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

Advice Memorandum

S.A.M. DATE: June 7, 2016

TO: Peter Sung Ohr, Regional Director
Region 13

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

SUBJECT: Lifeway Foods, Inc.
Case 13-CA-169510

512-5081-3300-0000
512-5081-7500-0000
524-3325-4200-0000
524-3350-5800-0000

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(1) of the Act when it questioned two discriminatees about their immigration documents during an unfair labor practice ("ULP") proceeding in which the discriminatees' immigration status was not relevant. We conclude that the Employer's questioning violated Section 8(a)(1) and (4) because it constituted an implied threat of reprisal and interfered with witness testimony.

FACTS

Lifeway Foods, Inc. ("the Employer") is a public company based in Illinois that supplies, manufactures, and distributes cultured dairy products known as kefir, organic kefir, probiotic cheeses, and related products. In June 2014, the Employer's employees at a number of its facilities in Illinois voted in favor of representation by the Bakery, Confectionery, Tobacco Workers and Grain Millers Union ("the Union"). The Employer filed objections to the election and has refused to bargain. In June 2015,[1] the Board overruled the Employer's objections and certified the Union.[2]

In July, the Region issued complaint against the Employer in Cases 13-CA-146689, et al., alleging a number of Section 8(a)(1) and (5) violations, including among other things, unlawful threats, unilateral changes, refusals to provide information,

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[1] All subsequent dates are in 2015 unless otherwise noted.

[2] The Employer is continuing to challenge the validity of the Union's certification by refusing to bargain. The Board recently issued a decision ordering the Employer to recognize and bargain on request with the Union. *Lifeway Foods, Inc.*, 364 NLRB No. 11, slip op. at 3 (May 24, 2016).

and the unlawful discharges of Employees 1, 2, and 3. The Region did not issue a concurrent compliance specification. The Employer filed an answer asserting that Employees 1 and 2 did not possess valid authorizations for employment in the United States and therefore, pursuant to *Hoffman Plastic Compounds, Inc. v. NLRB*,[3] even if the Employer had committed the alleged violations, those two employees would not be entitled to backpay, search-for-work expenses, or interim work-related expenses.

On August 12-13, 2015, the trial in Cases 13-CA-146689, et al., took place in Chicago, IL. Present during the trial were: Employer Counsel, Counsel for the General Counsel, and Charging Party/Union Counsel. Employee 3, one of the employees that the Region alleged the Employer had unlawfully terminated, served as the Union's representative during the trial. Other than Employee 3, no other current or former employees were permitted to sit in the courtroom or discuss their testimony based on a sequestration order issued by the administrative law judge ("ALJ").

On the first day of the trial, Counsel for the General Counsel called Employee 1 as its first witness. Employer Counsel then cross-examined Employee 1. During the cross-examination, Employer Counsel introduced Respondent Exhibit 3, which was a one-page document containing a copy of Employee 1's permanent resident card and social security card. Employer Counsel asked Employee 1 whether she recognized the two documents depicted in the exhibit. Employee 1 said that she did. Employer Counsel asked whether those were copies of documents that she had presented to the Employer when she was hired. Employee 1 said that they were. Employer Counsel then moved to admit Respondent Exhibit 3.

Charging Party/Union Counsel and Counsel for the General Counsel objected to the relevance of Respondent Exhibit 3. Employer Counsel then stated that it was relevant to the Employer's affirmative defense regarding the availability of backpay and that he was not going to ask any other questions about the exhibit. The ALJ told Employer Counsel that as he understood Board law, those issues were to be litigated in the compliance phase. Employer Counsel agreed with the ALJ, but added that if the ALJ did find violations and Employer Counsel had not introduced the exhibit into the record for the ULP proceeding, he would not be permitted to raise Employee 1's immigration status as a defense in the compliance proceeding. Employer Counsel said that there was an ALJ decision, which the Board had not yet considered, that stood for the proposition that if Employer Counsel did not raise the issue and make his record during the ULP proceeding, he could not then do any investigation, take any testimony, or ask Employee 1 any questions about that issue during the

[3] 535 U.S. 137 (2002).

compliance proceeding. Employer Counsel said he was merely attempting to make a record and had no intention of asking any further questions regarding the exhibit.

The ALJ then stated that, rather than engage in "an extended legal research project," he was going to overrule the objections and admit the evidence into the record based on Employer Counsel's representations that he would not ask any further questions about the exhibit. Counsel for the General Counsel then stated that she continued to object to admission of the document, and that an ALJ's decision was not binding on the Board. She also stated that her understanding of Board law was that issues regarding immigration status are not, and could not, be considered unless and until the parties were in the compliance phase and therefore the documents were completely irrelevant. The ALJ said that he was overruling the objections for the reasons that he had stated and would admit the exhibit at that time.

Later that day, Counsel for the General Counsel called Employee 2 as its second witness. Employer Counsel then cross-examined Employee 2. During the cross-examination, Employer Counsel introduced Respondent Exhibit 4, which was a one-page document containing a copy of Employee 2's permanent resident card and social security card. Counsel for the General Counsel again objected and stated that the exhibit was utterly irrelevant to the ULP proceeding. The ALJ said that he understood her position and informed Employer Counsel that he could continue.

Employer Counsel asked Employee 2 if the documents in the exhibit were the ones that she had presented to the Employer when she was hired. Employee 2 stated that they were. Employer Counsel also asked her if the handwriting on the exhibit was hers. Employee 2 stated that the handwriting on the exhibit itself was not hers but the handwriting on the social security card was. Employer Counsel then moved to admit Respondent Exhibit 4. The ALJ said that he understood that Counsel for the General Counsel had an objection and asked whether the Charging Party also objected. Charging Party/Union Counsel said that she did. The ALJ then said on the record:

> For the reasons I indicated previously, I'm going to admit the document based on the representation that there's at least one case that may be on appeal to the Board that made some statements about documents like this coming in in a ULP case. I take it that, Respondent, you have no further questions about this after the introduction of the document.

Employer Counsel confirmed that he had no further questions and then said that he could state for the record the case that he had referred to earlier. Employer Counsel stated that the case was *Farm Fresh Company, Target One, LLC*, and that it was issued by an ALJ in 2013. Employer Counsel then gave the Westlaw citation for the case. The ALJ then went off the record. When the ALJ went back on the record, he explained that Employer Counsel had located the decision previously mentioned

and that the Board had in fact passed on the ALJ's decision in that case. Employer Counsel then stated the citation for the Board decision in *Farm Fresh Company, Target One, LLC.*[4]

After Employees 1 and 2 testified, Employee 3 and three additional employees of the Employer testified. The Employer did not raise the immigration status of these witnesses.

On December 21, 2015, the ALJ issued his decision in Cases 13-CA-146689, et al.[5] He found merit to a number of the alleged violations. The ALJ also noted that he did not consider Respondent Exhibits 3 and 4 in his decision. Specifically he stated:

> At the trial, [Employer Counsel] on cross-examination, introduced, over the objections of the General Counsel and the Charging Party, the permanent resident and Social Security cards of [Employee 1] and [Employee 2] (R. Exhs. 3 and 4). [Employer Counsel] claimed that the administrative law judge's decision in *Farm Fresh, Target 1, LLC*, 361 NLRB No. 83 (2014) indicated that the [Employer] could not raise immigration status issues during compliance proceedings unless it was preserved as an issue at the unfair labor practice hearing. (Tr. 114-117; 163-164) So as not to delay the hearing while legal research was conducted, I admitted the exhibits based on counsel's representation. [Employer Counsel] asked no questions regarding these documents at the hearing. The General Counsel's brief points out that in *Farm Fresh*, supra, the Board affirmed the administrative law judge's ruling excluding direct questions about the alleged discriminatees' immigration status and reiterating its policy that determining the immigration status of discriminatees is left to compliance. Id. at fns. 1 and 3. In light of the Board's decision in [*Farm Fresh*], I have given no consideration to R. Exhs 3 and 4 in reaching my findings and conclusions in this case.[6]

On February 11, 2016, the Union filed the charge in the instant case alleging that the Employer had restrained, coerced, and intimidated its employees in violation

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[4] 361 NLRB No. 83 (Oct. 30, 2014).

[5] *Lifeway Foods, Inc.*, Cases 13-CA-146689, et al., JD-67-15 (NLRB Div. of Judges Dec. 21, 2015).

[6] *Id.*, JD-67-15 at 22 n.13.

of Section 8(a)(1) by questioning employees regarding the authenticity of residency documentation in the ALJ hearing.

ACTION

We conclude that the Employer's questioning of Employees 1 and 2 about their immigration documents during a ULP proceeding in which their immigration status was not relevant violated Section 8(a)(1) and (4) of the Act because it constituted an implied threat of reprisal and interfered with witness testimony.[7] Thus, the Region should issue complaint, absent settlement.

The Board has long noted the severely coercive effect on the exercise of Section 7 rights that results from an employer raising the immigration status of its employees in response to their protected concerted activities. For example, in *Viracon, Inc.*, the Board stated that employer threats that a union election could result in employees being reported to immigration officials would remain "indelibly etched in the minds" of any who would be affected by such actions.[8] More recently, in *Labriola Baking Co.,* the Board said that "[e]mployer threats touching on employees' immigration status warrant careful scrutiny, as they are among the most likely to instill fear among employees."[9] Indeed, the Board has noted that in analyzing the legality of such employer statements, it must be mindful of the tendency of employees, particularly in light of their dependent relationship with an employer, "to pick up on intended implications" that might be dismissed "by a more disinterested ear."[10]

The Board has specifically held that employer inquiries into their employees' immigration status in response to protected concerted activity are extremely coercive

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[7] The Region should seek an amended charge alleging that the Employer's conduct violated Section 8(a)(4) in addition to Section 8(a)(1). The Board has held that threats and other conduct covered by Section 8(a)(1) can also violate Section 8(a)(4). *See, e.g., Fuqua Homes (Ohio), Inc.*, 211 NLRB 399, 400-01 & n.7 (1974).

[8] *Viracon, Inc.*, 256 NLRB 245, 246-47 (1981).

[9] *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 (Sept. 8, 2014). *See also*
(b) (7)(A)

[10] *Labriola Baking Co.*, 361 NLRB No. 41, slip op. at 2 n.4 (*citing NLRB v. Gissel Packing Co.*, 395 U.S. 575, 617 (1969)).

and unlawful.[11] Similarly, an employer violates the Act by requiring employees to produce immigration documents in response to their protected concerted activity.[12] The Board has also analyzed such employer requests for immigration documents as implied threats of unspecified reprisal that could have adverse immigration consequences.[13]

The Board has further held that employer questions and comments to employee witnesses in preparation for or during ULP proceedings about their immigration status violate the Act where those questions and comments interfere with the employees providing free and uncoerced testimony. For example, in *John Dory Boat Works*, the Board held that an employer violated Section 8(a)(1) when it served subpoenas on five of its six Spanish-speaking employees, commanding them to produce travel and immigration documents that they could only possess if they were

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[11] *See, e.g., Nortech Waste*, 336 NLRB 554, 554-55 (2001) (employer review of employees' immigration status was a "smokescreen to retaliate for and to undermine a [u]nion's election victory").

[12] *See Murtis Taylor Human Services Systems*, 360 NLRB No. 66, slip op. at 1 n.3, 16 (Mar. 25, 2014) (concluding that employer violated the Act when, because of an employee's protected concerted activities, it required him to provide documentation to confirm his immigration and/or citizenship status); *North Hills Office Services*, 344 NLRB 1083, 1084, 1099-1100 (2006) (employer's demand to employee to provide it with documentation establishing that he was legally entitled to work in the United States was motivated by anti-union animus and violated the Act).

[13] *See, e.g., Belle Knitting Mills,* 331 NLRB 80, 80 n.2, 100-01 (2000) (employer's request to employees for immigration papers for union election was an implicit threat that without them, employees could face possible arrest and deportation); *Impressive Textiles*, 317 NLRB 8, 13 (1995) (in the absence of exceptions on the substantive violations, Board affirmed ALJ's rulings, findings, and conclusions, which included that an employer's requirement that an employee produce immigration documents upon recall constituted an implied threat to report her to the INS in retaliation for her support of the union).

legal immigrants into the United States.[14] The ALJ described the effect upon the General Counsel's witnesses of the "wholly irrelevant probe" as "rang[ing] from unsettling to devastating and certainly affected their ability to testify."[15] In *Commercial Body & Tank Corp,* the Board concluded that an employer's comment to an employee witness outside of the hearing room that "[Y]ou are in the wrong place . . . What happens if the immigration man should come inside here now," was in fact calculated to induce or influence the employee either not to testify in the case or to give false testimony and thus violated Section 8(a)(1).[16] And in *AM Property Holding Corp.,* the Board held that the employer attorney's objection to a line of questioning regarding the witness's good acts, in which the attorney stated he would "have to get an investigator and [find] out whether [the witness was] here in this country illegally" was an unlawful threat in violation of Section 8(a)(1) and (4).[17]

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[14] *John Dory Boat Works*, 229 NLRB 844, 852 (1977). The General Counsel did not allege a Section 8(a)(4) violation in that case. However, the Board has indicated in multiple Section 8(a)(4) cases that it is particularly suspicious of employer practices that affect the Board's processes because "Congress has made it clear that it wishes all persons with information about such [unfair labor] practices to be completely free from coercion against reporting them to the Board." *Manno Electric*, 321 NLRB 278, 297 (1996) (*citing Nash v. Florida Industrial Commission*, 389 U.S. 235, 238 (1967)), *enforced mem.,* 127 F.3d 34 (5th Cir. 1997).

[15] *John Dory Boat Works*, 229 NLRB at 852.

[16] *Commercial Body & Tank Corp.*, 229 NLRB 876, 879 (1977).

[17] *AM Property Holding Corp.*, 350 NLRB 998, 998 n.4, 1042-43 (2007), *enforced in part on other grounds*, 647 F.3d 435 (2d Cir. 2011). *See also Iowa Beef Processors, Inc.*, 226 NLRB 1372, 1374-75 (1976) (employer counsel's statement at Board hearing that witnesses had no immunity and that the employer would take "appropriate action" against any newly discovered wrongdoing was a maneuver to intimidate witnesses to prevent them from testifying for fear that their fellow employees might lose their jobs and/or be prosecuted and thus was unlawful), *enforced in rel. part*, 567 F.2d 791, 796 (8th Cir. 1977) (concluding that employer's statements at hearing intimidated prospective employee-witnesses even though they were technically correct); *OM Memorandum 11-62*, "Updated Procedures in Addressing Immigration Status Issues that Arise During NLRB Proceedings," dated June 7, 2011, at 7 (instructing Regions to contact the Board's Division of Operations-Management in cases where an employer is taking advantage of immigration status issues in an attempt to abuse the NLRB process and thwart the effective enforcement of the law,

In light of the Board's repeated acknowledgment that employees may feel intimidated by the prospect of having their immigration status probed and examined in a public proceeding, the Board has carefully prescribed the circumstances under which an employer may make such an intrusive inquiry. Initially, it is well established that where immigration status is not relevant to whether the respondent committed the alleged unfair labor practices, questioning regarding an employee's immigration status must be litigated at the compliance stage.[18] Further, even at the compliance stage, the Board has established strict parameters for how employers can inquire about these issues.

In *Flaum Appetizing Corp.*, the Board considered the appropriate standard for an employer pleading a discriminatee's immigration status as an affirmative defense to backpay liability in a compliance proceeding.[19] The Board discussed at length the harm of allowing an employer to use such an affirmative defense as a vehicle to inquire into the immigration status of employees.[20] The Board noted that "[n]umerous Federal courts have recognized that such formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights."[21] The Board quoted the Ninth Circuit's observation that:

> Even documented workers may be chilled by the type of discovery at issue here. Documented workers may fear that their immigration status would be changed, or that their status would reveal the immigration problems of their family or friends; similarly, new legal residents or citizens may feel intimidated by the prospect of having their immigration history examined in a public proceeding. Any of these individuals, failing to understand the

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including "alluding to immigration status in a menacing or suggestive way during representation or ULP proceedings").

[18] *Tuv Taam Corp.*, 340 NLRB 756, 760 (2003). *See also Rogan Bros. Sanitation*, 357 NLRB 1655, 1658 n.4 (2011) (leaving to compliance "questions concerning the effect, if any, of the discriminatees' immigration status on the reinstatement and make whole remedies").

[19] *Flaum Appetizing Corp.,* 357 NLRB 2006, 2009 (2011).

[20] *Id.* at 2011-12.

[21] *Id.* at 2012.

> relationship between their litigation and immigration status, might choose to forego civil rights litigation.[22]

The Board further reasoned that permitting such an "intrusive inquiry" into employee immigration status where the respondent "can articulate no justification for the inquiry, contravenes the purposes of the NLRA."[23] Thus, an employer may inquire into a discriminatee's immigration status only where it has pled that status as an affirmative defense to the compliance specification and offered either a factual basis for that defense or an articulable reason to believe a factual basis can be established.[24]

In the instant case, the Employer Counsel's questioning of Employees 1 and 2 about their immigration documents during a ULP proceeding where their immigration status was not relevant constituted an implied threat of reprisal and unlawful interference with Board proceedings. As set forth above, the Board has held that employer questions and comments touching on employee immigration status warrant careful scrutiny due to their severely coercive and lasting effect on the exercise of Section 7 rights, including providing testimony at Board proceedings. Indeed, the Board has acknowledged that requiring employees to answer questions about their immigration status during a legal proceeding can chill even authorized employees who may fear that their immigration status would be changed or that their status would reveal immigration problems of family or friends. Equally important is that the Employer flouted well-established Board procedural rules intended to maintain the validity of its processes by raising the issue during a ULP proceeding where the employees' immigration status was not relevant. The resulting effect was to intimidate Employees 1 and 2 and potentially others, such as those who testified after or who otherwise heard about the Employer's conduct at the trial, so that they would either not testify or provide false testimony in support of the Employer. In short, by presenting Employees 1 and 2 with their immigration documents during the ULP proceeding, the Employer violated Section 8(a)(1) and (4) of the Act.

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[22] *Id.* (*citing Rivera v. NIBCO, Inc.,* 364 F.3d 1057, 1065 (9th Cir. 2004), *cert. denied,* 544 U.S. 905 (2005)). In *Rivera,* the Ninth Circuit affirmed a protective order prohibiting an employer that was being sued for national origin employment discrimination from inquiring into where the plaintiffs were born, their immigration status, and their eligibility for employment. 364 F.3d at 1061-62.

[23] *Flaum Appetizing Corp.,* 357 NLRB at 2012.

[24] *Id.* at 2011-12.

Furthermore, Employer Counsel cannot justify his conduct at the ULP hearing by relying on the ALJ's decision in *Farm Fresh*. Indeed, his clear misrepresentation of that decision to the ALJ further supports finding a violation here. Employer Counsel represented to the ALJ that the judge's decision in *Farm Fresh* required him to introduce immigration documents at the merits stage of the case to preserve an affirmative defense regarding immigration status for the compliance stage. However, that representation could not have been further from the text of the *Farm Fresh* decision or the current state of Board law. In the first section of the ALJ's decision in *Farm Fresh*, the judge noted that he granted the Acting General Counsel's motion to preclude the respondent from questioning witnesses about their immigration status during the ULP trial.[25] The judge specified "that the public has an interest in maintaining the integrity of proceedings before the Board, and that the Board has recognized that 'formal inquiry into immigration status and facts arguably touching on it is intimidating and chills the exercise of statutory rights.'"[26] The Board then adopted the ALJ's decision to grant the Acting General Counsel's motion, with Member Schiffer concurring that "even authorized employees may be chilled from exercising their Section 7 rights if it means they might be questioned about their actual or perceived immigration status."[27] The ALJ in the underlying proceeding here noted Employer Counsel's statements at trial and then relied on the Board and ALJ decisions in *Farm Fresh*, including their reiteration that immigration status could be raised only in compliance proceedings, to not consider Respondent Exhibits 3 and 4 in reaching his conclusions.[28]

Thus, in stark contrast to Employer Counsel's claims during the hearing, the case law, including *Farm Fresh*, establishes that inquiring into employees' immigration status during the merits stage of an unfair labor practice case chills the exercise of statutory rights where such questioning is irrelevant. Despite this state of the law, which was articulated by both Counsel for the General Counsel and the ALJ at the hearing, Employer Counsel insisted on making Employees 1 and 2 answer questions about their social security cards and legal permanent resident cards during the merits phase of the trial. Under the circumstances, this misrepresentation of the law and subsequent questioning would reasonably tend to chill employees from exercising

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[25] *Farm Fresh Company, Target One, LLC*, 361 NLRB No. 83, slip op. at 5.

[26] *Id.* (*quoting Flaum Appetizing Corp.*, 357 NLRB at 2012).

[27] *Id.*, slip op. at 1 n.1.

[28] *Lifeway Foods, Inc.*, Cases 13-CA-146689 et. al., JD-67-15 (NLRB Div. of Judges Dec. 21, 2015), at 22 n.13.

their statutory rights, including providing unfettered testimony in a Board proceeding.

Finally, while the Employer has not raised a defense based on the First Amendment, we conclude that no such defense would be available here. The Board and Supreme Court have held that an employer's use of legal proceedings violates the Act where those proceedings have an illegal objective, and that such conduct is not shielded by the First Amendment right to petition the government for the redress of grievances.[29] Here, the Employer's presentation of immigration documents to Employees 1 and 2 during the ULP proceeding had the illegal objective of impliedly threatening employees with reprisal and unlawfully interfering with the Board's processes.[30] Thus, we conclude that the First Amendment does not shield the Employer from liability.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) and (4) by questioning employees about their immigration documents during the ULP proceeding in Cases 13-CA-146689, et al.

/s/
B.J.K.

ADV.13-CA-169510.Response.LifewayFoods.(b) (6), (b)

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[29] *See, e.g., Santa Barbara News-Press*, 358 NLRB 1539, 1542 (2012) (finding employer violated Section 8(a)(1) by serving subpoenas for employee Board affidavits; employer was not shielded either by the First Amendment or the *Noerr-Pennington* doctrine because it had an illegal objective), *adopted by* 361 NLRB No. 88 (Nov. 3, 2014); *Dilling Mechanical Contractors*, 357 NLRB 544, 546 (2011) (finding employer's discovery requests seeking the names of its employees who were members of the union had an illegal objective and thus the Board had authority under Supreme Court case law to find them to be unlawful); *Wright Electric, Inc.*, 327 NLRB 1194, 1195 (1999) (discovery request for signed authorization cards had an illegal objective and enjoyed no special protection under Supreme Court case law), *enforced*, 200 F.3d 1162 (8th Cir. 2000).

[30] *Cf. Chino Valley Medical Center,* 359 NLRB No. 111, slip op. at 1 n.2, 10 (Apr. 30, 2013) (employer violated the act by seeking, under the guise of subpoenas, information that was not related to the legal proceeding and which otherwise violated the Act), *adopted by* 362 NLRB No. 32 (Mar. 19, 2015).