

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

Advice Memorandum

DATE: June 9, 2003

TO : Peter B. Hoffman, Regional Director
Jonathan B. Kreisberg, Regional Attorney
John S. Cotter, Assistant to the Regional Director
Region 34

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

SUBJECT: Interior Builders, Inc. and
Wayne C. Fasske 512-5009-0100
Case 34-CA-8869 512-5009-6700
512-5009-6767

This Section 8(a)(1) case was submitted for advice as to whether the Employer's lawsuit, which has been withdrawn, was baseless and retaliatory, consistent with the holding of the Supreme Court in BE & K.¹ We conclude that the lawsuit was not baseless, and that there is insufficient evidence to assert that the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome" to argue that the lawsuit, although not baseless, was an unfair labor practice.²

BACKGROUND AND FACTS

Interior Builders, Inc., (IBI, or the Employer) is a non-union drywall contractor located in Southington, Connecticut. Wayne Fasske is the president and sole owner of IBI.

I. Key events preceding the Employer's lawsuit

A. 1998 Board complaint

In early February 1998, Carpenters Local 24 (the Union) began a salting campaign against IBI. All of the Union's approximately 20 applicants were considered for hire, and at least six were actually hired. However, by the end of February, three of those employees had been discharged, and the remainder had voluntarily resigned. As a result of the discharges, the Union filed an unfair labor practice charge against IBI (Case 34-CA-8253) on February 26, 1998. The Region issued a complaint on August 14, 1998, alleging that

¹ BE & K Construction Co. v. NLRB, 122 S.Ct. 2390, 170 LRRM 2225 (2002).

² See Id. at 2402.

IBI violated Section 8(a)(3) by discharging the three employees and Section 8(a)(1) by promulgating and maintaining a rule prohibiting its employees from engaging in Union activities. Prior to trial, the parties entered into a bilateral informal Board settlement agreement, which was approved by the Regional Director in October 1998, requiring IBI to provide full backpay to the three discriminatees and to post a Notice to Employees.

B. A & A Drywall lawsuit

In December 1997, Union counsel Christopher Souris sued IBI on behalf of A & A Drywall and Acoustics, Inc., a unionized drywall contractor, based upon a state statute providing relief for contractors harmed by the loss of a competitive bid to a fellow contractor who secured labor cost savings by misclassifying employees as independent contractors. According to Souris, A & A was his client in the lawsuit, and he was paid by A & A. Souris explains that IBI had stopped operating and that A & A, believing that it would not likely recover any monetary damages, allowed the case to be dismissed for lack of prosecution.

C. Department of Labor investigation

Based on information it received from the Union, the Connecticut Department of Labor (DOL), Wage and Hour Division, began a lengthy investigation of IBI for alleged misclassification of employees and failure to pay overtime. The investigation began in 1997 and continued until August 2001, when IBI entered into a settlement agreement with the DOL.

Relations between IBI and the DOL's investigator deteriorated in early 1998, when the Employer accused him of bias, apparently in part because he was the former president of a labor organization with ties to the Union. When the DOL sought to enforce a subpoena of all company records since 1996, IBI filed a federal lawsuit against the DOL seeking to enjoin the DOL's alleged harassment. Shortly thereafter, several DOL officials met with IBI's counsel and Fasske, and IBI agreed to withdraw its lawsuit in return for the replacement of the current investigator with two new investigators to perform a new audit. The two new investigators thereafter conducted a detailed audit of IBI's records from August 1998 to January 1999, which was followed by questionnaires and subpoenas sent to IBI's subcontractors and employees.

D. The Union leaflets Fasske's neighborhood

Meanwhile, in December 1998, the Union distributed a leaflet in Wayne Fasske's residential neighborhood. The leaflet, entitled "Spring is Here! Mother Nature Says Turn up the Heat! T.J. Maxx did," stated:

Wayne Fasske, who lives at 34 Desorbo Drive, is the owner of Interior Builders. T.J. Maxx's general contractor hired Interior Builders to work on its new location in Hamden. The Connecticut Carpenters informed T.J. Maxx that Interior Builders breaks the law, commits tax and insurance fraud, and mistreats its workers. So T.J. Maxx turned up the heat. As a result of receiving this information from the Carpenters, Mr. Fasske was informed that T.J. Maxx would not stand for his unscrupulous business practices. Therefore, they terminated the remainder of their contract and he was not allowed to finish the project.

II. The Employer's lawsuit against the DOL and the Union

On May 12, 1999, during the DOL's investigation, IBI and Fasske, as joint employers, filed in federal court the lawsuit that is the subject of the instant charge. The suit named as defendants both the Union and its parent, United Brotherhood of Carpenters and Joiners of America, as well as the DOL and certain named DOL officials.³

The lawsuit, which sought punitive damages and attorney's fees as well as a temporary and permanent injunction prohibiting the DOL from continuing its audit or instituting new audits, alleged violations of the federal and state Constitutions, 42 U.S.C. §1983 and a state defamation law. Specifically, the suit claimed:

the Defendants are working together with, or in support of the efforts by [the Union] to, *inter alia*: irreparably harm the business of [IBI]; deprive IBI and/or Wayne C. Fasske, its President, of their constitutional rights to due process, equal protection and to confront their accusers; and defame both Fasske and IBI. These goals of the Defendants are being accomplished through,

³ Specifically, the Commissioner of Labor; Director of the Wage and Workplace Standards Division; Assistant Director of the Wage and Workplace Standards Division; and the original investigator.

inter alia: intimidation and harassment by both Defendants of IBI's past and present employees and subcontractors; harassment and oppression of IBI [by] the [DOL] Wage and Workplace Standards Division in the investigation and audit process, including the use of auditor(s) with actual conflict(s) of interest and oppressive and biased methods of complaint investigation and audit.

The plaintiffs alleged that the DOL was auditing IBI in order to: cause "negative findings" sufficient to support the lawsuit filed by A & A Drywall; harass the plaintiffs; cause IBI to incur disproportionate costs in defending the audit; and provide the Union with access to information about IBI, its employees and its subcontractors.

There were ten counts in the lawsuit. Six (Counts 1 through 5 and 9) were solely against the DOL and/or its individually named officials.⁴ Two counts (6 and 7) were directed solely at the Union. Count 6 alleged that the Union violated 42 U.S.C. §1983 by "conspiring with the State by harassing, intimidating and otherwise assisting and using the assistance of the State, acting under color of state law, in violating the federal constitutional and statutory rights of [IBI]." Count 7 alleged defamation with respect to the content of the leaflets distributed in Fasske's neighborhood. Two counts (8 and 10) were directed at all defendants. Count 8 alleged that the plaintiffs suffered economic and emotional harm as a result of the defendants' conspiring to use the powers of the state to assist the Union in causing economic or other harm to the plaintiffs. Count 10 sought to enjoin all defendants from continuing the then-current audit or instituting new audits.

In an affidavit supporting the lawsuit, Fasske alleged that the initial DOL investigator behaved abusively during the audit, failed to show up for several appointments made

⁴ Count 1 alleged a due process violation by DOL and its named officials under the 14th Amendment; Count 2 alleged a due process violation by DOL and its named officials under Art. 1, § 10 of the Connecticut Constitution; Count 3 alleged an equal protection violation by DOL and its named officials under the 14th Amendment; Count 4 alleged an equal protection violation solely by DOL under Art. 1, § 10 of the Connecticut Constitution; Count 5 alleged a violation of 42 U.S.C. § 1983 by the named DOL officials; and Count 9 alleged that the DOL had deprived the plaintiffs of their 6th Amendment "right to face their accusers" by failing to provide IBI with the names of the employees who had complained about IBI.

to review documents, subpoenaed information that had already been reviewed, "planted" a document where it did not belong, had ties to the Union,⁵ and apparently leaked information to the Union.⁶ Fasske's affidavit further alleged that the two DOL investigators who replaced the original one also passed on to the Union information produced by IBI.⁷ Fasske noted that the issues of employee/subcontractor classification and "travel pay" were also the subject of the A & A Drywall lawsuit, which was filed by the Union's attorney approximately one week after the initial DOL investigator first appeared at IBI's offices. In support of the defamation claim, Fasske's affidavit stated that the leaflet distributed by the Union contained "false information," and stated that "IBI has been audited by the IRS, the State Department of Revenue Services, the United States Department of Labor and other governmental and insurance agencies, but has never been found to have committed any fraud."⁸

III. The charge

The Union filed the instant charge on May 26, 1999, alleging that IBI violated Section 8(a)(1) of the Act by filing and maintaining a frivolous and retaliatory lawsuit against the Union. The Union amended the charge in June 1999 to add Fasske as a respondent. Following the judge's ruling on the defendants' motions to dismiss, discussed

⁵ The affidavit stated that the investigator was the president of the Greater Waterbury Central Labor Council, a labor organization "closely related" to the Union.

⁶ Fasske alleged that within a few days of the investigator's receiving employee and subcontractor names and addresses, the Union would contact those employees and subcontractors.

⁷ Specifically, Fasske alleged that on January 25, 1999, the investigators demanded to review a box of subcontractor invoices that they had already had access to and had apparently reviewed thoroughly between August 1998 and January 15, 1999. Approximately four days later, the Union sent a letter to IBI's employees and subcontractors, past and present, containing (allegedly) false information about IBI.

⁸ His affidavit also stated that, through the date of the affidavit, "IBI has not been found to have misclassified employees, nor has there been any violation found as a result of its travel pay policy despite having been audited with respect to those issues by another agency or agencies."

below, the Region decided to defer the charge in light of the ongoing nature of the lawsuit.

IV. The court's ruling on defendants' motions to dismiss and its decision to hold the lawsuit in abeyance

In July 1999, after several conference calls and meetings between the parties and the judge failed to resolve the lawsuit, each defendant moved to dismiss the suit. The motions urged the court to abstain from exercising federal jurisdiction in accordance with the principles set forth in Younger v. Harris, 401 U.S. 37 (1971) -- a doctrine known as "Younger" abstention. The judge described the parties' positions as follows:

The defendants contend that abstention is proper because the plaintiffs are seeking direct federal judicial intervention in the DOL's ongoing administrative investigation of potential labor violations by the plaintiffs. The plaintiffs disagree and assert that their complaint should not be dismissed based on *Younger* abstention because the state has no legitimate interest in continuing the investigation. In addition, the plaintiffs argue that they have sufficiently alleged bad faith on the part of the defendants, and that in so doing, have satisfied an exception to *Younger* abstention. Finally, the plaintiffs assert that, even if *Younger* abstention is appropriate, it only requires dismissal of the claim for equitable relief, not the claim for monetary damages.

The judge's ruling on the motions concluded:

Younger and its progeny are clear that a district court should not enjoin an ongoing state criminal or administrative proceeding, absent bad faith, harassment or other highly unusual circumstances. Because the plaintiff's allegations of impropriety by the DOL do not rise to the level of bad faith, there is no ground on which to base an exception to *Younger* abstention. Accordingly, the plaintiffs' claim for equitable relief is dismissed.

The judge found, however, that the law did not permit dismissal of the plaintiffs' claims seeking monetary damages. Thus, the remainder of the lawsuit was stayed "pending the outcome of the DOL's investigation and/or administrative proceeding."

V. IBI and Fasske settle with the DOL and agree to a voluntary dismissal of the lawsuit

Based on its findings from its investigation of IBI, the DOL completed an "Application for Arrest Warrant" in Connecticut Superior Court on October 12, 2000. According to the application, the DOL investigation showed that Fasske failed to pay \$195,424.17 in wages to 172 employees during the period from July 1996 to June 1998. The allegations included: failure to pay premium overtime on alleged "travel" pay; failure to maintain accurate time records; failure to pay premium overtime wages on "banking system" hours; failure to pay premium overtime wages to employees improperly classified as independent contractors; and failure to pay weekly all moneys due.

On August 2, 2001, the DOL entered into a settlement agreement with Fasske and IBI. In exchange for the complete cessation of any investigations, enforcement actions, or other attempts at recovery of back wages or other damages, fines or penalties on all wage matters filed with the Wage and Workplace Standards Division prior to April 18, 2001, Fasske and IBI agreed that:

Mr. Fasske personally and in his capacity as a corporate officer for each of the above named corporations agrees to pay a lump sum of \$31,986 in settlement of the pending criminal allegations with final payment due on September 28, 2001; a \$15,000 lump sum in settlement of the disputed civil penalties and a \$70,000 lump sum in settlement of the alleged back wage bill by June 30, 2002. Total payments in checks payable to the [DOL] shall equal \$116,986.

On April 1, 2001, the district court approved a "Voluntary Dismissal of Claims" against the Union.⁹ On August 22, 2001, the court approved a "Voluntary Dismissal of Claims" against the DOL and its named defendants, stating, "this dismissal is being effectuated in connection with a settlement agreement reached by and among the Plaintiffs and said Defendants."

VI. IBI ceases operations

At some point after signing the DOL settlement agreement, IBI ceased all operations. A Choicepoint search in November 2002 revealed that: IBI is still listed as an

⁹ That document does not provide any reason for the voluntary dismissal.

active corporation; another corporation named "Fasske Enterprises, Inc.," which lists Fasske as its president, is also an active Connecticut corporation; and a corporation named "Housing Solutions, LLC," which lists Fasske as its registered agent, was incorporated in Connecticut on February 2, 2000.

The Union wishes to pursue the instant charge because it wants to recover the \$14,000 in attorney's fees it expended in defending the lawsuit.

ACTION

We conclude that the lawsuit was not baseless, and that there is insufficient evidence to assert that the suit would not have been filed "but for a motive to impose the costs of the litigation process, regardless of the outcome" such that an argument could be made that the lawsuit, although not baseless, was an unfair labor practice.

In BE & K, the Supreme Court reconsidered the circumstances under which the Board could find a concluded suit to be an unfair labor practice.¹⁰ Previously, in Bill Johnson's Restaurants,¹¹ 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 was brought for a retaliatory motive.¹² At the same time, however, it said that a *completed* lawsuit could be charged as an unfair labor practice under a lesser, alternative standard. Namely, it could be charged as an unfair labor practice if the litigation was unsuccessful (resulted in a judgment adverse to the plaintiff, or if the suit was withdrawn or otherwise shown to be without merit) and was filed with a retaliatory motive.¹³ The Court in BE & K reconsidered and rejected that alternative standard, because the class of lawsuits sanctioned would include a substantial portion of suits that involved "genuine petitioning" protected by the Constitution.¹⁴ The Court thus indicated that the Board could no longer rely on the fact that the lawsuit was ultimately unsuccessful, but must determine whether the lawsuit, regardless of its outcome on

¹⁰ Id. at 2397.

¹¹ 461 U.S. 731 (1983).

¹² Id. at 731, 742-743.

¹³ Id. at 747, 749.

¹⁴ 122 S.Ct. at 2399.

the merits, was reasonably based.¹⁵ The Court in BE & K explained that this Constitutional protection is warranted in any case in which a plaintiff's *purpose* is to stop conduct he reasonably believes is illegal.¹⁶ In such cases petitioning, the Court said, "is genuine both objectively and subjectively."¹⁷

The Court left open the question of whether, and under what circumstances, a lawsuit that was reasonably based as an objective matter might be considered an unfair labor practice. As to that question, a majority of the Court, in *dictum*, indicated that there could be no violation for a reasonably based lawsuit unless one could find that the suit would not have been filed "but for" a motive to impose litigation costs on the defendant, regardless of the outcome of the case, in retaliation for protected activity.¹⁸

The Court in Bill Johnson's articulated the basic standards for determining whether a lawsuit is baseless. It explained that while "genuine disputes about material historical facts should be left for the state court, plainly unsupported inferences from the undisputed facts and patently erroneous submissions with respect to mixed questions of fact and law may be rejected."¹⁹ Further, just as the Board may not decide "genuinely disputed material factual issues," it must not determine "genuine state-law legal questions." These are legal questions that are not "plainly foreclosed as a matter of law" or otherwise "frivolous."²⁰ Thus, a lawsuit can be deemed baseless only if it presents unsupported facts or unsupported inferences from facts, or if it depends upon "plainly foreclosed" or "frivolous" legal issues.

¹⁵ Id. at 2399-2402.

¹⁶ Id. at 2401 (emphasis in original).

¹⁷ Id.

¹⁸ Id. at 2402. Two of those Justices opined that the decision in BE & K implies that the Court, in an appropriate case, will rule that the Board can never find a reasonably based lawsuit to be unlawful. Id. at 2402-2403 (Scalia, concurring).

¹⁹ Bill Johnson's, 461 U.S. at 746, n.11.

²⁰ Id.

1. Reasonable basis analysis

In the instant case, we conclude that the Employer's lawsuit was not baseless.

a. Count dismissed based on *Younger* abstention

Count 10, which sought to enjoin all defendants from continuing the then-current audit or instituting new audits, was dismissed by the district court based on *Younger* abstention. The plaintiffs argued that *Younger* abstention was not appropriate because the alleged bias or conspiracy negated any legitimate state interest to be advanced by abstention. The plaintiffs also argued that they had sufficiently alleged bad faith on the part of the defendants to satisfy an exception to *Younger* abstention. In granting the Motions to Dismiss as to count 10, the judge did not find that there was no evidence of bad faith (which would suggest that such a claim was baseless), but rather found that the plaintiff's allegations of impropriety did not "rise to the level" necessary to justify an exception to *Younger* abstention. Accordingly, we cannot conclude that Count 10 was baseless.

b. Section 1983 claim

Nor can count 6, which alleged that the Union violated 42 U.S.C. §1983,²¹ be said to have been baseless. To state a claim under §1983, two things must be shown: (1) that the defendant acted under color of law, and (2) that the defendant deprived the plaintiff of a federal right, either statutory or constitutional.²² The plaintiffs' evidence of joint or coordinated action between the Union and the DOL, although largely circumstantial, was arguably sufficient to meet the state action/color of law requirement.²³ The

²¹ 42 U.S.C. §1983 (2002) ("Every person who, under color of any statute [or] ordinance ... of any State ... subjects, or causes to be subjected, any citizen of the United States ... to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured...").

²² See, e.g., Bacon v. Patera, 772 F.2d 259, 263 (6th Cir. 1985), citing Gomez v. Toledo, 446 U.S. 635, 640, 100 S.Ct. 1920, 64 L.Ed.2d 572 (1980).

²³ See, e.g., Tower v. Glover, 467 U.S. 914, 920, 104 S.Ct. 2820 (1984) (complaint filed against public defender adequately alleged conduct "under color of" state law in view of alleged conspiracy with state official).

plaintiffs also appear to have adequately alleged that this conspiratorial behavior violated a number of federal constitutional requirements (e.g., due process and equal protection). Accordingly, we cannot say this claim was baseless as a matter of fact or law.

c. Defamation claim

In a defamation case, only a small quantum of evidence is necessary to demonstrate that a suit is reasonably based.²⁴ In Beverly Health & Rehabilitation Services, an employer's state court defamation lawsuit alleged that the union, in handbills and a radio spot, accused it of maintaining unsafe and unsanitary conditions in its nursing homes.²⁵ While not explicitly contradicting this evidence, the employer proffered evidence that it had received fewer citations for health care deficiencies than most of its competitors. Based on the Employer's position, the Board held that although there were no actual credibility conflicts created by the testimony, a "genuine issue of material fact" had been raised as to the proper inferences to be drawn from the parties' testimony.²⁶

Count 7 of the present case alleged that the statements in the Union's leaflets claiming that IBI "breaks the law, commits tax and insurance fraud, and mistreats its workers" defamed the plaintiffs. We note that the leaflet was distributed in December 1998, almost two years before the DOL completed its investigation and applied for an arrest warrant against IBI. In support of the defamation claim, Fasseke's affidavit stated that this was "false information," and that IBI had been "audited by the IRS, the State Department of Revenue Services, the United States Department of Labor and other governmental and insurance agencies, but ha[d] never been found to have committed any fraud." His affidavit also claimed that IBI had not been found to have misclassified employees or to have had an unlawful "travel

²⁴ See, e.g., Beverly Health & Rehabilitation Services, Inc., 331 NLRB 960 (2000), reconsideration denied 336 NLRB No. 25 (2001).

²⁵ Id.

²⁶ Id. at 962. See also Citizens Publishing & Printing Co., 331 NLRB 1622, 1635 (2000), review denied 263 F.3d 224 (3rd Cir. 2001), where a genuine issue of material fact was found to have been raised by simple but conflicting statements about whether a particular person had failed to "stand behind" his word.

pay" policy even though it had been audited with respect to those issues. These statements clearly constitute evidence sufficient to raise genuine issues of material fact. Moreover, the Union now asserts that the leaflet statements were made so long ago that it has no witness available to testify as to the their truth.²⁷

d. General claim of harm from Union/DOL conspiracy

Count 8 of the suit alleged that the plaintiffs suffered economic and emotional harm as a result of the defendants' conspiring to use the powers of the state to assist the Union in causing economic or other harm to the plaintiffs. This claim appears to be essentially a restatement or variation of the plaintiffs' Section 1983 claim. To the extent that it is a restatement of that claim, it would not be baseless for reasons explained above. If, on the other hand, this were to be considered a separate claim, it is unclear what constitutional provision or statute was allegedly violated or whether the claim of violation would be baseless. In any event, it would not effectuate the purposes and policies of the Act to issue complaint based on this single aspect of this multi-count lawsuit in the context of this lack of clarity.

2. Retaliatory motive analysis

We also conclude that the Region should not take the position that the lawsuit was an unfair labor practice even though it was not baseless. Since the lawsuit must be viewed as reasonably based, its filing cannot be found to be a violation unless, at a minimum, it can be shown that the suit would not have been filed but for a motive to impose costs on the defendant, regardless of the outcome of the suit, in retaliation for protected activity. As the Region notes, there is significant evidence of retaliatory motive in this case, including the allegations in the prior Board complaint, plaintiff's request for punitive damages, and the lawsuit's inclusion of the Union solely on the basis that it provided the DOL with evidence to launch its investigation. However, there is also evidence showing that the Employer was motivated, at least in part, to stop the DOL's investigation, which was part of the relief it requested. Therefore, we would not argue that the lawsuit would not

²⁷ See Beverly, 331 NLRB at 962, where the existence of a genuine issue of fact was found even though, in contrast to the present case, the employer had not even explicitly contradicted the allegedly defamatory statement and there was evidence supporting the truth of the statement.

have been filed but for a motive to impose costs on the defendant, *regardless of the outcome of the case.*

For the above reasons, we conclude that the lawsuit cannot be considered baseless; nor can its filing otherwise be found to constitute an unfair labor practice. Accordingly, the charge should be dismissed, absent withdrawal.

B.J.K.