

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

Advice Memorandum

DATE: September 20, 2004

TO : Gary T. Kendellen, Regional Director
Region 22

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

SUBJECT: Rite Aid Corp.
Case 22-CA-26202

This case was submitted for advice as to whether the Employer's initiation of a criminal action against a Union agent for allegedly assaulting its store manager violated Section 8(a)(1). We conclude, in agreement with the Region, that the charge should be dismissed absent withdrawal.

In October 2003, Union agent Purcell came to the Employer's Hoboken store to re-post copies of an unfair labor practice charge which the Employer had removed from the Union's bulletin board. Store manager Farah confronted Purcell and they had an argument regarding whether Purcell was entitled to be present in the store for that purpose. Farah called the police and the incident was resolved. The following day, Farah filed a criminal complaint alleging that, during the argument, Purcell had hit him on the arm. The municipal court eventually dismissed the case for lack of evidence.

In BE & K,¹ the Supreme Court held that a lawsuit may be reasonably based even though it is ultimately unsuccessful. The Court also held that inferring a retaliatory motive from evidence of animus, in cases where a suit was reasonably based, was inappropriate because it would condemn "genuine petitioning."²

Here, the Employer's criminal complaint was directed only at activity that would be unprotected if it occurred as alleged by the Employer's agent. There were no witnesses to the incident, and Farah's version of the events is no less credible than Purcell's. In these circumstances, we cannot establish that the Employer's complaint was baseless. Therefore, since there is no evidence that the complaint was

¹ BE & K Construction Company, 536 U.S. 526 (2002).

² *Id.* at 533-536. The Court noted in dicta that a reasonably based lawsuit might be unlawful if it would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome." *Id.* at 536-537.

filed only in order to impose the costs of litigation on Purcell, it cannot be alleged as violative of Section 8(a)(1).

Accordingly, the Region should dismiss the charge absent withdrawal.

B.J.K.