Director
Region 2

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Trade Off, LLC
Case 02-CA-199415

512-5009-0100-0000
512-5009-6733-0000
512-5009-6767-0000
512-5030-2050-0000
512-5030-4090-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act by filing and maintaining a state defamation lawsuit against the Charging Party Union and two employees in response to their protected concerted statements to the media and the general public as part of a Union safety campaign. We conclude that the Employer's state court defamation lawsuit targets the Charging Parties' protected concerted activity and that it is baseless and retaliatory under the principles established in *Bill Johnson's*.¹ It therefore violates Section 8(a)(1) of the Act.² More specifically, the Employer failed to present the Region with any evidence showing that the allegedly defamatory statements that constituted protected concerted activity were made with malice and caused the Employer actual harm.³

FACTS

Trade Off, LLC, (the Employer) is a construction industry contractor that provides general labor services. The Employer's employees are not represented by a labor organization for the purposes of collective bargaining.

¹ *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

² We conclude that the Employer's lawsuit does not violate Section 8(a)(4) of the Act because the lawsuit only seeks monetary damages, and therefore does not seek to "discharge or otherwise discriminate against" the one employee who filed a charge with the Board.

³ *Linn v. Plant Guard Workers*, 383 U.S. 53, 65–66 (1966).

Background Facts Involving Employee #1

In January 2016, Employee #1 began working for the Employer as a laborer at \$15 an hour. In the fall of 2016, he was promoted to foreman at \$20 per hour. In November 2016, while still a foreman, Employee #1's supervisor saw him talking with a friend who worked as an organizer for Construction and General Building Laborers Local 79 (the Union). Shortly thereafter, in a one-on-one conversation, his supervisor told him not to talk with "those union guys," to which he responded that he was just catching up with an old friend. The supervisor then asked him what he thought about the union. He responded that he did not know, but if he were thinking about the union he would have left the Employer since his friend is doing well with the union. The supervisor again told him to be sure not to talk to the "union guys" because they were no good.

In December 2016, Employee #1 began working at the Employer's Water Street location in Manhattan. Although he continued to receive his foreman's wage of \$20 per hour, he was once again working as a laborer and doing laborer's work. During this time, Employee #1 and a co-worker had multiple conversations about unsafe working conditions at the worksite. They were particularly concerned that the Employer failed to provide the employees with personal protective equipment such as safety harnesses when they were working at elevated heights.

During the month of January 2017, the Employer assigned Employee #1 and the co-worker to perform maintenance work on the top two floors of the project on multiple occasions. For example, their supervisor assigned the co-worker to clean under a water tower that was on the top of the building and exposed to the open air without guardrails or any other safety features to prevent an individual from falling. During a conversation between Employee # 1 and some union workers at the site, the union workers said that they were crazy for going up there without safety equipment. A few days later, Employee #1 and the co-worker were instructed to clean the 28th floor. The area was an open-air court without harnesses, a safety net, or any protective structure to prevent employees from falling. When the co-worker asked for a harness, his supervisor laughed in a mocking tone and said that he did not need one. After reviewing the worksite, the two determined that a harness was necessary to perform this assignment safely. Employee #1 called the Employer's field supervisor and told him that he had been instructed to clean the edge of the 28th floor but that there were no harnesses or fall protection at the site. The field supervisor responded "why the fuck are you calling me, you're not the foreman on the job" and hung up.⁴

⁴ The co-worker saw Employee #1 call someone to request a harness but he did not overhear the conversation and Employee #1 did not inform him who he called.

After the phone call, Employee #1 and the co-worker agreed not to do the task without a harness.

Following this incident, The Employer reduced Employee #1's hours from about 50 to 40 hours per week, which eliminated his overtime pay. He was also assigned jobs that others considered undesirable such as cleaning up the basement. Less than two weeks after the phone call about the safety harness, Employee #1's supervisor informed him that they were cutting back on manpower from the Water Street job and that he was being laid off. He contacted the field supervisor each day to see if there was work but it was not until four or five days later that he received an assignment. However, on the morning of the first day he was to report to the new worksite, the Employer accused him of lying about his whereabouts. The Employer demanded that Employee #1 return his foreman phone and reduced his pay from \$20 to \$15 per hour. Later that day, Employee #1 tendered his resignation because of the reduction in his wages.

On April 4, 2017, Employee #1 filed a charge in Case 02-CA-196227, alleging that the Employer retaliated against him because of his protected concerted activity when it assigned him more onerous work assignments, temporarily laid him off, and constructively discharged him because he complained about the Employer's failure to provide safety equipment.⁵

Background Facts Involving Employee #2

Employee #2 started working for the Employer in around November 2016 where he worked at its Charleton Street worksite as a laborer until he was moved to the 56 Fulton Street worksite and promoted to a foreman. He remained employed with the Employer until February 2017 when he left to take a position with a union employer.

When Employee #2 worked for the Employer, it did not offer vacation pay, a pension, or a matching 401(k) plan. One of the Employer's representatives notified him about a health plan that it provided but told him that the plan offered was not worth getting. When he explained that he still wanted the health insurance for tax purposes, he was told that someone would sign him up. Despite this assurance, Employee #2 was never enrolled in the Employer's health plan.

According to Employee #2, the Employer's 56 Fulton Street jobsite was dangerous when he worked there because it did not have secure barricades at the elevator

However, the co-worker observed that Employee #1 was on the phone making hand gestures and sounding angry and upset.

⁵ The Region is still investigating the allegations in Case 02-CA-196227.

shafts, meaning that they were not properly secured with hooks or fasteners. He saw at least a dozen broken elevator barricades without protective netting and large holes in the work area that were not properly protected with planks or plywood. Many times, the Employer's employees could not wear personal protective equipment because there was not enough for everyone. Employee #2 asked the Employer's general labor foreman for harnesses, which he promised but never provided. When Employee #2 approached the general contractor about harnesses, the general contractor provided only one harness, which he put in the shanty for all of the employees to use.⁶ Employee #2 also noted that the Employer did not offer advanced safety training.

The allegedly defamatory statements

On March 21, 2017, an employee of the Union or one of its affiliates recorded Employee #2 making a statement about the advantages of being a union member. The recording was posted on Facebook, although Employee #2 cannot recall whether it was posted on the Union's Facebook page, his personal Facebook page, or a Facebook page called "Gilbane Exposed" (named for a general contractor with whom the Employer often works). The following is an unofficial transcript of the recording in pertinent part:

Text on the screen: *"A former [Employer] worker talks about the companies [sic] bad practices and how the Laborers union has changed his life"*

Video, Employee #2 speaking: When I was working for [the Employer] I wasn't able to provide a good life for my family, they don't really want to pay you what you're really worth, you know, and then not only that the jobsite is dangerous . . . you might only have one harness in the shanty with a whole bunch of guys that you gotta share, and you're lucky to get that because you gotta fight for that, you gotta argue for that, you gotta push them for that, you gotta do a lot of dangerous things being a laborer. When I was a foreman for [the Employer] . . . There are no benefits, you know they told me that they had a medical coverage insurance or something like that, but they told me straight out when they was offering it, that it's not even worth it, and then I said you know what, I still want it, and the whole entire time they never even signed me up for it.

⁶ Based on his experience, Employee #2 believed that each laborer needed a harness and therefore that they needed at least 11 additional harnesses for the Employer's employees.

Text on the Screen: *“Life has changed drastically for [Employee #2]”*

Video, Employee #2 speaking: My life has completely changed. Now that I’m in the union everything is possible: I got safety training my first several weeks on the site. They got advanced safety training. . . . Pension, I have annuities, I have vacation, I have everything I [could] ask even or ever dream for. . . Health coverage . . . I still don’t believe all of the benefits that the union has provided me.

Text on screen: *“Let’s stop worker exploitation together, for more info go to www.GilbaneExposed.com.”*

On March 30, 2017, PR newswire-US Newswire published an article titled *“Construction Workers, Elected Officials, and Community Activists Urge City Council to Act Now and Protect New York City Construction Workers.”* The article states “[f]ollowing last week’s construction accident that left a hoist dangerously dangling hundreds of feet in the air above thousands of passersby, today construction workers, elected officials, and community gathered . . . to call attention to this unsafe [contractor] job site and their subcontractor, [the Employer], firing of a worker who requested a safety harness on the job.” The article names the Mason Tenders District Council as its source and quotes the director of organizing of the Mason Tenders District Council of Greater New York as saying “The [contractor] and [Employer] should be doing everything in their powers to promote and support safe job sites, not firing workers that demand such things.”

On April 1, 2017, LaborPress magazine quoted Employee #1 in an article titled *“Falling Cement Sparks Building-Trade Protest”* about a protest by building-trades workers over a developer’s use of a nonunion general contractor. The article noted that Employee #1 had become an apprentice with the Union and includes the following description of his statements at the protest about working for the Employer:

“I received no safety training,” he told the demonstration. He quit in January while working on a 32-story luxury-apartment building near the South Street Seaport. When he complained about not having a harness, he says the [Employer] supervisor “petty much cursed me out,” threatened to cut his pay by \$5, and hung up on him.

The article also quotes another former employee of the Employer as saying that he had quit his job with the Employer the previous June because, when he could not find a place to secure his harness while working on the 10th floor of a building, he was told that if he did not keep working he would lose his job. The article states that the former employee also said that he made \$15 an hour without getting any benefits or training, and the only safety-equipment he got was a hardhat.

The Lawsuit

On April 24, 2017, the Employer filed a lawsuit against the Union, Employee #1 and Employee #2 (collectively, "Defendants"). The lawsuit, filed in the Supreme Court of the State of New York, County of Nassau, alleges defamation and libel causes of action, and requests compensatory and punitive damages. More specifically, the lawsuit alleges that the Defendants made three statements that contained defamatory and/or libelous content. First, the lawsuit alleges that the following statement from the video clip created by the Union and featuring Employee #2 was defamatory and libelous:

When I was working for [the Employer] ... you might only have one harness in a shanty with a whole bunch of guys that you gotta share. And you're lucky to get that because you gotta fight for that, you gotta argue for that, you gotta push him for that, because you gotta do a lot of dangerous things just being a laborer[] ... [t]here was no benefits.

Second, the lawsuit attributes the March 30, 2017 news article to the Union and alleges the following statements as defamatory and libelous:

Following last week's construction accident that left a hoist dangerously dangling hundreds of feet in the air above thousands of passersby, today construction workers, elected officials, and community activists gathered at 200 E 59th Street to call attention to this unsafe ... job site and their subcontractor, Tradeoff, firing of a worker who requested a safety harness on the job[] ... Tradeoff should be doing everything in their power to promote and support safe job sites, not firing workers that demand such things.

Finally, the lawsuit alleges that Employee #1 made defamatory and libelous statements in the April 1, 2017, news article:

When [Employee #1] complained about not having a harness, [Employee #1] says, the [Employer] [sic] supervisor 'pretty much cursed me out,' threatened to cut his pay by \$5 an hour, and hung up on him.

On May 24, 2017, the Union filed the instant charge alleging, among other things, that the Employer violated Section 8(a)(1) of the Act by filing a frivolous state lawsuit against the Defendants in retaliation for their protected concerted activity.

Post-Lawsuit Conduct

In late July 2017, after attending a Union meeting, the co-worker who worked with Employee #1 received a text message from his foreman telling him he was to now report to the 59th Street worksite at 6 a.m. Prior to this, the earliest he had been

asked to report was 6:45 a.m. He responded by text to let the foreman know that he could not be there that early. The next morning when he showed up at 6:30 a.m., his foreman sent him home. Before leaving the worksite, he received a phone call from a fellow employee advising him that the foreman said he had been directed to send the co-worker home because he attended a Union meeting.⁷

ACTION

We conclude that the Employer's state court defamation lawsuit targets the Defendants' protected concerted activity and that it is baseless and retaliatory under the principles established in *Bill Johnson's*. It therefore violates Section 8(a)(1) of the Act. More specifically, the Employer failed to present the Region with any evidence showing that the allegedly defamatory statements that constituted protected concerted activity were made with malice and caused the Employer actual harm.

The Defendants were engaged in protected concerted activity when they made the allegedly defamatory statements

Initially, we conclude that Employees #1 and #2 were engaged in protected concerted activity when they made or recorded the allegedly defamatory statements complaining about terms and conditions of employment at the Employer's worksites. Both of their statements were made in furtherance of the Charging Party Union's campaign to improve safety conditions and dissuade a general contractor from using nonunion subcontractors, and neither was "so disloyal, reckless, or maliciously untrue" as to fall outside the protections of the Act.⁸

Section 7 of the Act protects the right of employees to engage in concerted activities for their mutual aid or protection. "The protection afforded by Section 7 extends to employee efforts to improve terms and conditions of employment or otherwise improve their lot as employees through channels outside the immediate employee-employer relationship."⁹ Specifically, "the Board has found employees'

⁷ According to the co-worker, his foreman warned him approximately 10 times that he should not talk to Union representatives. He also warned him not to talk to picketers at the worksite. The field supervisor also warned him once not to talk to Union representatives and said that if he did, he would be jeopardizing his job.

⁸ *Emarco, Inc.*, 284 NLRB 832, 833 (1987).

⁹ *Valley Hospital Medical Center*, 351 NLRB 1250, 1252-53 (2007) (nurse's critical statements about hospital's staffing ratios and their effect on patient care at a press conference and on a union website were protected Section 7 activity), *enforced sub nom. Nevada Service Employees Union Local 1107 v. NLRB*, 358 Fed.Appx. 783

communications about their working conditions to be protected when directed to advertisers, its parent company, a news reporter, and the public in general,” so long as the communications are “related to an ongoing labor dispute and are not so disloyal, reckless, or maliciously untrue as to constitute, for example, a disparagement or vilification of the employer’s product or reputation.”¹⁰

We conclude that Employee #1’s statements, as quoted in the April 1 news article, were protected concerted activity made in furtherance of a Union campaign aimed at improving worker safety and increasing union representation in the building trades. He and other building-trades workers were protesting a general contractor’s use of nonunion sub-contractors—including the Employer—at a Union rally sparked by two high-profile safety incidents at that particular worksite. His statements were restricted to his experience working for the Employer and detailed the unsafe conditions he experienced while working for the Employer on a similar project. The article that quoted Employee #1’s statements at the rally also quoted another former employee of the Employer, who reported similar safety concerns, and a city councilmember, who had proposed new construction-safety legislation and spoke of the improved safety practices on union worksites. And Employee #1’s statements were not so disloyal, reckless, or maliciously untrue, within the meaning of *Jefferson Standard*,¹¹ as to fall outside the Act’s protection because they did not disparage the

(2009). *See also, e.g., Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 5 (2018) (union and its members engaged in protected concerted activity by notifying potential hotel customers of the union’s labor dispute with the hotel and leading a consumer boycott of a hotel in connection thereof); *Hilton’s Environmental, Inc.*, 320 NLRB 437, 445 (1995) (“Section 7 of the Act protects the rights of employees, acting in concert, to bring complaints concerning wages, hours, and working conditions to the attention of a wide variety of public officials”); *Hacienda de Salud-Espanola*, 317 NLRB 962, 962, 966 (1995) (the Act protects employees’ “airing their work-related grievances to a news reporter”); *Kinder-Care Learning Centers*, 299 NLRB 1171, 1171 (1990) (rule prohibiting communications of employees of child care center with parents regarding center operations held to be unlawful as such communications are protected activity); *Grandview Country Manor, Inc.*, 267 NLRB 1046, 1049–50 (1983) (employee complaints to state agencies regarding polluted cooking and washing water, and safety concerns from children dismantling wheelchairs and climbing through windows held to be protected because alleged conduct detrimentally affects patients and employees alike, even if the state agencies ultimately determine that the complaints lack merit).

¹⁰ *Kinder-Care*, 299 NLRB at 1171 (internal citations omitted).

¹¹ *NLRB v. Electrical Workers UE Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953).

Employer's product or service but only criticized its labor relations and worker safety practices.¹² Nor, as discussed below, were the statements "maliciously untrue." Thus, we conclude that Employee #1's statements were protected concerted activity.

Likewise, we conclude that Employee #2's recorded statement on behalf of the Union constituted protected concerted activity and did not fall outside the protection of the Act. Section 7 "defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities."¹³ Here, the Union and other building-trades unions were engaged in an ongoing labor dispute over a general contractor's practice of using both union and nonunion sub-contractors on construction jobs, and the Employer was one of the nonunion sub-contractors that the general contractor used. Employee #2's statement was recorded by either the Union or its affiliates in furtherance of this labor dispute and addressed the actual issue that the labor dispute involved. Thus, he spoke about how he viewed his job to be dangerous while working for the nonunion Employer because of the lack of safety equipment or training, and contrasted that with the advanced safety training he received once he joined the Union. Employee #2's statement simply reflected his personal opinion, as a former employee of the Employer, regarding the benefits of working for a union employer, and his comments were restricted to a comparison of terms and conditions of employment. As with Employee #1's statements at the rally, Employee #2's statements criticized the Employer's labor policies and safety practices without disparaging the Employer's products or services¹⁴ and, as discussed below,

¹² See, e.g., *MasTec Advanced Technologies*, 357 NLRB 103, 108 (2011) (finding that employees' participation in newscast accusing employer of deceptive business practices did not lose Act's protection because they were publicizing dispute over pay practices and there was no evidence they intended to inflict economic harm on employer), *enforced sub nom. DirecTV, Inc. v. NLRB*, 837 F.3d 25 (D.C. Cir. 2016). Cf. *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240–41 (2000) (finding phone call to employer's competitor that referred to "union problems" was not so disloyal as to lose protection of the Act while flyer that sharply criticized employer's product and services with no reference to labor dispute unprotected).

¹³ *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). See also *C.S. Telecom, Inc.*, 336 NLRB 1193, 1193–94 (2001) (finding that employee who gave employer's jobsite locations to union so it could target employer's customers was concerted activity even though employee was acting alone; assisting a union is, "by definition," acting concertedly).

¹⁴ See *supra*, note 12.

they were not “maliciously untrue.” Accordingly, his statements were not so disloyal, reckless, or maliciously untrue as to fall outside the Act's protection.

The Employer’s state court defamation lawsuit aimed at the Defendants’ protected concerted activity violates Section 8(a)(1) because it is baseless and retaliatory

In *Bill Johnson’s*, the Supreme Court held that the Board may enjoin as an unfair labor practice the filing and prosecution of a lawsuit only when the lawsuit: (1) lacks a reasonable basis in law or fact; and (2) was commenced with a retaliatory motive.¹⁵ In *BE & K Construction Co.*, the Board clarified that a baseless lawsuit, whether ongoing or completed, violates the Act if the motive for initiating the lawsuit was to retaliate against Section 7 rights.¹⁶ Both elements of the *Bill Johnson’s* analysis are satisfied here.

A lawsuit is objectively baseless when its factual or legal claims are such that “no reasonable litigant could realistically expect success on the merits.”¹⁷ The analysis requires “[an examination of] the plaintiff’s evidence to determine whether it raises any material questions of fact.”¹⁸ The burden rests on the court plaintiff to present the Board with evidence showing genuine issues of material fact and that there is prima facie evidence of each cause of action alleged.¹⁹

In order to successfully prosecute a state defamation lawsuit that is connected to a labor dispute, a complainant—in addition to satisfying the state defamation requirements—must demonstrate that the allegedly defamatory remarks were made

¹⁵ 461 U.S. at 748–49.

¹⁶ 351 NLRB 451 (2007). *See also Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 4, 6 (2018) (employer’s retaliatory, baseless, and preempted lawsuit attacking union’s Section 7-protected consumer boycott violated Section 8(a)(1)); *Atelier Condominium & Cooper Square Realty*, 361 NLRB 966, 968 (2014), *enforced*, Nos. 14-4692-ag(L), 15-95-ag(XAP), - F. Appx -, 2016 WL 3548372 (2d Cir. 2016).

¹⁷ *BE & K*, 351 NLRB at 457.

¹⁸ *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366, 1376 (7th Cir. 1997). *See also Bill Johnson’s*, 461 U.S. at 745–47.

¹⁹ *Bill Johnson’s*, 461 U.S. at 746 n.12.

with actual malice and that the plaintiff was injured by them.²⁰ A statement is malicious if it is made with knowledge of its falsity or with reckless disregard of whether it is true.²¹ Before the test of reckless or knowing falsity can be met, there must be in the first instance a false statement of fact.²² And, demonstrating the federal overlay of actual malice is a “heavy burden” that must be shown by “clear and convincing proof.”²³ Additionally, a court plaintiff that alleges harm to its reputation must show evidence of actual loss due to reputational harm.²⁴

Here, we conclude that the lawsuit lacked a reasonable basis because the Employer has failed to present the Region with any evidence demonstrating that the Defendants’ statements were made with malice and caused it actual harm, or that it will be able to demonstrate malice and damages before the court. Indeed, the Employer has offered no proof that the allegedly defamatory statements were actually untrue.²⁵ First, Employee #1’s statement that the supervisor cursed him out,

²⁰ *Linn v. Plant Guard Workers*, 383 U.S. 53, 65–66 (1966). New York also follows the *Linn* standard, such that a New York State court claim of unlawful defamation stemming out of a “labor dispute” must also demonstrate that the allegedly defamatory remarks were made with actual malice and that the plaintiff was injured. *See generally, Richards v. Local 79*, 25 Misc.3d 1212(a), 901 N.Y.S.2d 910 (Sup. Ct. 2009) (unreported disposition reiterating that “it is also necessary to allege actual or special damages” in New York state defamation cases arising in the context of a labor dispute).

²¹ *See Linn*, 383 U.S. at 65–66.

²² *Beverly Health & Rehabilitation Services*, 331 NLRB 960, 963 (2000) (citing *Dunn v. Air Line Pilots Assn*, 193 F.3d 1185, 1192 (11th Cir. 1999), *certiorari denied* 120 S.Ct. 2197 (2000)).

²³ *Id.*

²⁴ *See Linn*, 383 U.S. at 65; *Intercity Maint. Co. v. Local 254, SEIU*, 241 F.3d 82, 89–90 (1st Cir. 2001) (despite evidence of malice, plaintiff alleging defamation in labor dispute “could not rest on the common law presumption of damages” and failed to show “evidence of actual loss due to reputational harm and consequent lost profits”).

²⁵ *See Milum Textile Services Co.*, 357 NLRB 2047, 2052–53 (2011) (when considering reasonableness of a party’s defamation claim, “the question [for the Board] is whether a plaintiff, with the factual information in its possession ... [plus any evidence it could reasonably expect to acquire through discovery], could reasonably have believed it had a cause of action upon which relief could eventually be granted”). *See also, e.g., Beverly Health & Rehabilitation Services*, 331 NLRB at 963 (Board examines whether

threatened to cut his pay, and hung up on him described a private conversation between Employee #1 and the supervisor. The Employer has not presented a statement from the supervisor refuting Employee #1's version of the phone conversation. Furthermore, the fact that Employee #1's pay was, in fact, reduced by \$5 within three weeks of the conversation lends support to Employee #1's version of the phone call. And his co-worker corroborates Employee #1's claim about the lack of safety equipment at the Employer's worksites and provides a contemporaneous accounting of Employee #1's description of the call. Moreover, the Employer's lawsuit allegation relies on a newspaper story about the Union rally, which summarized Employee #1's statement rather than presenting it as a direct quote. Thus, the Employer has failed to present any evidence that Employee #1 even made the statement as attributed to him, let alone demonstrate that the statement was maliciously untrue. Nor has the Employer offered any evidence or argument that Employee #2's statement about only having one safety harness available for all of the workers on site was untrue. Indeed, that Employee #1 and the co-worker described virtually identical working conditions at another Employer worksite buttresses its veracity. As for his allegedly defamatory claim that "there was no benefits," he immediately clarified that he did not receive the only benefit offered, health coverage, because the Employer failed to sign-him up despite his requests. Finally, even had the Employer offered any proof that these statements were untrue, it would still need to demonstrate that the Defendants made the statements with knowledge of their falsity or a reckless disregard for their truth. The Employer has presented no such evidence. Thus, the Employer has failed to demonstrate that the statements were made with malice.²⁶

The allegedly defamatory statement attributed to the Union about the Employer firing an employee for requesting a harness was actually made by the director of organizing from another union. The Employer has failed to present any evidence that the person was an agent of the Union at the time that the statement was made or that the Union had anything to do with the organizing director's decision to make the statement. Under common-law principles, an agency relationship is established by evidence indicating that the putative agent had "actual" or "apparent" authority to act

defamation suit raises a genuine issue of material fact under *Bill Johnson's* and whether plaintiff's pleadings are adequate under *Linn*).

²⁶ See *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 6 ("[N]ot only did the Respondent fail to adequately plead actual malice, the Respondent did not assert any facts that, if proven, would have established actual malice . . . Thus, from the beginning, an essential element of the lawsuit was lacking, preordaining the lawsuit's failure.").

on a principal's behalf.²⁷ The Employer has presented no evidence to establish such a relationship between the Union and the director of organizing for the Mason Tenders District Council of Greater New York. Therefore, regardless of the truthfulness of the statement, it cannot be attributed to the Union.

Additionally, the Employer has also failed to demonstrate that the allegedly defamatory statements caused it actual harm.²⁸ In its complaint, the Employer claims that the Defendants' allegedly defamatory statements tended to subject it "to public contempt, ridicule, aversion, disgrace, and induce an evil opinion of it in the minds of right-thinking persons," and to "injure [the Employer] in their business and trade."²⁹ However, relying on such general and vague assertions without identifying some specific impact that the allegedly defamatory statements have had on the Employer's business fails the *Linn* actual damage requirement.³⁰ A plaintiff that alleges reputational harm must show some evidence of actual damages that resulted from the alleged defamation.³¹ Here, the Employer has failed to provide the Region

²⁷ See *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 n.4 (1991).

²⁸ See, e.g., *Milum Textile*, 357 NLRB at 2053 (under *Linn*, plaintiff must plead and prove actual damages, in contrast to those jurisdictions where damages are presumed under state defamation law).

²⁹ We note that even assuming the Employer were being viewed in this light, it is as likely that any harm to the Employer's reputation resulted from its work on the 200 E. 59th Street site, where there were two highly-publicized construction accidents within a week during this time-frame: one on March 22 that involved a hoist left "dangerously dangling above thousands of passerby" and one on March 29 that involved a concrete blowout.

³⁰ See, e.g., *Intercity Maint. Co.*, 241 F.3d at 86, 90 (although plaintiff presented evidence of pecuniary loss from losing clients, plaintiff failed to show how the loss actually resulted from the union's maliciously false statements). Cf. *Linn*, 383 U.S. at 64 (noting in dicta that economic loss often accompanies labor disputes); *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at n.17 (2018) (ALJ found that lawsuit was baseless because, where hotel led in regional sales during boycott, it failed to show actual damages; Board did not rely on this rationale, noting that sales might have been even higher but for the boycott, but still held lawsuit was baseless).

³¹ *Linn*, 383 U.S. at 65.

with any evidence that connects the allegedly defamatory statements to a specific harm, and thus has failed to satisfy an essential element under *Linn*.³²

Because the Employer has not shown that it possesses or reasonably believes it can obtain evidence to support essential elements of its cause of action—that the Defendants’ statements were maliciously false and that the Employer experienced actual harm as a result of the Defendants’ statements—the Employer’s lawsuit is baseless under *Bill Johnson’s*.³³

The Employer’s lawsuit is also retaliatory under *Bill Johnson’s* and *BE & K*. Factors for discerning a retaliatory motive include whether the lawsuit was filed in response to protected concerted activity; evidence of the respondent’s prior animus toward protected rights; whether the lawsuit is baseless; and any claim for punitive damages.³⁴ Here, the Employer’s lawsuit explicitly targeted the Employees’ Section 7 activity of supporting the Union in its labor dispute and concertedly complaining about workplace safety. The Employer also demonstrated antiunion animus when it warned Employees #1 and #2, and the co-worker, about engaging in the protected right to talk to Union representatives. The Employer continued to demonstrate antiunion animus even after filing its lawsuit by sending the co-worker home because he attended a Union meeting. Additionally, the Employer’s request for compensatory and punitive damages for unspecified reputational injuries, with no attempt to justify or quantify any amount of alleged damages, also evidences retaliatory motive.³⁵

³² See *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 6 (General Counsel may demonstrate baselessness by showing that there is an absence of evidence to support an element in the plaintiff’s case).

³³ After this case was sent to the Division of Advice, the Employer was given another opportunity to present any evidence that would support its claim that the statements were malicious and had caused the Employer actual harm. The Employer failed to present any such evidence, nor has it argued that it will be able to demonstrate malice and damages before the court.

³⁴ See, e.g., *Ashford TRS Nickel, LLC*, 366 NLRB No. 6, slip op. at 6–7 (2018); *Atelier Condominium & Cooper Square Realty*, 361 NLRB at 970; *Milum Textile Services Co.*, 357 NLRB at 2051–52.

³⁵ See, e.g., *Atelier Condominium & Cooper Square Realty*, 361 NLRB at 971 (employer’s request for punitive damages was additional evidence of retaliatory motive behind lawsuit against former employee, particularly where employer made no attempt to justify the amount of damages alleged).

Thus, we conclude that the Employer violated Section 8(a)(1) by filing and maintaining a baseless and retaliatory lawsuit because the lawsuit targets the Defendants' protected, concerted activity. The Region should issue complaint, absent settlement, alleging that the Employer's lawsuit attacking the Defendants' protected concerted activity violates Section 8(a)(1).³⁶

/s/
J.L.S.

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³⁶ (b) (5)
(b) (5)

