Federal Security, Inc. and its alter egos or agents, James R. Skrzypek and Janice M. Skrzypek *and* Joseph Palm. Case 13–CA–38669

October 1, 2001

DECISION AND ORDER

BY MEMBERS LIEBMAN, TRUESDALE, AND WALSH

On May 1, 2001, Administrative Law Judge Robert A. Giannasi issued the attached decision. The Respondents filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondents filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified.

AMENDED REMEDY

Pursuant to our authority under Section 10(c) of the Act, we shall require the Respondents to take affirmative action within 7 days to have the lawsuit at issue in this case dismissed and to have the default orders in the proceeding vacated. This requirement is intended to speedily terminate an otherwise continuing violation of Section 7 rights, and also to minimize the possibility of State court action that might have additional coercive impact on employees' protected activities. We have imposed the same prompt dismissal requirement in an analogous case, *Loehmann's Plaza*, 305 NLRB 663, 671 (1991), rev. denied 74 F.3d 292 (D.C. Cir. 1996). There, the Board held that, in order to avoid committing an unfair labor practice, a respondent who has filed a State court lawsuit seeking to enjoin concerted employee activity must take affirmative action to stay the lawsuit within 7 days after the General Counsel issues a complaint alleging that the employee activity is protected by Section 7, thereby preempting the lawsuit. While we have found that the lawsuit in this case violates the Act under different theories than that upon which *Loehmann's Plaza* rests,[3] we see no reason why the same remedial requirement should not be applied. Accordingly, we will modify the Order to include a provision requiring the Respondents to take affirmative action, within 7 days of service of this Decision and Order, to have the lawsuit dismissed and to have the default orders in the proceeding vacated.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondents, Federal Security, Inc., and its alter egos or agents, James R. Skrzypek and Janice M. Skrzypek, their officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(a).

"(a) Within 7 days after service of this Decision and Order by the Region, withdraw and, if necessary, otherwise seek to dismiss its lawsuit docketed in the Circuit Court of Cook County, Illinois, as No. 00-L-06317, *James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer et. al.*, including any amendments or refilings, and take affirmative action to have the default orders in the proceeding vacated."

2. Substitute the attached notice for that of the administrative law judge.

[1] The Respondents have excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] On August 23, 2001, the Respondents filed a motion to take administrative notice of state court decision denying defendants' motion to dismiss and a separate motion to reopen record to accept motion to dismiss and brief in support thereof, and court order denying motion to dismiss. We have taken judicial notice, as an official document, of the August 17, 2001 order of the Circuit Court in Cook County, Illinois, denying a motion to dismiss by certain defendants in the State court lawsuit that is the subject of the unfair labor practice charge in this case. We deny the Respondents' motion to reopen the record to admit the motion to dismiss, documents filed in its support, and the court's order. We find that the court's order does not affect our conclusion that the Respondent violated Sec. 8(a)(1) by prosecuting and maintaining the lawsuit against its former employees.

Member Truesdale notes that in *Federal Security, Inc.*, 318 NLRB 413 fn. 2 (1995), enf. denied 154 F.3d 751 (7th Cir. 1998), for the reasons stated in his dissent therein, he would not have found the walkout by Federal Security's guard employees to be protected and consequently would not have found their discharge by Federal Security to be unlawful. Member Truesdale, however, agrees with the judge that the State court lawsuit at issue in this case violated Sec. 8(a)(1).

[3] In *Loehmann's Plaza*, the Board held that the employee activity was "arguably" protected by Sec. 7 and the lawsuit consequently was preempted by the Act when the General Counsel issued his complaint. By contrast, the State court lawsuit in this case violated Sec. 8(a)(1) from the time it was filed, both because it was preempted as directed against activity which was "actually" or "clearly" protected by Sec. 7, and because it was baseless and retaliatory. *Manno Electric*, 321 NLRB 278, 298 (1996), enfd. per curiam mem. 127 F.3d 34 (5th Cir. 1997) (maintenance of lawsuit alleging that charging party knowingly filed false charges with the Board constitutes interference with activity that is actually protected by Sec. 7); *LP Enterprises*, 314 NLRB 580 (1994) (lawsuit alleging that employee knowingly filed false charges with the Board was baseless and retaliatory).

APPENDIX

NOTICE TO EMPLOYEES
Mailed by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to sign, mail and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection
To choose not to engage in any of these protected concerted activities.

WE WILL NOT file, maintain, or prosecute lawsuits which are preempted by the Act and which interfere with activity protected by Section 7 of the Act.

WE WILL NOT file, maintain or prosecute lawsuits without a reasonable basis in fact or law in order to retaliate against activity protected by Section 7 of the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 7 days from the date of the Board's Order, withdraw and, if necessary, otherwise seek to dismiss our lawsuit docketed in the Circuit Court of Cook County, Illinois, as No. 00-L-06317, *James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer et. al.*, including any amendments or refilings, and take affirmative action to have the default orders in the proceeding vacated.

WE WILL reimburse the defendants in the above lawsuit for all legal and other expenses incurred in defending the lawsuit, to date and in the future, plus interest.

JAMES R. SKRZYPEK AND JANICE M. SKRZYPEK ON BEHALF OF OURSELVES AND FEDERAL SECURITY, INC.

Denise Jackson Riley, Esq. and *Richard S. Andrews, Esq*., for the General Counsel.

Douglas A. Darch, Esq. and *David Baffa, Esq. (Alissa B. Lipson, Esq. on brief, of Seyfarth Shaw)*, of Chicago, Illinois, for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. GIANNASI, Administrative Law Judge. This case was tried in Chicago, Illinois, on March 13, 2001. The complaint alleges that Respondent violated Section 8(a)(1) of the Act by filing an Illinois State court lawsuit seeking monetary damages from former employees.[1] The complaint also alleges that the lawsuit lacks a reasonable basis in fact or law and was motivated by a desire to retaliate against those employees for participating in an earlier unfair labor practice case against Federal Security, Inc. (Federal Security). Respondent filed an answer denying the essential allegations in the complaint. The parties have filed posttrial briefs—both opening and reply briefs, which I have read and considered.[2]

Based on the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

Federal Security, a corporation, with offices and places of business in Chicago, Illinois, was engaged in the business of providing security guard services until August 1997, when the Secretary of State for Illinois dissolved the corporation.

In an earlier unfair labor practice case, the Board found that Federal Security was an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act (Board Case 13–CA–31155, 318 NLRB 413 (1995)). The Board's assertion of jurisdiction over Federal Security was sustained by the United States Court of Appeals for the Seventh Circuit in *NLRB v. Federal Security, Inc*., 154 F.3d 751 (7th Cir. 1998).

The complaint in this case alleges that the Board has jurisdiction over Respondent here because the individual respondents, James and Janice Skrzypek, filed the State court lawsuit, relying on their status as "sole shareholders" and "successors-in-interest" to the corporate respondent, Federal Security. Documents in the lawsuit confirm that is how they pleaded their State court lawsuit. The Skrzypeks, who are husband and wife, testified in this case and admitted that they were the sole shareholders in Federal Security. They further admitted that the money damages they seek in the lawsuit were not incurred by them as individuals but by the corporation through which they acted. The complaint here alleges that the Skrzypeks are and were former agents and supervisors of Federal Security. In the earlier case, the Board found that they were president and vice president of the corporate respondent. I find that the evidence in this case and the findings in the earlier case support a finding of agency and supervisory status. Finally, the complaint alleges that the Skrzypeks established themselves, after the dissolution of Federal Security, as a disguised continuation of Federal Security. I find that the Skrzypeks in effect continued Federal Security for the limited purpose encompassed by the complaint in this case.

Respondent makes two basic arguments in support of its contention that the Board lacks jurisdiction in this case. The first is that Federal Security no longer exists as a corporation and the Skrzypeks are simply individuals who are not presently en-

[1] The complaint refers to all respondents collectively as Respondent, even though the State court lawsuit was filed only by James and Janice Skrzypek, who were officers and sole shareholders of the corporate respondent, Federal Security, Inc.

[2] I grant the Respondent's unopposed motion to correct transcript.

gaged in interstate commerce. But that argument overlooks the inextricable interweaving of the instant case—and indeed the State court lawsuit—with the earlier unfair labor practice case. The State court lawsuit seeks to recover moneys expended by Federal Security to defend against the allegations in the earlier unfair labor practice case. And the instant proceeding is an attempt to protect the defendant-employees' use of Board processes in the earlier case. Thus, the instant case is derivative of the earlier unfair labor practice case. Indeed, the Skrzypeks' alleged right to file the State court lawsuit is derivative of their relationship with Federal Security, the respondent in that proceeding. To deny jurisdiction in these circumstances would be to permit the Skrzypeks to rely on their relationship to Federal Security to bring their State court action and to reject that relationship to defend this case. Respondent's purely technical argument defies common sense. See generally *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 176, 178–179 (1973); *NLRB v. Deena Artware, Inc*., 361 U.S. 398, 402–403 (1960).[3]

Respondent's second argument is equally unpersuasive. It asserts that the former employees—the defendants in the State court action—are no longer employees of Federal Security or employees under the Act. To the extent that this is a variant of its first argument, it must fail for the same reason as set forth above. But to the extent that it focuses on employee status alone, I do not understand the argument. Board jurisdiction turns on employer status, not employee status. Not only employees, but any person may file an unfair labor practice charge. See *Apex Investigation & Security Co.*, 302 NLRB 815, 818 (1991). As discussed more fully below, free access to the Board's processes is vital to enforcement of employee rights under the Act, irrespective of the identity of those filing unfair labor practice charges. In any event, the defendants were sued in State court for actions taken as employees in the earlier unfair labor practice case. I find, therefore, that, for the purposes of this case, the defendants in the State court lawsuit are employees within the meaning of the Act, as they were in the earlier case.

In these circumstances, I find that the Skrzypeks and Federal Security, at all material times, have been and are alter egos and a single employer within the meaning of the Act. They shall be referred to herein as Respondent, an employer within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICE

A. The Prior Unfair Labor Practice Case

Federal Security provided armed security guards at various public housing sites pursuant to a contract with the Chicago Housing Authority. At about 8:30 a.m. on the morning of August 11, 1992, guards Charles Robinson and Joseph Palm tried to contact Federal Security President James Skrzypek to inform him that, unless he met with them to discuss pending employee grievances, they would walk off the job. They were unable to contact him directly, but left a message that, unless he contacted them by 10 a.m., the guards would initiate their walkout. Other guards decided to join Robinson and Palm. Having received no response to their request for a meeting, the guards left their posts and participated in the walkout. Skrzypek made radio contact with the employees and told them that their participation in the walkout would result in their termination and their placement on the Housing Authority's "bar list," which would exclude them from employment anywhere in the jurisdiction of the Chicago Housing Authority. Shortly after the walkout began, Federal Security covered all affected guard positions using off-duty personnel, whom it contacted by radio. On August 17, 1992, after refusing to meet with the striking employees, Federal Security fired them and undertook to see that they were placed on the bar list.

Joseph Palm filed a charge with the Regional Director of the Board in Chicago, alleging that the terminations were unlawful. Through the Regional Director, the General Counsel issued a complaint on the matter. A trial was held before an administrative law judge, who issued a decision finding the terminations violative of the Act. The judge found that the "evidence establishes that the employees resorted to the walkout in order to protest the terminations of [Supervisor Carlton] Short and [employee Larry] Smith and what they considered Skryzypek's reneging on promises to provide them with various benefits." This included "bullet proof vests, unlimited overtime, insurance, paid vacations and other benefits." The judge further found that "[t]heir action was a protected exercise of Section 7 rights." 318 NLRB at 418–419, citing cases.

The judge's decision was appealed to the Board. In its decision, the Board adopted the administrative law judge's finding that the walkout amounted to concerted protected activity and that Federal Security therefore violated the Act by discharging the employees who participated in the walkout and by having them placed on the bar list. The Board also affirmed the judge's finding that Federal Security violated the Act by maintaining a rule that prohibited employees from participating in or supporting a strike or work stoppage and by interrogating and threatening employees regarding their participation in the walkout. The Board issued an appropriate remedial order, including reinstatement and backpay for the terminated employees. 318 NLRB 413.[4]

On court review, the Seventh Circuit denied enforcement of the Board's order. The court did not disturb the Board's finding that the employees resorted to the walkout for the reasons set forth in the quoted passage from the administrative law judge's decision. Instead, relying on an exception to the general

[3] In view of the Skrzypeks' pleadings in the State court action and their testimony in this case, my findings are compatible with *White Oak Coal Co.,* 318 NLRB 732 (1995), enfd. mem. 81 F.3d 150 (4th Cir. 1996), where the Board permitted a piercing of the corporate veil in order to avoid an evasion of legal obligations. See also *Manno Electric, Inc.,* 321 NLRB 278 fn. 3 (1996), enfd. per curiam mem. (5th Cir. 1997) (individual respondent who filed state court lawsuit charged separately "to avoid frustrating the remedial purposes of the Act"). Accord: *Associated Builders & Contractors*, 331 NLRB 132 (2000), modified on another point, 333 NLRB 955 (2001).

[4] In its exceptions to the administrative law judge's decision, Federal Security did not contest the findings of the judge, quoted above, concerning the reasons for the walkout. Instead, it took the position, later vindicated by the Seventh Circuit, that the employees lost the protection of the Act because Federal Security was not given adequate notice "to cover deserted posts" and eliminate what it called "a dangerous situation." (Exception 4.)

rule that strikes to protest working conditions are protected concerted activity, it held that the walkout lost the protection of the Act because employees had compromised safety by leaving behind unattended guard stations at public housing sites. The court thus faulted the means used in implementing the walkout, not the reasons for the walkout. In addition, although the court noted, in footnote 2 of its decision, that Federal Security did not timely object to the Board's finding that its anti-strike rule was unlawful, it apparently refused to enforce that aspect of the order as well. The court's decision issued on September 9, 1998. 154 F.3d 751.

B. The State Court Lawsuit

James Skrzypek testified before me that he decided to file his State court lawsuit as a result of a chance meeting he had with former employee Michael Davenport, who was not an alleged discriminatee in the earlier unfair labor practice case.[5] They met in May 1999 (Skrzypek mistakenly placed the meeting in April) at a Walgreen's Drug Store in Chicago, and had lunch together. Apparently, Davenport was unaware that the Seventh Circuit had refused to enforce the Board's order and Skrzypek undertook to send Davenport copies of the Seventh Circuit's decision. Davenport also testified about the encounter. Davenport testified that Skrzypek asked him why the employees brought the case before the NLRB and criticized former employee Joseph Palm, who was one of the two leaders in the walkout and the person who filed the charge with the Board in the original unfair labor practice case. According to Davenport, Skrzypek made what Davenport considered a threat against Palm. Skrzypek said he "hated" Palm and, if he ever ran into Palm, there was "no telling what he would do to the man." Skrzypek did not deny Davenport's testimony in this respect. On the other hand, Skrzypek testified Davenport stated that Skrzypek had been "set up" to take a fall, that counsel for the General Counsel in the original case "falsified the affidavits" and that "the reasons [the employees] gave were lies in order to get their jobs back." Davenport denied telling Skrzypek that he or other employees lied about the facts of the walkout.

On June 2, 2000, James Skrzypek and his wife, Janice, filed a verified complaint at law in the Circuit Court of Cook County, Illinois, against most, but not all, of the employees who had been terminated by Federal Security and ordered by the Board to be reinstated with backpay. The plaintiffs identified themselves as sole shareholders and sole successors in interest to Federal Security, which, the complaint alleges, was dissolved involuntarily by the Illinois Secretary of State. The State court complaint alleges the named defendants engaged in a walkout after learning of the suspension of Supervisor Carlton Short and were terminated for abandoning their posts. The complaint also alleges that defendant Joseph Palm filed a charge with the NLRB on behalf of himself and other terminated employees, and recites the history of the NLRB case against Federal Security.

Paragraph 45 of the State court complaint purports to set forth the circumstances of the May 1999 meeting between Davenport and Skrzypek. According to the complaint, Davenport told Skrzypek that the employees "fabricated the facts, circumstances and the reasons for the Walkout to the NLRB agents and attorneys . . . to make it appear that the Walkout was concerted union activity so that the NLRB would become involved." The State court complaint further attributes to Davenport the statement that "the only reason the Guards left their posts was to show support for and loyalty to Short after he was suspended." Paragraphs 46 and 47 of the State court complaint state that it was only after the Davenport-Skrzypek meeting that the plaintiffs knew that the "NLRB charge and the reasons for the Walkout had been fabricated by Palm and the other Guards." Paragraphs 48 and 49 allege that the walkout was organized by the employees "as a show of support for Short after he was suspended by Federal Security" and that "Palm, on behalf of himself and the Guards, fabricated the facts, circumstances and reasons surrounding the Walkout" and brought an action "against Federal Security without probable cause."

Count I of the State court complaint, titled malicious prosecution, alleges that the NLRB charge significantly interfered with the plaintiffs' business operations, and that the charge was filed for "improper purposes" and "with the intent to harass Federal Security." It also alleges that "[m]alice is the gist of this action'' and asks for damages expended in defending against "the false allegations and charges brought by Palm and the other Guards." Count II alleges that the same basic conduct constituted an abuse of process; Count III alleges a civil conspiracy to commit malicious prosecution; and Count IV, a civil conspiracy to commit abuse of process. Plaintiffs seek damages "in excess of $140,000 in attorneys' fees and court costs incurred in defending the NLRB Charges, court costs and reasonable attorneys' fees" in bringing the State court action, as well as "punitive damages."

C. The Instant Case and Subsequent Events in the State Court Lawsuit

On June 30, 2000, Joseph Palm filed an unfair labor practice charge that resulted in the issuance of the complaint in this case, on January 29, 2001, alleging that the State court lawsuit lacks a reasonable basis in fact or law and was filed to retaliate against employees for having pursued their rights under the National Labor Relations Act. The General Counsel also filed a petition in the United States District Court for the Northern District of Illinois for an injunction under Section 10(j) of the Act. That petition was pending at the time of the hearing in this case.

As of the date of this hearing, the State court lawsuit was also still pending, although the court had issued some preliminary orders. First of all, a default order was issued against 11 of the 17 defendant-former employees, presumably because they had failed to file answers to the State court complaint. Two of those default orders were later vacated, based on an unopposed motion to set the orders aside. On March 6, 2001,

[5] Both Skrzypek and Davenport testified before me that Davenport participated in the walkout. I have consulted Davenport's testimony in the earlier case, however, and it appears that he did not leave his post or withhold his labor, although he met with some of the participants during the walkout. He went off duty at 8 a.m. on the day of the walkout and was not working when the walkout began at 10 a.m. He was not terminated and voluntarily took another job shortly thereafter (Tr. 732–738 in Case 13–CA–31155).

Cook County Illinois Circuit Court Judge Philip Bronstein ruled on a motion to dismiss filed by defendants. Judge Bronstein granted the motion, without prejudice, with respect to Counts II and IV, dealing with the abuse of process allegations. He denied, without prejudice, the motion to dismiss Counts I and III, dealing with the malicious prosecution allegations, and permitted the plaintiffs to replead those allegations. [6]

D. Discussion and Analysis

By now, the applicable principles are well established. The prosecution of a State court lawsuit is an unfair labor practice and may be enjoined, if the General Counsel establishes that the lawsuit lacks a reasonable basis in fact or law and that the lawsuit was filed with a retaliatory motive. *LP Enterprises*, 314 NLRB 580 (1994), citing the lead case of *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 748–749 (1983). See also *Geske & Sons, Inc. v. NLRB*, 103 F.3d 1366 (7th Cir. 1997), enfg. 317 NLRB 28 (1995). It is also clear, under *Bill Johnson's,* that the unfair labor practice respondent is required "to present the Board with evidence that shows his lawsuit raises genuine issues of material fact." 461 U.S. at 745–746 and footnote 12. Moreover, at footnote 5 of *Bill Johnson's*, the Supreme Court set forth another category of cases that could be enjoined because they are preempted by Federal law, without regard to retaliatory motive. Pursuing such preempted State court lawsuits also constitutes an unfair labor practice. *Manno Electric,* above at fn. 3, 321 NLRB at 278 fn. 5 and 297–298. See also *Associated Builders & Contractors,* above at fn. 3, 331 NLRB 132 (2000).

The free and unfettered access to Board processes has been recognized as a particularly important federal right. In *Nash v. Florida Industrial Commission*, 389 U.S. 235 (1967), the Supreme Court struck down a State administrative ruling that disqualified an individual from receiving unemployment compensation benefits because she had filed a charge with the Board. In holding that the Commission's action violated the Supremacy Clause of the Constitution, the Court issued an unqualified defense of individuals who resort to the Board's processes:

> The National Labor Relations Act is a comprehensive regulatory code passed by Congress to regulate labor relations in activities affecting interstate and foreign commerce. As such it is of course the law of the land which no state law can modify or repeal. Implementation of the Act is dependent upon the initiative of individual persons who must, as petitioner has done here, invoke its sanctions through filing an unfair labor practice charge [footnote omitted]. Congress has made it clear that it wishes all persons with information about such practices to be completely free from coercion against reporting them to the Board. . . . The action of Florida here, like the coercive actions which employers and unions are forbidden to engage in, has a direct tendency to frustrate the purpose of Congress to leave people free to make charges of unfair labor practices to the Board. [389 U.S. at 238–239].

1. The State court action has no reasonable basis in law

The gravamen of the Respondent's State court lawsuit is the claim that the charge in the earlier unfair labor practice case was "fabricated," as were the affidavits in support of the charge. More specifically, the State court lawsuit alleges that the reasons for the employees' walkout were fabricated so as to invoke the Board's jurisdiction. That issue, however, was fully litigated and decided in the earlier unfair labor practice case. An administrative law judge found that the reasons for the walkout were related to employee working conditions, activity protected under the Act. Federal Security filed no exceptions to the judge's finding in that respect, and the Seventh Circuit did not disturb that finding, which was adopted by the Board. Moreover, even though the court denied enforcement to the Board's order, the charge alleging that Federal Security unlawfully fired the employees for engaging in the walkout was found to have merit. Thus, the General Counsel issued a complaint on the charge after an investigation; an administrative law judge found a violation, after a full-scale hearing; and the Board affirmed the judge on review.[7]

Two lines of Board cases support the view that the State court action is without a reasonable basis in law. In *LP Enterprises*, cited above, an employer filed a State court lawsuit alleging that an employee had engaged in malicious prosecution by filing a false unfair labor practice charge. The charge in that case was withdrawn after the General Counsel indicated that it would be dismissed; no complaint issued and no hearing was held. The Board found that the lawsuit lacked a reasonable basis and was retaliatory and therefore violative of the Act under *Bill Johnson's*. In finding that the lawsuit lacked a reasonable basis, the Board noted that the filing of a charge is a protected activity, unless it is filed in bad faith. The Board defined bad faith in terms of malice, that is, filing with knowledge the allegations are false or with reckless disregard for the truth. The Board also observed that, in determining whether the lawsuit lacked a reasonable basis, Federal and not State law

[6] Counsel for the General Counsel attached to their opening brief a document that purports to be an amended complaint filed in the State court lawsuit, on March 23, 2001. There was, however, no motion to make the amended complaint an exhibit in this case.

[7] In its State court lawsuit, Respondent implies that the Board's jurisdiction would not have been invoked if the reason for the walkout was to protest the suspension of a supervisor or if union activity was not involved. Those positions are wrong as a matter of law. As indicated, the Board found that there were several reasons for the walkout, only one of which was to protest the discharge of Supervisor Short. Those reasons related to working conditions and thus implicated protected rights. It is well settled, however, that, even standing alone, protesting the discharge of a supervisor may be protected, if it involves issues that bear on employee working conditions. See *Puerto Rico Food Products. Corp. v. NLRB*, 619 F.2d 153, 155–156 (1st Cir. 1979). Here, after thoroughly analyzing this precise issue, the judge specifically found that the employees' decision to walk out resulted from "the perceived effect [Short's termination] would have on their own working conditions." 318 NLRB at 420. Nor does the Act require that concerted activity be union activity before it is protected. It is clear that Sec. 7 of the Act safeguards employee conduct for mutual aid and protection, whether or not a union is involved. See *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962).

should govern, at least where, as here, the target of the lawsuit is the filing of unfair labor practice charges. 314 NLRB at 580.

In *Manno Electric*, also cited above, the issue was whether a State court lawsuit alleging, in part, an abuse of Board processes—giving allegedly false statements to the Board—amounted to an unfair labor practice under *Bill Johnson's*. The State court lawsuit was filed after the Board proceeding was initiated and remained pending at the time of the hearing before an administrative law judge. The Board adopted the administrative law judge's findings that the lawsuit interfered with resort to Board processes and that such interference was unlawful and preempted, within the meaning of footnote 5 of *Bill Johnson's*. 321 NLRB 278 fn. 5 and 297–298. Concurring, Member Cohen noted that a malicious use of Board processes might not be protected and preempted, but he observed that, in *Manno Electric*, "there [was] no evidence to support the allegation of malice."[8]

Applying the above principles, I find that the State court lawsuit in this case has no reasonable basis in law. The lawsuit essentially alleges that the charge and supporting affidavits were malicious because they were false in one particular respect, the reasons for the walkout. But the testimony of the employees in support of the charge was credited after a full trial at which their testimony was tested by cross-examination and the opportunity to submit counter evidence. Both the charge and the supporting evidence resulted in a favorable decision by the administrative law judge and the Board. Although the Seventh Circuit denied enforcement, the court did not disturb the Board's finding that the reasons for the walkout were related to employee working conditions. The charge and supporting affidavits cannot therefore be deemed malicious or submitted in bad faith. Indeed, the Board's finding with respect to the reasons for the walkout is not subject to relitigation. The rule of issue preclusion or collateral estoppel provides that, when an issue is actually litigated and determined by a valid and final judgment, such determination is conclusive in a subsequent action between the parties, whether on the same or a different claim. See *NLRB v. Yellow Freight Systems*, 930 F.2d 316, 319 (3d Cir. 1991), citing *Restatement (Second) of Judgments*, Section 27 (1982).

Nor is there evidence in this proceeding that Palm's charge in the earlier unfair labor practice case was filed in bad faith or with malice. There is no evidence that the charge was filed for any purpose other than to obtain reinstatement and backpay for alleged unlawful terminations, traditional Board remedies for such conduct. Skrzypek's testimony about his May 1999 meeting with Davenport does not have anything to do with the motivation for Palm's charge in the earlier case; it would have been hearsay in any event because all Skrzypek knew was what Davenport told him. Davenport, of course, did not file the original charge. He had, at best, a limited connection with the earlier unfair labor practice case. Although Davenport testified briefly in the earlier case, he was not an alleged discriminatee and was not terminated for participating in the walkout. Skrzypek's testimony, in this case, that Davenport told him the employee affidavits amounted to "lies" is insufficient to show that the affidavits in support of the charge were inspired by malice or made in bad faith. Davenport could not have known what was or was not true in the affidavits other than his own; moreover, his alleged statement about the affidavits lacks detail and does not reveal the motivation of those who submitted them. Finally, Davenport's alleged statement that Skrzypek was "set up" to take a fall is ambiguous. In short, Skrzypek's testimony does not amount to anything but conclusory assertions, far short of a showing of malice. Thus, I cannot find that the charge and the supporting statements were motivated by bad faith or malice.

For all these reasons, I find that the General Counsel has proved that the lawsuit lacks a reasonable basis in law.[9] My finding is also supported by reference to State law, although, as I have indicated above, Federal law and not State law governs in this case. As counsel for the General Counsel point out in their brief, an Illinois circuit court decision has held that the filing of charges with the EEOC is immune from a State lawsuit alleging libel. See *Thomas v. Petrulis*, 465 N.E. 2d 1059 (Ill. App. Ct. 1984). That decision applies as well to Board charges. As the circuit court noted, hearings and investigations before the EEOC are governed by Section 11 of the National Labor Relations Act. 465 N.E. 2d at 1063.[10]

2. The lawsuit was filed for a retaliatory motive

Although, under the theory set forth in *Manno Electric* and footnote 5 of *Bill Johnson's*, there is no need for the General Counsel to show retaliatory motive, I shall address the issue here because such a showing is required under the theory set forth in *LP Enterprises.* The evidence of retaliatory motive is overwhelming.

First of all, it is clear that the very lack of merit of a lawsuit is one consideration that may lead to a finding of retaliatory motive. See *Petrochem Insulation, Inc. v. NLRB*, 240 F.3d 26, 32–33 (D.C. Cir. 2001); *BE&K Construction Co. v. NLRB,* 246 F.3d 619 (6th Cir. 2001). Here, there is much more. James Skrzypek admitted in this proceeding that he and his wife sued for twice the money that Federal Security expended for attorneys' fees. Apparently, the original fee of $140,000 was reduced to $70,000 as a compromise; yet the lawsuit asked for the larger amount. Moreover, the suit asks for punitive damages, another circumstance that has been found to show retaliatory motive. See *Summitville Tiles, Inc*., 300 NLRB 64, 66 (1990); *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1089 (9th Cir. 1995). In addition, the lawsuit itself focuses on the charge filed by Joseph Palm in the earlier unfair labor prac-

[8] The briefs of the General Counsel and Respondent do not cite or discuss either *LP Enterprises* or *Manno Electric*.

[9] Obviously, since the lawsuit lacks a reasonable basis in law, the Respondent has failed to prove that its lawsuit raises a genuine issue of material fact. I therefore deny Respondent's renewed motion to stay this case until after the State court proceeding has been completed.

[10] The General Counsel makes a number of other arguments that the evidence in this case does not support either a malicious prosecution or abuse of process claim, under Illinois law. In their reply brief, counsel for the General Counsel also suggest that the Skrzypeks cannot, under Illinois law, sue on a corporate cause of action as individuals, after the dissolution of the corporation. I do not reach those issues because it is unnecessary to do so, in view of my analysis of the case set forth above.

tice case, and refers to him repeatedly by name. Significantly, as the Board found in the earlier case, shortly after the walkout began, Janice Skrzypek told another employee that Federal Security was going to terminate all of the strikers, but "Joe Palm, especially, because he was the ringleader." And finally, Davenport's uncontradicted testimony shows that Skrzypek specifically railed against Palm and made what Davenport took as a threat against Palm during their May 1999 meeting. There could be no stronger evidence that Skrzypek harbored a lingering and seething animus against the individual who had brought the charge that caused Federal Security and Strzypek to litigate the Board case through the Seventh Circuit. The inference is inescapable that the lawsuit, admittedly spawned by the Davenport-Skrzypek meeting, was motivated by the same animus expressed by Skrzypek in that meeting.

CONCLUSION OF LAW

In these circumstances, I find that, by filing and maintaining its State court lawsuit, Respondent violated Section 8(a)(1) of the Act. That violation is an unfair labor practice within the meaning of the Act.

THE REMEDY

Having found that Respondent violated the Act in certain respects, I shall recommend that it be required to cease and desist therefrom. Because, in the particular posture of this case, there is no present employer-employee relationship, the notice that would ordinarily be posted is to be mailed, at Respondent's expense, to all the former employee-defendants in the State court lawsuit. Respondent will also be required to file a motion with the State court for leave to withdraw its unlawful lawsuit, as well as a motion to vacate the default orders that were entered and are still operative. The latter action is necessary to fully remedy the violation because the lawsuit was unlawful from its inception and the defaults should never have been entered. In addition, the Respondent will be required to reimburse the defendants in that lawsuit for all legal and other expenses incurred in the defense of the lawsuit, to date and in the future, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). See *Geske & Sons, Inc.*, 317 NLRB 28, 58–59 (1995).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended order.[11]

ORDER

The Respondent, Federal Security, Inc., and its alter egos or agents, James R. Strzypek and Janice M. Skrzypek, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Filing, maintaining and prosecuting lawsuits with causes of action that are preempted by the Act and include conduct protected by the Act.

(b) Filing, maintaining and prosecuting lawsuits with causes of action that are without reasonable basis and are motivated by a desire to retaliate against activity protected by Section 7 of the Act.

(c) In any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights under the Act or persons filing charges or cooperating with the Board.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) File a motion for leave to withdraw its lawsuit docketed in the Circuit Court of Cook County, Illinois, as No. 00-L-06317, *James R. Skrzypek and Janice M. Skrzypek v. Kelvin Brewer, et. al*., including any amendments or refilings of the same lawsuit, and file a motion for leave to vacate default orders issued in that proceeding that are still operative.

(b) Reimburse the defendants in that lawsuit for all legal and other expenses incurred in defending the lawsuit, to date and in the future, plus interest as described in the remedy section of this decision.

(c) Mail to all defendants in the State court lawsuit, at their last known home addresses, and at Respondent's expense, on a form provided by the Region and signed by the Skrzypeks, a copy of the attached notice marked "Appendix."

(d) Within 21 days after service by the Region, file with the Regional Director a sworn certification by the Skrzypeks, on a form provided by the Region, attesting to the steps Respondent has taken to comply with this order

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[11] If no exceptions are filed as provided by Sec. 102.42 of the Board's Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.