

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

Advice Memorandum

DATE: March 24, 2004

TO : Curtis Wells, Regional Director
Region 16

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Texas Instruments
Case 16-CA-23263

This case was submitted for advice on whether the Employer violated Section 8(a)(1) by filing a lawsuit against a former employee/union organizer to enjoin him from using proprietary or confidential Employer material on his political and union organizing websites.

We conclude that the Employer did not violate Section 8(a)(1) because the lawsuit, which settled when the employee agreed to a permanent injunction, was reasonably based and there is no evidence that the Employer filed it solely for the purpose of imposing the costs of litigation.

The facts are set forth in the Region's memorandum. Briefly, until recently, Joseph Valley worked for the Employer as an engineer. He also, apparently during his nonwork time, actively protested federal legislation that supported the hiring of foreign or immigrant labor, and he created a website in support of these activities.

Sometime in the summer of 2003,¹ Valley posted on his website a video clip taken from an Employer satellite broadcast. The clip showed a portion of a presentation conducted by an Employer vice president where he spoke favorably about the Employer's hiring of employees in India.² Valley posted the clip on his website as proof that the Employer was engaged in age and race discrimination. The Employer learned that Valley had posted the videoclip on his website and demanded that he remove it. Valley complied and he was later discharged.³

¹ All dates are in 2003, except where noted.

² The videoclip was an excerpt from a videotape created by the Employer and labeled "For [Employer] Internal Use Only." Valley obtained the video by ordering it from the Employer's internal website.

³ Valley filed a charge in Case 16-CA-23122 alleging that he was terminated in retaliation for protected concerted activity. The Region dismissed the charge, finding that he

After his discharge, Valley contacted a union and began attempting to organize the Employer's employees. In connection with his organizing efforts, Valley established a second website on which he placed links to portions of the Employer's internal website. He also restored the video clip to his other website.

On November 5, the Employer sent Valley a letter demanding that he remove the videoclip and the links to the Employer's internal website from his two websites. The letter also demanded that Valley return any and all Employer information, documents, or other items in his possession within 48 hours or the Employer would initiate legal proceedings.

Valley did not comply with the Employer's November 5 demand, and on November 13 the Employer filed a Petition and Application for Temporary Restraining Order and Temporary and Permanent Injunction in the local state court. The Employer also served Valley with a notice of deposition duces tecum.⁴ Valley appeared for the deposition on December 5 and there is no evidence that the Employer's attorneys asked any questions regarding the union organizing campaign.

On January 6, 2004, the parties entered into a settlement permanently enjoining Valley from using or disclosing any information, knowledge, or data relating to the Employer's trade secrets, confidential marketing or business strategies and plans. The settlement enjoins Valley from posting or displaying any portions of the Employer's satellite broadcast, or any material from any Employer internal website except in connection with pending or future legal proceedings against the Employer. The settlement specifically states that the terms of the injunction are not intended to infringe upon Valley's rights in connection with union organizing as allowed within the

was fired for posting confidential company information on his personal website, and that he was not engaged in any protected concerted activity prior to his termination.

⁴ The original notice of deposition duces tecum arguably was unlawfully overbroad, as it required Valley to release evidence that might potentially infringe on his or other employees' confidential Section 7 interests. However, the Employer later amended the deposition duces tecum deleting the arguably overbroad requests, and clarifying that the Employer was not interested in seeking information concerning Valley's organizing or protected concerted activities.

NLRA and the First Amendment. The settlement also states that it is specifically tailored and intended to protect the Employer's interests in protecting its confidential, proprietary and trade secret information without limiting either Valley's or the Employer's union or management activities.

In these circumstances, we conclude that the Employer did not violate Section 8(a)(1) by filing a lawsuit to enjoin Valley from placing proprietary or confidential Employer information on his websites. The Employer's lawsuit was reasonably based and there is no contention otherwise. In fact it was ultimately settled on the Employer's terms. Also there is no evidence that it was filed solely to impose the costs of the litigation process, regardless of the outcome.

In Bill Johnson's Restaurants,⁵ the Court held that in order for the Board to halt the prosecution of an ongoing lawsuit, it had to find that the suit lacked a reasonable basis in fact or law and had been brought for a retaliatory motive.⁶ The Court held that a completed lawsuit that was successful (i.e., meritorious resulting in a judgment for the plaintiff) cannot be an unfair labor practice.⁷ While the Court in BE & K reconsidered the circumstances under which the Board could find a concluded nonmeritorious civil suit to be an unfair labor practice,⁸ it also suggested that, in limited circumstances, the Board may find a reasonably based lawsuit unlawful if it would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome.⁹

The Employer's lawsuit was reasonably based. The legal proceedings concluded when the parties entered into a consent injunction and, since the Employer essentially obtained all the relief it was seeking, the lawsuit must be viewed as reasonably based and the Charging Party doesn't otherwise contend. As to retaliatory motive, there is no evidence that the lawsuit was filed solely for the purpose of imposing on Valley the costs of the litigation process.

⁵ 461 U.S. 731 (1983).

⁶ Id. at 731, 742-743.

⁷ Id. at 747.

⁸ BE & K Construction Co. v. NLRB, 536 U.S. 516, 532-537, 170 LRRM 2225 (2002).

⁹ Id. at 536-537.

The absence of unlawful motive is amply demonstrated by the Employer's willingness to settle the lawsuit in exchange for Valley's assurances that he would no longer post proprietary or confidential Employer material on his political and union organizing websites.

Therefore, the Region should dismiss the Section 8(a)(1) charge, absent withdrawal.

B. J. K.