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

DATE: August 7, 2018

TO: Paula S. Sawyer, Regional Director
Region 27

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

SUBJECT: Colorado Professional Security Services, LLC (COPSS)
Cases 27-CA-203915, -206097, -206104

512-5009-6767
512-5012-0125
512-5036-6720
512-7550-6000

These cases were submitted for advice as to whether the Employer violated Section 8(a)(1) of the Act by: (1) discharging one of the Charging Parties pursuant to unlawfully overbroad Employer rules; and (2) filing and maintaining a lawsuit against the Charging Parties, allegedly in retaliation against their participation in federal and state wage-and-hour lawsuits against the Employer. We conclude that the Employer violated Section 8(a)(1) by maintaining overbroad work rules. We further conclude that the Employer did not violate the Act by discharging one of the Charging Parties or by filing and maintaining its lawsuit against the Charging Parties.

FACTS

Colorado Professional Security Services, LLC ("the Employer") provides armed security services to shopping malls, car dealerships, and other clients in and around Colorado Springs, Colorado. Among its other policies, the Employer maintains the following provision:

> ***Harm to Business or Reputation****: Employees must refrain from engaging in conduct that could adversely affect the Company's business or reputation. Such conduct includes, but is not limited to:*
>
> > *1. publicly criticizing the Company, its management or its employees . . .*
>
> * * *

Beginning in (b) (6), (b) (7)(C) 2016, Charging Party 1, a former security guard employee of the Employer, filed federal and Colorado state court lawsuits against the Employer

alleging violations of the Fair Labor Standards Act and Colorado wage-and-hour laws. The federal lawsuit was joined by eight other former and current security guard employees of the Employer, including Charging Party 2; the Colorado state court lawsuit was only joined by Charging Party 2.

A. Events Involving the [redacted] of Charging Party 1

In May 2017, Charging Party 1's [redacted] posted on their joint Facebook page two photographs of a security guard employed by the Employer apparently sleeping in [redacted] vehicle while on the job.[1] The photos had various captions, including: "Shhhh no make to much noise you might wake [redacted] [sic]," and, "Wow look at Colorado Professional security services hard at work, don't work to hard out C.O.P.S. Security [sic]." [redacted] also commented, "Security guard sleeping on duty," "I had to take [redacted] pic I figured no one would believe this shit," "[redacted] works for Colorado professional sleeping services [sic]," and "Some [redacted] woke [redacted] up as I was leaving telling [redacted] that [redacted] just took your pic [redacted] was pissed." Soon thereafter, after some brief Facebook conversation about the photos, Charging Party 1 and [redacted] deleted the photos from their joint Facebook page. The Employer's [redacted] has claimed, without offering any evidentiary support, that some employees of one of the Employer's clients saw Charging Party 1's [redacted] Facebook posts, and that the Employer "ended up cutting ties with this client." There is no evidence that would indicate any causal linkage between the Facebook posts and the termination of this business relationship, particularly as the Employer's [redacted] says that [redacted] cut ties with the client, not that the client did so.

B. Events Involving Charging Party 2

On several occasions in 2017,[2] the Employer disciplined Charging Party 2 for being unkempt and not wearing the proper uniform -- Charging Party 2 regularly wore [redacted] instead of the required uniform boots, even after the [redacted] lent Charging Party 2 $100 to purchase regulation boots and any other uniform items [redacted] needed.[3] The disciplinary letters included language prohibiting Charging Party 2 from discussing [redacted] discipline with coworkers or clients; the Employer's disciplinary letters always include the same confidentiality language, and the

[1] The Employer's [redacted] has claimed that the security guard in the photos was not sleeping, but was merely closing [redacted] eyes while taking a work break, as [redacted] was suffering from a migraine headache.

[2] All dates hereinafter are in 2017, unless otherwise noted.

[3] The Region has concluded that none of those discipline actions violated the Act and has not submitted those issues for advice.

Employer's [redacted] has said that this language is included because the Employer does not want employees to discuss disciplinary issues.

Beginning in late [redacted] the Employer significantly reduced Charging Party 2's hours of employment. The Employer asserts that this reduction in hours was due to the fact that, while [redacted] was on duty and in uniform: (1) Charging Party 2 discussed with clients and their employees the wage-and-hour lawsuit and [redacted] disaffection from the Employer; and (2) Charging Party 2 had given [redacted] personal telephone number to the Employer's clients and their employees. Because of this conduct, the Employer wanted to assign Charging Party 2 only to those hours in which [redacted] would not have direct contact with clients and their employees.[4]

On [redacted] the Employer again disciplined Charging Party 2 for wearing improper footwear. After receiving the discipline, Charging Party 2 posted a 23-minute live video on [redacted] Facebook page during work hours -- at the time, Charging Party 2 was in uniform in [redacted] car at [redacted] work location, apparently after [redacted] had finished making [redacted] rounds and when [redacted] had no other work responsibilities. Charging Party 2 was Facebook friends with some coworkers and former coworkers, as well as an Employer supervisor. In the video, among other subjects, Charging Party 2 talked about [redacted] discipline for wearing improper shoes, the overbroad confidentiality provision in the disciplinary notice, the Employer treating [redacted] unfairly, the Employer opposing a coworker's workers' compensation claim by coaxing Charging Party 2 into lying about it, and the Employer trying to get something on [redacted] because of the wage-and-hour lawsuits. Charging Party 2 also made crude, disparaging, and dismissive jokes and comments about [redacted] supervisor and the Employer's [redacted] In particular, Charging Party 2: (1) "joked" that [redacted] supervisor was "being a [redacted], but not a [redacted]; a [redacted] because [redacted] a [redacted] and (joke) you know how these [redacted] are. They need to compensate for something;" (2) said that, by asking [redacted] to sign something interfering with free speech, the conduct of Employer officials amounted to treason under the Constitution, so "you are against the United States Constitution and you need to be shot on sight"; (3) said that, if [redacted] saw [redacted] supervisor outside of work, Charging Party 2 wouldn't be civil to [redacted], because the supervisor is a "dog on a leash"; and (4) referred to the Employer's [redacted] as an "old [redacted] with no friends," and [redacted] supervisor as a "dog."

Soon after Charging Party 2 posted the Facebook video, the Employer removed Charging Party 2 from [redacted] work location. On [redacted] next day of work, the Employer discharged Charging Party 2 for [redacted] Facebook video. The termination notices state that Charging Party 2 was discharged for: (1) insubordination; (2) regularly being unkempt and not in the proper uniform, (3) conflict of interest towards/with the

[4] The Region has concluded that the reduction in hours violated Section 8(a)(1) and has not submitted this issue for advice.

Employer's clients and their workers/clients; and (4) insidious remarks regarding the Employer's company name, business, security officers, and clients while working. The termination notices emphasized that Charging Party 2 had made the insidious remarks in the Facebook video while on duty and in uniform. The Employer's position statement expressly states that Charging Party 2 was terminated, *inter alia*, for the remarks and conduct that hurt the Employer's reputation, and cites the Employer's "Harm to Business or Reputation" policy. In addition, the Employer's owner expressly cited the policy in [redacted] explanation for discharging Charging Party 2. The Employer's owner has also stated that, to [redacted] knowledge, the client at the location where Charging Party 2 worked was not aware of [redacted] Facebook video and did not complain about it.

C. The Employer Files a State Court Lawsuit against Charging Party 1, Charging Party 1's [redacted], and Charging Party 2

On [redacted], the Employer filed a state court lawsuit against Charging Party 1, Charging Party 1's [redacted] and Charging Party 2, alleging that the defendants' Facebook posts constituted defamation, interference with contractual relations, and interference with business relations. The Employer's state law complaint does not allege that Charging Party 1, Charging Party 1's [redacted], or Charging Party 2 acted with malice, and the complaint does not specify any actual damages the Employer may have suffered from their statements. The complaint in the Employer's lawsuit emphasizes the federal wage-and-hour lawsuit that Charging Party 1 initiated, although the Employer's lawsuit is not a counterclaim to the wage-and-hour lawsuit, but instead is an entirely independent legal action. In particular, the Employer's lawsuit states:

* * * *

> 8. In 2016 a claim was filed in the US District Court for Colorado, case number 1 [redacted] by three Plaintiffs, one of whom was and is [Charging Party 1], alleging any number of violations by COPSS of Federal and State of Colorado employment laws. It was originally filed with the expectation by the plaintiffs in that matter that a group of employees and former employees of COPSS could be assembled into a class action against COPSS. That effort has so far failed and the plaintiffs in that lawsuit are now deemed an Opt-In Collective. [Charging Party 2] is now one of the plaintiffs in the Federal court action.
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> 9. Since joining in the Federal matter, [Charging Party 1] and [redacted] wife, [ ] have made efforts to encourage other employees of COPSS to join the lawsuit and have made statements to any number of clients of COPSS that they should also join the Federal lawsuit. It is unclear

> how COPSS clients could join the lawsuit involving former and current employees, but that fact did not deter [Charging Party 1 and (b) (6), (b) (7)(C)] from making the requests.
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> 10. As part of the effort by [Charging Party 1 and (b) (6), (b) (7)(C) to encourage others to join the Federal lawsuit, both of those Defendants have made a number of statements about COPSS that are both untrue and defamatory.[5]

* * * *

The Employer has offered no direct evidence that would indicate that any of the statements it alleges as defamatory were false, and has offered no evidence at all that Charging Party 1, Charging Party 1's (b) (6), (b) (7)(or Charging Party 2 acted with malice, or that the Employer had any actual damages from the statements at issue in the lawsuit.

ACTION

Initially, we conclude that the Employer violated Section 8(a)(1) by maintaining unlawfully overbroad rules. Second, we conclude that the Employer's discharge of Charging Party 2 did not violate Section 8(a)(1) because (b) (6), (b conduct did not constitute protected concerted activity and was gross misconduct. Finally, while the Employer's state court lawsuit lacks a reasonable basis, we conclude that it was not filed with an unlawful retaliatory motive.

I. The Employer Maintains Overbroad Rules that Violate Section 8(a)(1)

We conclude that the Employer's "Harm to Business or Reputation" policy prohibiting employees from criticizing the Employer, and the standard disciplinary letter language prohibiting employees from discussing their discipline with coworkers or clients, violate Section 8(a)(1) of the Act. Under *Boeing*,[6] these provisions are Category 2 rules that violate Section 8(a)(1) because the impact on employee NLRA rights outweighs the Employer's business justification. Regarding the policy, by prohibiting any public criticism of the Employer or its management, the Employer is

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[5] The allegation in paragraph 10 of the Employer's lawsuit does not appear to refer to any of the particular statements alleged as defamatory in the Employer's lawsuit, as none of those statements would have been related to encouraging others to join in the federal wage-and-hour lawsuit.

[6] 365 NLRB No. 154, slip op. at 3-5 (Dec. 14, 2017).

expressly interfering with any appeals to the public in labor disputes, and it does not have a legitimate business justification for that kind of total ban. Regarding the standard language in its disciplinary letters, by prohibiting employees from discussing their discipline with coworkers, as well as clients, the Employer is expressly interfering with employees' right to communicate with each other or third parties on a central term of employment, again without any legitimate business justification for doing so. In sum, as to both of these provisions, the impact on employee NLRA rights is significant and that impact is not outweighed by legitimate business justifications.[7] Thus, the Region should issue complaint, absent settlement, alleging that those rules violate Section 8(a)(1).

II. The Employer's Discharge of Charging Party 2 Did Not Violate Section 8(a)(1)

While Charging Party 2 was discharged, at least in part, for violating these unlawfully overbroad provisions, we conclude that [redacted] discharge was not unlawful because [redacted] Facebook video did not constitute protected concerted activity, and it was so egregious that other employees would not connect [redacted] discharge to the overbroad aspect of the rules.[8] With regard to whether the [redacted] Facebook video was protected concerted activity, while Charging Party 2 referred there to Section 7 subjects that could have been relevant to employees' mutual aid or protection, including the wage-and-hour lawsuit and the overbroad confidentiality provision in the disciplinary notice, the comments [redacted] expressed were entirely individual complaints and there is no indication that [redacted] was speaking for other employees or seeking to act in concert with others. Rather, Charging Party 2's comments were more in the nature of "mere griping," not protected under Section 7 of the Act.[9]

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[7] *See* GC Memorandum 18-04, "Guidance on Handbook Rules Post-*Boeing*," at pp. 15-17 (June 6, 2018).

[8] *See Continental Group, Inc.,* 357 NLRB 409, 411-12 (2011) (an employer may violate Section 8(a)(1) by imposing discipline pursuant to an unlawfully overbroad rule if the employee was engaged in protected conduct, or if the employee was engaged in conduct that otherwise implicates the concerns underlying Section 7; however, an employer does not violate the Act by disciplining an employee for conduct "wholly distinct" from the concerns underlying Section 7, even if the discipline is imposed pursuant to an unlawfully overbroad rule). (b) (5) [redacted].

[9] *See Mushroom Transportation v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964), which was "fully embrace[d]" by the Board in *Meyers Industries*, 281 NLRB 882, 887 (1986), *affirmed sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied*, 487 U.S. 1205 (1988).

In addition, Charging Party 2 made several crude, disparaging, and dismissive jokes and comments about [redacted] supervisor and the Employer's [redacted] comments that would have been seen as gross misconduct and so egregious that other employees would not connect [redacted] discharge to the overbroad aspect of the rules.[10] Thus, Charging Party 2: (1) "joked" that [redacted] was "being a [redacted], but not a [redacted]; a [redacted] because [redacted] a [redacted] and (joke) you know how these [redacted] are. They need to compensate for something;" (2) said that, by asking [redacted] to sign something interfering with free speech, that conduct amounts to treason under the Constitution, so "you are against the United States Constitution and you need to be shot on sight"; (3) said that, if [redacted] saw [redacted] supervisor outside of work, [redacted] wouldn't be civil to [redacted], because the supervisor is a "dog on a leash"; and (4) referred to the Employer's [redacted] as an "old [redacted] with no friends," and [redacted] supervisor as a "dog." These offensive and potentially threatening comments, made while Charging Party 2 was on duty and in uniform (as emphasized by the Employer in its termination notices), would plainly be seen by his coworkers to have been the basis for Charging Party 2's discharge, and as gross misconduct or egregious statements warranting the discharge, wholly apart from the Employer's application of its unlawfully overbroad rules. This would particularly be the case here, where the Employer expressly relied on other legitimate reasons for the discharge, including Charging Party 2's long disciplinary history, continual refusal to abide by the Employer's uniform and appearance policies even after the Employer's [redacted] provided [redacted] with $100 to purchase the appropriate work boots, and previous inappropriate conduct of giving [redacted] personal telephone number to the Employer's clients and the clients' employees. In these circumstances, other employees would understand that Charging Party 2 would have been discharged for these legitimate reasons, even without the application of the unlawfully overbroad rules, thus mitigating any chilling effect on potential Section 7 activity presented by the discharge. Based on these considerations, and our conclusion that the conduct for which Charging Party 2 was discharged was not protected concerted activity, we conclude that the Employer did not violate Section 8(a)(1) by discharging [redacted].

[10] *See Flex Frac Logistics, LLC*, 360 NLRB 1004, 1005 (2014) (employee was lawfully discharged for gross misconduct; any chilling impact on the exercise of their Section 7 rights would be minimal); *Food Services of America, Inc.*, 360 NLRB 1012, 1012 n.4 (2014) (employee was lawfully discharged where his actions were so egregious that the chilling impact on employees' exercise of their Sec. 7 rights would be minimal), *vacated on other grounds*, 365 NLRB No. 85 (2017).

III. The Employer's State Court Lawsuit

In *Bill Johnson's Restaurants v. NLRB*,[11] 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. In *BE & K Construction Co.*,[12] 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, but that a reasonably based lawsuit does not violate the Act regardless of the motive for bringing it.[13]

A. The Employer's state court lawsuit is baseless

A lawsuit is objectively baseless when its factual or legal claims are such that "no reasonable litigant could realistically expect success on the merits."[14] The analysis of this issue requires "[an examination of] the plaintiff's evidence to determine whether it raises any material questions of fact."[15] 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 supporting each cause of action alleged.[16]

In *Linn v. Plant Guard Workers Local 114*,[17] the Supreme Court held that a state court has jurisdiction to apply state remedies against defamation in a lawsuit brought by "either party to a labor dispute" against the other party *only* where the state complainant "pleads and proves that the [allegedly defamatory] statements were made with malice and injured him."[18] The Court and the text of the Act itself have

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[11] 461 U.S. 731, 748–49 (1983).

[12] 351 NLRB 451 (2007).

[13] *See also, e.g., 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*, 653 Fed. Appx. 62 (2d Cir. 2016).

[14] *BE & K,* 351 NLRB at 457.

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

[16] *Bill Johnson's,* 461 U.S. at 746, n.12.

[17] 383 U.S. 53 (1966).

made it clear that the term "labor dispute" is to be broadly interpreted in this context,[19] and would include a wage-and-hour lawsuit pursued by current or former employees against an employer. In order to prove malice, the plaintiff must show that the statements were made with knowledge of falsity or with reckless disregard of whether the statements were true or false.[20] Demonstrating the federal overlay of actual malice is a "heavy burden" that must be shown by "clear and convincing proof."[21] And, where, as here, a plaintiff alleges harm to its reputation, the plaintiff must also show evidence of actual damages or loss due to any such reputational harm.[22] The Board has recognized that *Bill Johnson's* and *Linn* are to be read together, and that in a defamation case arising out of a labor dispute, a plaintiff must prove the "[f]ederal overlay of both actual malice and damages" to have its lawsuit treated as reasonably based.[23] In addition, the *Linn* standard equally applies to

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[18] 383 U.S. at 55. *See also Beverly Health & Rehabilitation Services*, 331 NLRB 960, 961 n.3, 963 (2000) ("where a party to a labor dispute circulates false and defamatory statements, a state court defamation lawsuit is not preempted by the Act 'if the complainant pleads and proves that the statements were made with malice and injured him.'"), *reconsideration denied*, *Beverly Health & Rehabilitation Services*, 336 NLRB 332, 333 (2001) ("where the plaintiff has alleged and can prove actual malice and damages, the defamation suit is not preempted" and "the Board cannot enjoin it unless and until the Board determines that it lacks a reasonable basis and is retaliatory").

[19] *See, e.g., Letter Carriers v. Austin,* 418 U.S. 264, 278–79 (1974) ("whether *Linn*'s partial pre-emption of state libel remedies is applicable obviously cannot depend on some abstract notion of what constitutes a 'labor dispute'; rather, application of *Linn* must turn on whether the defamatory publication is made in a context where the policies of the federal labor laws leading to protection for freedom of speech are significantly implicated"); Section 2(9) of the Act ("[t]he term 'labor dispute' includes any controversy concerning terms, tenure or conditions of employment, or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment, regardless of whether the disputants stand in the proximate relation of employer and employee").

[20] *Linn,* 383 U.S. at 65.

[21] *Id.*

[22] *Id.*; *Intercity Maint. Co. v. Service Employees Local 254*, 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").

allegations of tortious interference with contract or business relations, which are also at issue here.[24]

Thus, to determine if the filing and maintenance of a defamation lawsuit constitutes an unfair labor practice, the Board examines whether the plaintiff has pled and can prove malice and actual damages.[25] For instance, in *Beverly Health & Rehabilitation Services*, the Board dismissed aspects of the ULP complaint that alleged that the employer had unlawfully maintained a preempted lawsuit, because the employer there had satisfied the *Linn* framework by pleading malice and damages.[26]

Here, the Employer's state court lawsuit lacks a reasonable basis in law or fact because the Employer has entirely failed to plead the required *Linn* elements, and has failed to present the Region with *any* evidence demonstrating that the Charging Parties' statements were made with malice, or that it has some reason to believe that it may be able to demonstrate malice before the court.[27] Indeed, the Employer has not even offered any proof, as required by state law, that the allegedly defamatory statements were false.[28]

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[23] *Beverly Health & Rehabilitation Services*, 336 NLRB at 333.

[24] *See Beverly Hills Foodland, Inc. v. Food & Commercial Workers Local 655*, 39 F.3d 191, 196 (8th Cir. 1964) ("the malice standard required for actionable defamation claims during labor disputes must equally be met for a tortious interference claim based on the same conduct or statements").

[25] *See Beverly Health & Rehabilitation Services*, 331 NLRB at 963.

[26] *Id.*

[27] *See Ashford TRS Nickel*, 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."); *Beverly Health & Rehabilitation Services*, 331 NLRB at 963 (Board examines whether defamation suit raises a genuine issue of material fact under *Bill Johnson's* and whether plaintiff's pleadings are adequate under *Linn*).

[28] Under Colorado law, defamation and interference with contract or business relations can only be found where the defendant has made statements of "verifiable facts . . . capable of being proved true or false." *Keohane v. Stewart*, 882 P.2d 1293, 1300 (Colo. 1994). Thus, mere opinions, even derogatory opinions, cannot be found to be defamatory. *See, e.g., Fry v. Lee,* 408 P.3d 843, 855-56 (Colo. App. 2013)

Additionally, the Employer has not pled any specific damages or offered any proof that it suffered any actual damages. There is no evidence showing damages from the Charging Party 2's Facebook video; indeed, the Employer[redacted] has stated that, to [redacted] knowledge, the client at the location where Charging Party 2 worked was not aware of [redacted] Facebook video and did not complain about it. The Employer's [redacted] has claimed, without offering any evidentiary support, that some employees of one of the Employer's clients saw Charging Party 1's [redacted] Facebook posts and that the Employer "ended up cutting ties with this client." But there is no evidence that would indicate any causal linkage between the Facebook posts and the end of the business relationship, particularly where the Employer's [redacted] says that [redacted] cut ties with the client, not that the client did so. The Employer has presented no other evidence that would indicate any damages or actual harm. Therefore, 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 Charging Parties' statements were made with malice and that the Employer experienced actual harm as a result of the Defendants' statements -- the Employer's lawsuit is baseless under *Bill Johnson's*.

B. The Employer's state court lawsuit is not unlawful because it is not directed at any protected conduct and has not been otherwise shown to retaliate against the Charging Parties' protected conduct

Factors for discerning an employer's unlawful retaliatory motive for initiating a state court lawsuit include whether the lawsuit targeted protected concerted activity;[29] evidence of the plaintiff's prior animus toward protected rights;[30] whether the lawsuit is baseless;[31] and any claim for excessive damages.[32]

("[a]lternative torts cannot be used to evade the constitutional requirements for defamation actions"); *Henderson v. Times Mirror Co.,* 669 F.Supp. 356, 357 (D. Colo. 1987) (a "claim of intentional interference with contract cannot be predicated on [an] expression of opinion") (citing *Redco Corp. v. CBS, Inc.,* 758 F.2d 970 (3d Cir. 1985), *cert. denied,* 474 U.S. 843 (1985), for the proposition that "since the defendants could not be liable for defamation arising out of their statements of opinion, the intentional interference with contractual relations claim was likewise not actionable"), *affirmed,* 876 F.2d 108 (10th Cir. 1989). Thus, even statements by a Charging Party considered to be insults would not satisfy the Employer's burden under state law.

[29] *See, e.g., Ashford TRS Nickel*, 366 NLRB No. 6, slip op. at 6; *Summitville Tiles*, 300 NLRB 64 (1990).

[30] *See, e.g., Atelier Condominium & Cooper Square Realty*, 361 NLRB at 970

[31] *Id.*; *Bill Johnson's*, 461 U.S. at 747.

Here, while the Employer's lawsuit in the instant cases is clearly baseless, it is not itself directed at any protected conduct, and there is insufficient evidence to show that the Employer commenced its suit to retaliate against the Charging Parties' Section 7 activity. In this regard, we particularly note the timing here -- the Employer's lawsuit came soon after Charging Party 1's [redacted] and Charging Party 2's Facebook posts and almost one year after Charging Party 1 first filed the wage-and-hour lawsuits. This supports the Employer's assertion that it was the Facebook posts that were the reason for its state court lawsuit, and not the Charging Parties' earlier lawsuits.

Moreover, although the Employer's state court complaint references the Charging Parties' participation in the federal wage-and-hour lawsuit against it, that in itself does not demonstrate animus toward their participation in the wage-and-hour suit. Rather, it appears to be an attempt to provide context for the Employer's state court lawsuit and to show that what the employees were doing on Facebook was actually *not* in furtherance of their lawsuit, because the Charging Parties would not be able to add the Employer's clients to their lawsuit which is limited to former and current employees of the Employer (i.e., the Employer appears to have been defending in advance against an argument the Charging Parties would be likely to use in defense of the statements at issue in the Employer's lawsuit). And, while the Employer's lawsuit does target former employees who were prominent in the federal and state wage-and-hour lawsuits against the Employer, it is undisputed that these employees also made the allegedly defamatory statements, and there is no evidence that any other employees or former employees made any similar statements targeting the Employer.

In addition, we note that, although the Board will consider a lawsuit's lack of a reasonable basis as a factor in its analysis of motive, that factor alone is insufficient to prove unlawful retaliation.[33] Finally, in the absence of any clear demand for excessive punitive damages or injunctive relief, we would not rely on the speculativeness of the damages sought by the Employer. Therefore, despite the clear lack of merit to the Employer's state court lawsuit, the allegation that it violated Section 8(a)(1) should be dismissed, absent withdrawal.

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by maintaining unlawfully overbroad rules. The

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[32] *See, e.g., Atelier Condominium & Cooper Square Realty*, 361 NLRB at 971, 1006; *H.W. Barss Co.*, 296 NLRB 1286, 1287 (1989).

[33] *Allied Mechanical Services*, 357 NLRB 1223, 1234 (2011), *enforcement denied,* 734 F.3d 486 (6th Cir. 2013).

Region should dismiss, absent withdrawal, the allegations regarding the Employer's discharge of Charging Party 2 and the Employer's state court lawsuit.

/s/
J.L.S.

ADV.27-CA-203915.Response.CoPSS (b) (6), (b) (7)(