Guess?, Inc. *and* Union of Needletrades, Industrial & Textile Employees, AFL–CIO. Case 21–CA–33132

June 30, 2003

DECISION AND ORDER

BY CHAIRMAN BATTISTA AND MEMBERS LIEBMAN AND WALSH

The issue presented in this proceeding is whether the Respondent violated Section 8(a)(1) of the Act by asking employee Maria Perez, during a deposition in a workers' compensation case, for the names of employees who attended union meetings. The judge found that the Respondent did not violate the Act because the questions were relevant to the Respondent's defense in the workers' compensation case, and because the Respondent did not have an illegal objective under the Act in asking these questions. Contrary to the administrative law judge, and for the reasons set forth below, we find that the Respondent's questioning of Perez violated Section 8(a)(1).[1]

Relevant Facts

Employee Maria Perez filed a workers' compensation claim against the Respondent relating to injuries she sustained to her hand and shoulder. Dennis Hershewe served as the Respondent's attorney in that proceeding.[2] On August 20, 1998, during the Respondent's deposition of Perez, Hershewe questioned Perez about her activities at the union hall.[3] Hershewe asked Perez how many hours a week she spent at the union hall, and what kind of activities she engaged in at the hall. Perez responded that she spent a couple of hours a week at the union hall attending meetings with her coworkers. Hershewe asked Perez how many of her coworkers attended the union meetings, and also asked Perez for the names of those coworkers in attendance.[4] Perez provided Hershewe with the names of several employees who had attended the meetings, and added that there were many others as well. Perez' attorney did not object to these questions.[5]

Hershewe contends that he questioned Perez about her activities at the Union's offices in order to discover whether Perez sustained her injuries while performing activities on behalf of the Union, and also to ascertain whether Perez engaged in physical activities at the union hall that were inconsistent with her alleged injuries.[6] He contends that he needed the names of other employees in attendance at the union hall in order to identify potential witnesses to testify about these matters.

[1] On July 6, 2000, Administrative Law Judge Michael A. Marcionese issued the attached decision. The General Counsel filed exceptions and a supporting brief. The Respondent filed cross-exceptions and an answering brief to the General Counsel's exceptions.

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, and conclusions only to the extent consistent with this Decision and Order.

[2] The parties stipulated that Hershewe, the attorney for the Respondent's workers' compensation insurance carrier, was an agent of the Respondent within the meaning of Sec. 2(13) of Act.

[3] Prior to asking Perez for the identities of employees at the union hall, Hershewe asked Perez whether she had viewed a film showing her engaging in certain physical activities such as driving a car. Perez replied that she had viewed the film with the "union attorneys." Hershewe then asked Perez whether the union attorneys had represented her in any matter, and Perez replied that one of the union attorneys had filed a grievance for her in the past. Hershewe then asked Perez whether she was a member of the Union, and followed up with the questions about her union activities.

[4] The only questions alleged to be unlawful are those that asked the identities of employees who were at the union hall.

[5] The parties stipulated that the relevant questions are the following:

Q. How many hours a week do you go to the union hall?
A. Perhaps a couple of hours a week, perhaps.
Q. And what do you do there?
A. Just our co-workers having a meeting, its simply that.
Q. Co-workers at Guess?
A. Yes?
Q. How many are there?
A. I wouldn't be able to say.
Q. 10? 20? 30? 40?
A. Probably 20.
Q. Who were some of them?
A. There are several.
Q. I know. Give me some names.
A. Freddy.
Q. Freddy who?
A. I don't know what his last name is.
Q. Anyone else?
A. Mario.
Q. Who else.
A. Guadalupe.
Q. Okay. Who else?
A. Rocio.
Q. Who else?
A. There are so many.
Q. I know. Okay. Keep going. You know who they are.
A. Yes, but
Q. Just give me the names.
A. Araceli.
Q. How do you spell that?
A. A-r-a-c-e-1-i.
Q. Anybody else?
A. Amilcar.
Q. How do you spell that?
A. A-m-i-l-c-a-r.
Q. Anybody else?
A. There's many

[6] The parties jointly entered into the record the "Declaration of Dennis Hershewe," and have agreed that this declaration is to be treated as if it were testimony at a hearing before an administrative law judge.

The Judge's Findings

The judge found that Hershewe's questioning of Perez about the identities of employees at the union hall did not violate Section 8(a)(1). While recognizing that an employer's interrogation of an employee about union activities is frequently found to violate the Act, the judge also noted that such questioning is not per se unlawful. Relying on *Maritz Communications Co.*, 274 NLRB 200 (1985) (deposition questions about an employee's unfair labor practice charge and the employee's relationship with the union not unlawful), and *Wright Electric, Inc.*, 327 NLRB 1194 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000) (employer's discovery requests for union authorization cards unlawful), the judge applied a two-part test for determining whether questions propounded during discovery in a civil proceeding, which questions pertain to employees' protected concerted activities, are permissible. First, the judge stated that the information sought must be relevant to the civil suit. Second, the judge stated that assuming the matter is relevant to the civil suit, the employer must not have an illegal objective under the Act. Citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731, 738 fn. 5 (1983) (State court case for unlawful objective can be enjoined as an unfair labor practice), the judge explained that if the Board determines that the employer had an illegal objective under the Act, the Board has the authority to enjoin the discovery request.

Applying this standard, the judge first found that the questions at issue were relevant to the Respondent's defense in the workers' compensation claim. The judge found that California Civil Procedure Code, Section 2017,[7] permitted the Respondent to depose Perez about the identities of employees who were at the Union's offices with Perez, because these employees may have witnessed activities relevant to the Respondent's defense. The judge added that the identities of these employees were particularly relevant because Perez offered only limited responses to questions about her activities at the union hall.

Having found that Hershewe's questions were relevant, the judge next considered whether the questioning had an illegal objective. The judge began his analysis of this factor by noting that, to date, the only Board case to find that a discovery request in a separate civil proceeding was violative of Section 8(a)(1) was *Wright Electric*, supra, which concerned a discovery request for union authorization cards. The judge further noted that the Board's rationale in *Wright Electric* relied on an earlier case, *National Telephone Directory Corp.*, 319 NLRB 420 (1995), which the judge found distinguishable.

The judge explained that *National Telephone* involved an interlocutory appeal from an administrative law judge's ruling in an unfair labor practice proceeding. The Board held that the respondent employer in that case was not entitled to obtain the names of employees who signed union authorization cards or the names of employees who attended the union meetings where the cards were signed, even though this information was sought for the purpose of cross-examining a key witness about events testified to on direct examination. The judge determined that *National Telephone* was distinguishable because it involved the identities of employees who signed authorization cards. The judge additionally found that *National Telephone* was not applicable here because that case involved a Board proceeding rather than a separate civil lawsuit.

The judge concluded that the Board is generally reluctant to limit the right of a party to engage in discovery in a civil proceeding in another forum. With this in mind, the judge found that the Respondent had a right to engage in discovery to defend itself against the workers' compensation claim, and that the line of questioning here did not present a clear danger that employees' Section 7 rights would be violated. The judge, thus, determined that the questioning did not have an illegal objective. Having found that the questioning was relevant and that it lacked an illegal objective, the judge concluded that the questioning did not violate Section 8(a)(1) of the Act as alleged.

Analysis

We disagree with the standard applied by the judge. For the reasons set forth below, we find that the application of the proper standard requires a finding that the questioning violated Section 8(a)(1).

A. The Appropriate Standard

As noted above, the judge's analysis considered only whether the questioning was relevant and, if so, whether it had an illegal objective. We agree that these are proper considerations, but further analysis is required. If the questioning is found to be both relevant *and* lacking an illegal objective, the analysis must then consider whether the Respondent's need for the information outweighs the employees' rights under Section 7 of the Act. See *Wright Electric*, supra, and *National Telephone*, supra. In both of these cases, the Board balanced the employer's

[7] California Civil Procedure Code Sec. 2017, states that

> [u]nless otherwise limited by order of the court accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . ., if the matter either is itself admissible in evidence appears reasonably calculated to lead to discovery of admissible evidence. Discovery be obtained of the identity and locations of persons having knowledge of any discoverable matter. . . .

need for the information against the employees' rights, under Section 7 of the Act, to keep their union activities confidential.

In *National Telephone*, supra, the Board held that an employer in an unfair labor practice proceeding was not entitled to obtain the names of employees who attended union meetings and signed authorization cards, after a careful balance of competing legitimate interests. The Board acknowledged the employer's legitimate need for this information, i.e., to cross-examine a witness about events testified to on direct examination, but ultimately concluded that this interest was outweighed by the confidentiality interests of the employees who attended union organizing meetings and signed union authorization cards. The Board reasoned that while the danger of employee intimidation would be severely heightened if the names of the employees were revealed, the danger of prejudice to the employer in those circumstances was not as great because the employer had the opportunity to cross-examine other witnesses who corroborated this testimony. In addition, as part of its balance of the competing interests, and in order to safeguard the employer from any undue prejudice in that proceeding, the Board held open the possibility that it could afford less weight to any portions of the testimony that were immune from a full cross-examination. 319 NLRB at 421–422.

In *Wright Electric*, supra, the Board applied *National Telephone* to find that an employer violated Section 8(a)(1) by seeking discovery of employee authorization cards in a separate civil proceeding. As in *National Telephone*, the Board's analysis in *Wright Electric* included a balance of the competing interests. The Board held that the employer's attempt to discover this information violated Section 8(a)(1) because the employer "failed to state an interest in examining employee authorization cards that outweighs the considerable confidentiality interests of employees who sign cards." 327 NLRB at 1195.

Here, the judge construed *National Telephone* and *Wright Electric* as holding that an employer's attempt to discover the identities of employees who sign authorization cards is, in essence, a per se violation of Section 8(a)(1), but that the attempt to discover the identities of employees who attended union meetings, assuming the discovery attempt is relevant and otherwise lacks an illegal objective, does not violate the Act. We disagree with this analysis. It fails to recognize that the Board's decisions in these cases were based on the balancing of the respective competing interests.

In addition, the judge erroneously limited the applicability of these decisions to the identities of employees who signed authorization cards. In finding that these cases are not relevant to discovery questions about attendance at union meetings, the judge considered the attendance at union meetings in *National Telephone* to be incidental to the information concerning the signed authorization cards, because the cards were signed at the union meetings. However, the Board's analysis in that decision did not include any such language of limitation, and specifically considered the signing of authorization cards and the attendance at union meetings as separate conduct. Indeed, that decision specifically referred to the dangers of an employer's ability to "obtain the names of employees who signed cards *or* attended meetings." 319 NLRB at 421 (emphasis added). In view of this language in *National Telephone*, and in view of the Board's reliance on *National Telephone* in its decision in *Wright Electric*, we find that both of these cases are applicable here to the extent that they require a balancing of the respective interests.

Accordingly, we hold that in determining whether the Respondent's deposition questions were lawful, the appropriate analysis is the following three-part test. First, the questioning must be relevant. Second, if the questioning is relevant, it must not have an illegal objective. Third, if the questioning is relevant and does not have an illegal objective, the employer's interest in obtaining this information must outweigh the employees' confidentiality interests under Section 7 of the Act.

B. Application of the Standard

As noted above, the first two parts of this analysis consist of the same two questions asked by the judge, i.e., was the Respondent's questioning relevant, and if so, did the questioning have an illegal objective. Finding the questioning relevant and lacking an illegal objective, the judge answered both questions in the Respondent's favor. We find, however, that it is unnecessary to address these questions. Assuming arguendo that the questioning was relevant and lacked an illegal objective, we find that the questioning violates Section 8(a)(1) because, under the third part of the analysis, the employees' confidentiality interests under Section 7 of the Act outweigh the Respondent's need for this information.

It is well settled that Section 7 of the Act gives employees the right to keep confidential their union activities, including their attendance at union meetings. See, e.g., *National Telephone*, supra, 319 NLRB at 421. This right to confidentiality is a substantial one, because the willingness of employees to attend union meetings would be severely compromised if an employer could, with relative ease, obtain the identities of those employees.

Concededly, the employees' confidentiality interests may not be the same as they would be during an organizing campaign, as was the case in *National Telephone*.

Nevertheless, the confidentiality interests are still substantial here. Indeed, had the Respondent asked these questions in a forum outside of the deposition, the questioning would constitute a clear violation of Section 8(a)(1). E.g., *Resolute Realty Management*, 297 NLRB 679, 685 (1990). We thus find that the employees' confidentiality interests are indeed significant.[8]

Conversely, we do not believe that the Respondent has demonstrated that its need for this information justifies compromising its employees' Section 7 right to confidentiality. While we assume that the questioning was relevant, the relevance was only marginal.

The Respondent contends that the questioning was necessary to determine whether there were any witnesses that could support the Respondent's defense in the workers' compensation case, i.e., that Perez sustained her injuries while performing activities on behalf of the Union, or alternatively that she engaged in activities inconsistent with her alleged injuries at the union hall. The deposition questions, however, were not limited to a particular period in which Perez claimed to have been injured, and did not inquire as to whether any of the employees had witnessed Perez' activities at the union hall during the period in which she claimed to be injured. Instead, the Respondent merely asked Perez to provide the names of employees who have attended union meetings. Thus, while the questioning would definitely reveal the identity of employees who have engaged in activity protected by Section 7 of the Act, its scope was very broad, and would not necessarily lead to information that would be helpful for, or relevant to, the Respondent's workers' compensation defense.[9]

Accordingly, because the questioning was so broad in scope that it focused neither on the actual time period of Perez' injuries nor on the union meetings when Perez was present, the Respondent's need for the answers to *these* questions is outweighed by the employees' confidentiality interests under Section 7 of the Act. Finally, inasmuch as we have found that the Section 7 rights here outweigh the Respondent's discovery rights under California State law, we conclude that the discovery here is preempted under the Act.[10]

In sum, by asking Perez in the deposition to reveal the identities of other employees who attended union meetings, we find that the Respondent has violated Section 8(a)(1) of the Act as alleged.[11]

ORDER

The National Labor Relations Board orders that the Respondent, Guess?, Inc., Los Angeles, California, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Questioning employees about the identities of employees who attend union meetings.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed under Section 7 of the Act.

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

(a) Within 14 days after service by the Region, post at its facility in Los Angeles, California, copies of the notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 21, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respon-

[8] We disagree with the dissent's contention that the employees' confidentiality interests are somehow diminished by the fact that the questions were asked by the workers' compensation attorney. This assertion misses the point that employees are guaranteed a certain degree of assurance that their Sec. 7 activities will be kept confidential, if they so desire. Our colleague's assertion also fails to recognize the possibility that employees would choose to refrain from attending union meetings if they knew that their employer could obtain this information through the normal course of litigation.

[9] Our dissenting colleague does not find it significant that the Respondent's questions were not limited to the names of employees who witnessed Perez' activities during the period of her injury. According to the dissent, even if employees identified in the answers were not present at the union hall during the relevant period, these employees would lead to potential witnesses who observed Perez' activities at the union hall. We note, however, that the Respondent did not ask generally for the names of people at the union hall, the Respondent only asked for the names of its employees who were present. Thus, the Respondent's claim of great necessity for the identities of employees who were present at the union hall *at any time* is entitled to considerable skepticism in these circumstances because the Respondent made no attempt to obtain the identities of any nonemployee witnesses to Perez' activities at the union hall.

[10] Where the importance of the Sec. 7 rights that would be compromised by a discovery request outweighs the interests that would be served by the discovery request, the discovery is preempted by the Act. See *Wright Electric, Inc.*, 327 NLRB at 1195, citing *Bill Johnson's Restaurants*, 461 U.S. at 738 fn. 5.

[11] We also find no merit to the Respondent's contention that Perez waived any confidentiality rights that existed under Sec. 7 of the Act. In particular, we find insignificant the fact that Perez' attorney did not object to the questioning at issue. Perez' attorney was acting to protect Perez' interests in the workers' compensation case; he was not acting to protect the Sec. 7 confidentiality interests of the employees who attended the union meetings. Consequently, the failure by her attorney to raise an objection at the deposition does not raise an issue of waiver here.

[12] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

dent to insure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current and former employees employed by the Respondent at any time since August 20, 1998.

(b) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply with this Order.

CHAIRMAN BATTISTA, dissenting.

Contrary to my colleagues, I agree with the administrative law judge that the Respondent did not violate Section 8(a)(1) of the Act by asking employee Maria Perez, at a deposition in a workers' compensation case brought by Perez, for the names of employees who attended union meetings.

The facts are not in dispute. Employee Perez brought a workers' compensation case against the Respondent. She alleged that she sustained injuries while working for the Respondent, and was unable to work for a certain period. The Respondent's defense to Perez' claim included two matters. First, the Respondent claimed that Perez engaged in activities, at the union hall, which were inconsistent with her claimed injury. Second, the Respondent claimed that Perez did not sustain her injuries while at work, but rather sustained them while engaging in activities at the union hall.

In pursuing these defenses, the Respondent's insurance counsel asked Perez about her activities at the union hall. In addition, counsel asked for the names of other persons who may have worked with Perez at the union hall, and who may have therefore observed Perez at the union hall.

I find, contrary to my colleagues' contention, that the Respondent's questions did not violate Section 8(a)(1).

As an initial matter, I agree with the judge that relevance has been shown. The applicable statute, the California Civil Procedure Code, Section 2017, provides as follows:

> Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . ., if the matter either is itself admissible in evidence or appears reasonably calculated to lead to discovery of admissible evidence. Discovery may be obtained of the identity and locations of persons having knowledge of any discoverable matter. . . .

Further, California's Civil Procedure Code has been interpreted to mean that information sought for discovery should be regarded as relevant "if it might reasonably assist a party in evaluating the case, preparing for trial, or facilitating settlement thereof." *Gonzalez v. Superior Court*, 33 Cal. App. 4th 1539, 1546 (1995).

The Respondent's questioning easily satisfies this standard. Obviously, Perez' activities at the union hall were directly related to the Respondent's defense to the workers' compensation claim. Further, the names of other persons at the union hall would lead to potential witnesses who observed Perez' activities at the union hall. Clearly, this information is "reasonably calculated to lead to discovery of admissible evidence."

My colleagues assume that the questions at issue are relevant. However, they add that if the questions are relevant, they are only marginally relevant. They contend that the questions are too broad. I disagree. The California statute does not distinguish between degrees of relevance. To the contrary, California's discovery rules are to be applied liberally in favor of discovery.[1] What matters is whether the inquiry is "reasonably calculated to lead to discovery of admissible evidence." As shown, the information sought clearly meets this standard.[2]

Next, with respect to whether the Respondent's questions had an illegal objective under the Act, I agree with the judge that they did not. There is no evidence even remotely suggesting that the Respondent had any objective other than to prepare its defense in the workers' compensation case initiated by Perez.

Finally, I assume arguendo that, in a given case, a party's rights (under the State statute) can be outweighed by employee rights under Section 7 of the Act. In such a case, grave issues of preemption would arise. However, I need not reach these issues. For, on the facts of this case, the Respondent's rights to inquire were not outweighed by Section 7 rights. As noted above, the Respondent was seeking relevant information that was necessary to determine the validity of Perez' workers compensation claim. The information went to the heart of the Respondent's defense to the workers compensation claim. Accordingly, I find that the Respondent's need for this information was substantial.[3]

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[1] See *Stewart v. Colonial Western Agency, Inc.*, 87 Cal. App. 4th 1006, 1013 (2001).

[2] No party to the discovery proceeding objected to the questions.

[3] I disagree with my colleagues' contention that the Respondent did not limit the questions, i.e., did not confine them to employees who were present at the hall during the period of her injury. In response, I note that there were no objections raised along these lines. Further, to the extent that the questions related to periods when Perez was not

The employees' Section 7 interests were less substantial. In this regard, the instant case differs from *Wright Electric, Inc*., 327 NLRB 1194 (1999), enfd. 203 F.3d 1162 (8th Cir. 2002). That case involved an employer effort to discover authorization cards obtained in an organizational campaign. By contrast, the instant case does not involve authorization cards, nor does it involve an organizing campaign. Further, there is no record evidence of any hostility toward the Union on the part of the Respondent. In addition, the questioning was conducted by someone with little connection to the Respondent's operations, i.e., the attorney for the Respondent's workers' compensation insurance carrier. Finally, the questioning occurred away from the Respondent's facility, in the attorney's private office. The likelihood that an employee would feel intimidated by the prospect that his or her identity would be revealed in this manner is negligible at most. Consequently, in balancing the two competing interests, I find that the Respondent's need for this information outweighs any confidentiality interests that are at stake here.

The instant case is also distinguishable from *National Telephone Directory Corp*., 319 NLRB 420 (1995). That case involved the issue of whether the Board should quash a subpoena for authorization cards and the names of employees who signed them. The Board quashed the subpoena. The case did *not* involve the issue of whether the employer *violated the Act* by seeking the information, i.e., by making the subpoena request. By contrast, the instant case involves the issue of whether Respondent violated the Act by seeking the information. In my view, it is one thing for the Board to quash a subpoena, it is quite another thing for the Board to condemn as unlawful the seeking of the subpoena.

Finally, I note that the parties have a constitutional right to litigate civil claims. See *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983); *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). In my view, they have a similar right to defend against such claims. Engaging in discovery is a well-recognized part of that process. Thus, the Respondent's conduct herein had the aura of constitutional protection.

In sum, the Respondent's questioning was relevant to its defense in the workers' compensation case, it did not have an illegal objective under the Act, and the Respondent's need for this information outweighed the employees' confidentiality interest. Accordingly, I find that the Respondent did not violate Section 8(a)(1) by asking Perez for the names of the employees who attended meetings at the union hall.[4]

injured, they were, at most, irrelevant to that extent. But, as noted above, my colleagues do not challenge the relevance of the questions.

Nor was the Respondent's need for this information somehow diminished by the fact that the Respondent did not ask for the names of nonemployee witnesses to Perez' activities at the union hall. Perez testified that her activities at the union hall consisted merely of having meetings with her fellow employees. It is no surprise, therefore, that the followup question would ask for the names of her fellow employees rather than nonemployees. Thus, the Respondent's questions reasonably reflect the fact that Perez' fellow employees could likely provide the Respondent with relevant information. In view of Perez' specific reference to attending meetings with her coworkers at the union hall, it would not have been logical for the Respondent to followup with a question about the existence of any nonemployees who might have been in attendance.

APPENDIX

NOTICE TO EMPLOYEES
POSTED 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 Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist any union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT question our employees about the identities of employees who attend union meetings.

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

GUESS?, INC.

Jean C. Libby, Esq., for the General Counsel.
Lawrence A. Michaels and *Jenny Schneider, Esqs. (Mitchell Silberberg & Knupp LLP)*, for the Respondent.
Janet Herold, Esq. (Bahan & Herold), for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. MARCIONESE, Administrative Law Judge. The Charging Party, Union of Needletrades, Industrial & Textile Employees, AFL–CIO, filed the charge in this proceeding on January 15, 1999. The complaint issued on October 14, 1999. The complaint alleges that the Respondent, Guess?, Inc., violated Section 8(a)(1) of the Act on August 20, 1998, by interrogating an employee concerning the identities of other employ-

[4] In view of my finding that the questioning is not violative of Sec. 8(a)(1), I do not pass on the Respondent's waiver argument.

ees who had attended union meetings. The alleged interrogation occurred during a deposition of the employee conducted by an attorney who represented the Respondent in a workers' compensation case filed by the employee. The Respondent filed its answer to the complaint on October 21, 1999, denying the unfair labor practice allegation and raising a number of affirmative defenses.

On May 10, 2000, the General Counsel, the Respondent, and the Charging Party jointly filed a Motion to Submit Case on Stipulation together with a Stipulation of Facts. By Order dated May 11, 2000, I granted the motion, received the stipulation and postponed the hearing indefinitely. The parties filed briefs on June 1, 2000. The parties have stipulated that the stipulation of facts with attached exhibits constitutes the entire record in this case and that no oral testimony is necessary or desired by any party.

On June 1, 2000, the Charging Party filed with its brief a request that I take judicial notice of a judgment entered against the Respondent by the Court of Appeals for the Ninth Circuit on November 16, 1998. The Respondent filed an opposition to this request. The General Counsel has taken no position. The judgment, on its face, was entered pursuant to an agreement among the Respondent, the General Counsel, and the Charging Party which resolved several unfair labor practice charges the Charging Party had filed against the Respondent. The underlying settlement agreement, which is attached to the Respondent's opposition, contains a nonadmissions clause.

Rule 201 of the Federal Rules of Evidence requires that a judicially noticed fact must be one "not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." While the fact that the court of appeals entered such a judgment would seem to meet this test, it is apparent that the Charging Party is seeking judicial notice of much more than that fact. In its brief, the Charging Party relies upon this judgment as proof that the Respondent engaged in the alleged unfair labor practices which were the subject of the proceeding resolved by the parties through their agreement. This "history" of unlawful conduct is then relied upon to prove an unlawful motive behind the interrogation at issue in this case.

The Board has held in a number of cases that settlement agreements or formal settlement stipulations that contain a nonadmissions clause have no probative value in establishing that violations of the Act have occurred and may not be used to establish a party's proclivity to violate the Act. *Sheet Metal Workers Local 28 (Astoria Mechanical)*, 323 NLRB 204 (1997); *Tri-State Building Trades Council (Structures, Inc.)*, 257 NLRB 295, 297 (1981). Moreover, under Rule 408 of the Federal Rules of Evidence, the fact that a party settled a claim is not admissible to prove the validity of the claim. Thus, the entry of the consent judgment as part of a formal settlement agreement containing a nonadmissions clause is inadmissible to establish that the Respondent in fact committed the unfair labor practices alleged in the prior case.

Having considered the arguments made by the Charging Party and the Respondent, I conclude that the Ninth Circuit's judgment is of no probative value in this case and inadmissible as evidence of prior unlawful conduct. Accordingly, I shall deny the Charging Party's request to take judicial notice.

On the entire record, and after considering the arguments made by the parties in their briefs,[1] I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Delaware corporation, with its principal office and a facility in Los Angeles, California, designs, markets, and distributes wearing apparel. The Respondent annually derives gross revenues from its business operations in excess of $500,000 and sells and ships from its Los Angeles facility goods valued in excess of $50,000 directly to points outside the State of California. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The facts are undisputed. Employee Maria Perez filed a workers' compensation claim against the Respondent which was heard by the State of California Division of Workers' Compensation in a case entitled *Maria Perez v. Guess; Fireman's Fund Insurance*, Cases LBO 281491 and LBO 281492. Dennis J. Hershewe, Esq., of the law offices of Dennis J. Hershewe, represented the Respondent in that proceeding.[2] On August 20, 1998, Hershewe deposed Perez at his office in connection with her workers' compensation claim. The transcript of that deposition is attached to the parties' stipulation and part of the record. The parties have stipulated, for the purposes of this proceeding only, that Hershewe was acting as an agent of the Respondent within the meaning of Section 2(13) of the Act. Perez was represented at the deposition by her own attorney, John A. Mendoza, Esq.

In the course of the deposition, which lasted almost 2 hours, Hershewe asked Perez the following questions and received the following responses:

> Q. How many hours a week do you go to the union hall?
>
> A. Perhaps a couple of hours a week, perhaps.
>
> Q. And what do you do there?
>
> A. Just our co-workers having a meeting, its simply that.
>
> Q. Co-workers at Guess?
>
> A. Yes?
>
> Q. How many are there?
>
> A. I wouldn't be able to say.
>
> Q. 10? 20? 30? 40?
>
> A. Probably 20.
>
> Q. Who were some of them?
>
> A. There are several.

[1] In addition to the parties' brief, I received valuable assistance from legal intern Kristine Sova who conducted additional legal research into the novel issue raised by this case.

[2] Hershewe was actually the attorney for Fireman's Fund Insurance Company, the Respondent's workers' compensation insurance carrier.

Q. I know. Give me some names.
A. Freddy.
Q. Freddy who?
A. I don't know what his last name is.
Q. Anyone else?
A. Mario.
Q. Who else?
A. Guadalupe.
Q. Okay. Who else?
A. Rocio.
Q. Who else?
A. There are so many.
Q. I know. Okay. Keep going. You know who they are.
A. Yes, but—
Q. Just give me the names.
A. Araceli.
Q. How do you spell that?
A. A-r-a-c-e-l-i.
Q. Anybody else?
A. Amilcar.
Q. How do you spell that?
A. A-m-i-l-c-a-r.
Q. Anybody else?
A. There's many.

The parties have stipulated that this is the relevant questioning.[3] Perez' attorney did not object to any of these questions.

Attached to the stipulation and part of the record in this case is a "Declaration of Dennis Hershewe," made under penalty of perjury, which the parties have agreed shall be treated as if it were testimony given at a hearing before an administrative law judge. Hershewe states that, among the issues he identified in defending the Respondent against Perez' claim, were whether she engaged in fraud by fabricating or exaggerating her injuries and whether she worked for any other employer at the time of her injury who might be liable for her injury. In order to explore these issues during her deposition, Hershewe asked Perez questions related to her activities during the time she claimed to be injured, including questions about her activities during time she spent at the Union's offices. According to Hershewe, he asked these questions to learn if she might have sustained her injuries while performing activities on behalf of the Union and whether her activities at the Union's offices were inconsistent with her alleged injuries. Hershewe states that he also asked for the names of other employees of the Respondent who were with her at the Union's offices in order to identify potential witnesses who could be called upon to testify about Perez' activities and whether they were consistent with her alleged injuries. Such individuals were also potential witnesses to any statements Perez may have made that would be inconsistent with her alleged injuries or might reflect on her credibility. Hershewe states further that the questions at issue are typical of questions he routinely asks where a claimant's injuries are disputed and there is an issue that the claimant has fabricated or exaggerated his or her injuries. Because the parties have waived a hearing and the opportunity to cross-examine Hershewe, I must accept the statements made in his declaration as true for purposes of deciding the issues raised by the complaint.

The parties have stipulated that hearings were held on Perez' workers' compensation claims beginning on or around April 7, 1999, which resulted in two Orders dated October 12, 1999, from Workers' Compensation Administrative Law Judge Cynthia A. Quiel, finding that one claimed injury was not sustained in the course of her employment, but that an injury to her left shoulder was compensable. Judge Quiel denied the Respondent's request for a finding of fraud on both claims and deferred certain issues related to her disability.

Although the parties agree as to the facts, they are unable to agree on the issue. According to the General Counsel, the issue is whether the Respondent violated Section 8(a)(1) of the Act by interrogating Perez concerning the names of other employees who attended union meetings during a deposition in a State workers' compensation proceeding. The General Counsel argues that a violation occurred because the information requested was not relevant to the workers' compensation case. The General Counsel argues further that the questioning had an illegal objective because it sought information that the Board has historically treated as confidential in the absence of any overriding business purpose that would warrant disclosure.

The Charging Party joins in the General Counsel's argument but goes further. As previously noted, the Charging Party contends that the Respondent had an illegal motive in asking Perez for the identity of other employees who were with her at the union office because of its "history" of unlawful conduct, as reflected in the Consent Judgment of the court of appeals.

According to the Respondent, the issue is whether it is a per se violation of the Act for an employer to conduct discovery in a State court legal proceeding where such discovery has the effect of revealing the names of employees who engaged in protected concerted activity. The Respondent would answer that question in the negative. The Respondent argues that the Board has generally permitted discovery into protected concerted activities in State court proceedings with the exception of a request for union authorization cards. The Respondent does agree with the General Counsel that State court discovery can violate the Act when the information sought is both irrelevant and the discovery is conducted for an improper purpose. According to the Respondent, the questions asked of Perez here were relevant to the workers' compensation proceeding and were not asked for an illegal purpose. Finally, the Respondent argues that any challenge to the questions asked at the deposition should have been raised, at least initially, under the California Code of Civil Procedure rather than before the Board.

In *Westwood Health Care Center*,[4] the Board recently reaffirmed that the applicable test for determining whether an

[3] The stipulation reveals that the Charging Party also alleged in the original charge that Hershewe's questioning of Perez about her own union sympathies and activities and the union sympathies, activities, and other matters involving other employees violated Sec. 8(a)(1) of the Act. By letter dated October 1, 1999, the Board's Regional Director approved the withdrawal of this aspect of the charge, reserving only the allegation that Hershewe interrogated Perez regarding the identity of union supporters for litigation in this proceeding.

[4] 330 NLRB 935 (2000).

employer's questioning of an employee constitutes an unlawful interrogation is the totality-of-the-circumstances test adopted by the Board in *Rossmore House*.[5] In analyzing alleged interrogations under this test, the Board has found it appropriate to consider the *Bourne* factors first set out in *Bourne v. NLRB*, 332 F. 2d 47, 48 (2d Cir. 1964). Those factors are:

> (1) The background, i.e. is there a history of employer hostility and discrimination?
>
> (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?
>
> (3) The identity of the questioner, i.e. how high was he in the company hierarchy?
>
> (4) Place and method of interrogation, e.g., was employee called from work to the boss's office? Was there an atmosphere of formality?
>
> (5) Truthfulness of the reply.

In *Westwood*, supra, the Board cautioned that these factors are not to be mechanically applied, but are to be used as a guideline for evaluating the circumstances in which the questioning takes place. 330 NLRB at 939. The alleged interrogation here is unusual because it occurred in the context of discovery in a non-Board legal proceeding. Nevertheless, the *Bourne* factors and the totality of circumstances test provide some guidance in evaluating the questioning here.

While the Board has frequently found that an employer's interrogation of an employee regarding his or his coworker's union support and/or activity violates Section 8(a)(1) of the Act,[6] such questioning is not per se unlawful. The Board has long recognized, for example, that an employer may have "legitimate cause" to interrogate employees on matters involving Section 7 rights where the questioning is directed toward the "investigation of facts concerning issues raised in a complaint" and "is necessary in preparing the employer's defense for trial of the case." *Johnnie's Poultry Co.*, 146 NLRB 770, 775 (1964). In those circumstances, the employer will not run afoul of the Act as long as he provides the employee with the requisite safeguards and assurances against reprisal. In two cases more directly on point, the Board has recognized the right of an employer to engage in discovery in civil proceedings even where the discovery might encroach upon an employee's protected activity. *Maritz Communications Co.*, 274 NLRB 200 (1985); *Wright Electric, Inc.*, 327 NLRB 1194 (1999), enfd. 200 F.3d 1162 (8th Cir. 2000). The parties are in agreement that these last two cases are the governing authority here. They differ, obviously, in how they would apply the law as set forth in those cases to the stipulated facts.

In *Maritz Communications*, supra, an employee filed an age discrimination suit in Federal court against his employer as well as a charge with the Board claiming that he was discharged for union activity. The employer deposed the employee in connection with his civil lawsuit. At the deposition, the employer's attorney questioned the employee on a wide range of subjects, including his relationship with the Union and the charge he filed with the Board. The administrative law judge found that this questioning violated Section 8(a)(1) of the Act because it was coercive and concerned issues irrelevant to the civil suit. The judge also found the interrogation unlawful because the employer's attorney did not comply with the safeguards established in *Johnnie's Poultry*, supra. The Board reversed the judge and dismissed this allegation of the complaint. The Board found that the deposition questions were "within the scope of arguably relevant questioning permitted by the Federal Rules of Civil Procedure." 274 NLRB supra at 201. The Board noted that, since the issues in the civil suit and the Board proceeding arose from the same or similar operative facts, the employer's inquiry into the employee's work history and termination were "likely to touch on a number of areas also related to the unfair labor practice proceeding." Id. The Board found that the employer's questions were also relevant because the employee's claim in the Board charge that he was unlawfully discharged for union activities might have been inconsistent with his civil lawsuit claim that he was terminated because of his age. In dismissing the complaint, the Board also rejected the argument that the interrogation violated the Act because the attorney did not comply with *Johnnie's Poultry*, supra. The Board held that the employer was not required to give such assurances because the employee initiated the lawsuit in which he was deposed and "must have or should have been aware that the [employer] could examine him concerning any matter relevant to the preparation of a defense to the civil suit." Id. at 201–202.

In *Wright Electric*, supra, the employer had discharged an employee for allegedly concealing his prior union involvement and omitting any mention of it on his application. The Union filed an unfair labor practice charge alleging that the employee's discharge violated Section 8(a)(1) and (3) of the Act, and the employee filed a state claim for unemployment benefits. The unfair labor practice charge was dismissed and the unemployment claim was denied. The employer then initiated a lawsuit in state court against the employee and the Union alleging malicious prosecution, breach of contract and fiduciary duty of honesty and loyalty, unjust enrichment, fraudulent misrepresentation, concealment, and wrongful use of property. In connection with that lawsuit, the employer made discovery requests for documents concerning the Union's efforts to organize or "salt" the employer or other nonunion employees; any communications by the Union with the employer's employees; any authorization cards received from the employer's employees; any charges or complaints filed or lodged against the employer by the Union; information relating to alleged "salts" and newsletters or informational bulletins given to members. The General Counsel issued a complaint alleging that the employer violated Section 8(a)(1) and (4) of the Act by filing the malicious prosecution claims in its lawsuit and that the discovery requests violated Section 8(a)(1) of the Act. The administrative law judge dismissed both allegations, applying the Supreme Court's decision in *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983), to find that the Respondent's lawsuit did not lack a reasonable basis in fact and law. The judge found further that the discovery requests were relevant to the State court litigation. He

[5] 269 NLRB 1176 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985).

[6] See *Sundance Construction Management*, 325 NLRB 1013 (1998); *T & J Trucking Co.*, 316 NLRB 771, 778–779 (1995).

concluded that it was unlikely that the Supreme Court in *Bill Johnson's* would direct the Board to allow a State court lawsuit to proceed while permitting the Board to enjoin discovery of items sought during the State court proceeding. 327 NLRB at 1205. The Board reversed the judge's dismissal of the allegation regarding the filing of the lawsuit, holding instead that the Board should defer decision on this issue until final resolution of the State court proceeding. As to the discovery requests, the Board affirmed the judge's dismissal of this allegation with one exception. The Board held that the Respondent's requests for union authorization cards signed by employees was unlawful, even if the cards were arguably relevant to the State court proceeding. Id. at 1195.

In reaching its conclusion in *Wright Electric*, supra, that the employer's discovery request was unlawful, the Board initially noted the importance it has historically attached to protecting the confidentiality of the identity of employees who sign union authorization cards. The Board, relying upon Board and court precedent, reasoned that employees would be chilled when asked to sign union authorization cards if they knew that their employer could see who signed them. Because of the tendency of such a discovery request to deter employees in the exercise of protected activity, the Board held that an employer must demonstrate an overriding business justification to obtain signed union authorization cards through discovery in a civil proceeding. Id. The Board found that the employer's justification, i.e., that the presence or absence of union cards signed by its employees would tend to prove or disprove whether the union had a lawful objective in "salting" it, was not sufficient to outweigh the considerable confidentiality interests of the employees who signed cards. The Board also noted that the employer itself had suggested that there were less intrusive means of obtaining the same information. The Board then addressed the judge's concern that the Board did not have authority, under *Bill Johnson's Restaurant's*, supra, to enjoin discovery in a civil lawsuit. According to the Board, the Supreme Court's decision in that case authorized the Board to enjoin civil proceedings that have an illegal objective under Federal law. Because the Board found that the employer had an illegal objective in requesting the names of employees who signed union authorization cards, it held that the request was unlawful under Section 8(a)(1) of the Act and could be enjoined. Id.

The Board in *Wright Electric*, supra, relied upon its earlier decision in *National Telephone Directory Corp.*, 319 NLRB 420 (1995). In that case, the Board was faced with an interlocutory appeal from an administrative law judge's ruling that permitted an employer, in an unfair labor practice proceeding, to subpoena union authorization cards and the names of employees who attended union meetings at which the cards were signed. The employer sought this information for use in cross-examination and to impeach the credibility of one of the General Counsel's key witnesses. The Board, in reversing the judge, first noted that the Act normally prohibits an employer from obtaining such information through interrogation or surveillance of protected activity. While recognizing that the employer had an important interest in cross-examining and impeaching the credibility of witnesses against it, the Board held that this interest did not outweigh the employees' interest in keeping their union activity hidden from their employer. The Board reasoned that the fact that the employer sought this information during litigation, rather than through interrogation and surveillance, did not reduce the potential chilling effect on union activity that could result from employer knowledge of this information. The court of appeals which enforced the Board's decision in *Wright Electric* cited *National Telephone Directory* with approval. *Wright Electric, Inc. v. NLRB*, 200 F.3d at 1167.

The above precedent demonstrates that the Board does not apply a per se rule prohibiting any discovery in a civil proceeding that might invade employees' protected concerted activities. On the contrary, in *Maritz Communications*, supra, and *Wright Electric*, supra, the Board permitted a wide range of discovery into matters that are protected under the Act. The test appears to be a two-part test. First, it must be determined whether the information sought through discovery is relevant to the civil suit. The Board, in *Maritz*, supra, held that relevance is to be determined under the law of the forum in which the civil suit is pending. The second part of the test, assuming relevance is found, is whether the employer had an illegal objective under the Act. This is what gives the Board the authority, under *Bill Johnson's Restaurant*, supra, to enjoin the discovery request.

As to the first test, I find that the questions that Hershewe asked Perez during her deposition were relevant to her workers' compensation claim. The California Code of Civil Procedure, applicable to Perez' workers' compensation claim, defines relevance for discovery purposes broadly:

> Unless otherwise limited by order of the court in accordance with this article, any party may obtain discovery regarding any matter, not privileged, that is relevant to the subject matter involved in the pending action . . ., if the matter either is itself admissible in evidence or appears reasonably calculated to lead to discovery of admissible evidence. Discovery may relate to the claim or defense of the party seeking discovery or of any other party to the action. Discovery may be obtained of the identity and locations of persons having knowledge of any discoverable matter.

California Civil Procedure Code Section 2017(a).

There is no dispute that Hershewe's questioning of Perez regarding her own activities while at the Union's office during the time she was claiming a work-related injury was lawful. Such questions directly relate to the defenses raised by the Respondent that Perez' injuries were either fabricated or exaggerated. They also relate to the issue whether her injuries were sustained in the course of her employment or some other activity outside work. If the inquiry regarding what she did at the Union's office is relevant, then the identity of persons who may have witnessed her activities there is relevant. The California Code specifically permits discovery of the identity of such witnesses. I also note that it is common when questioning a witness, whether at a deposition or in a Board hearing, for the attorney to ask who else was present during a meeting or other event. The General Counsel argues that Hershewe's questions here were not relevant because he asked Perez only a few limited questions regarding her own activities. I disagree. Having asked her about her activities, even if in a limited fashion, he was permitted under the

California Code to seek discovery of witnesses to that activity. Moreover, I note that Perez offered only limited responses, volunteering very little about her activities at the Union's office. Under these circumstances, the identity of witnesses who could provide more information was particularly relevant.

Having found that the questioning was relevant, I must determine if it was nevertheless unlawful under the Act because it had an "illegal objective." In *Wright Electric*, the Board found that a request for union authorization cards had an illegal objective, relying upon the special protection afforded such cards under the Act. The General Counsel and the Charging Party argue that the Board's reliance on *National Telephone Directory*, supra, which dealt with a request for union authorization cards and the identity of employees who attended union meetings, suggest that Hershewe's questioning here was likewise illegal. However, in *Wright Electric*, the Board omitted any reference to the language in *National Telephone Directory* regarding the employer's request for the identity of employees who attended union meetings. As pointed out by the Respondent here, the meetings at issue in *National Telephone Directory* were the same meetings at which the union authorization cards were signed. Under these circumstances, the disclosure of the names of employees who were at the meetings would provide the employer with the information that the Board was seeking to protect from disclosure. Moreover, the issue in *National Telephone Directory* arose in the context of a Board unfair labor practice proceeding. Because the Board has control over its own proceedings, it has greater authority to limit the rights of parties appearing before it.

The narrow holding in *Wright Electric*, supra, and the expansive holding in *Maritz Communications*, supra, suggest that the Board is reluctant to limit the right of a party to engage in legitimate discovery in connection with a civil proceeding in another forum. In fact, the only discovery that the Board has found unlawful to date is the request for union authorization cards. There is good reason for proceeding with caution in this area. The Respondent did not initiate the litigation involving Perez. The Respondent had a right to engage in discovery to defend itself against her claim for workers' compensation benefits. The Board should not exercise its authority to limit the rights of parties in non-Board proceedings unless there is a clear danger that employees' Section 7 rights will be violated. I find that there is no such danger here.

There can be no question that, had a supervisor or manager of the Respondent asked Perez these questions at the Respondent's facility, a violation of the Act would be found. The totality of circumstances here negates the coercive tendencies of such questioning. Hershewe, the questioner, was not directly employed by the Respondent. He was an attorney retained by the Respondent's insurance carrier to defend it against a claim Perez had initiated. There is no evidence that he had any involvement in the Respondent's labor relations practices. The questioning did not take place in a supervisor or manager's office. It occurred at a lawyer's office away from the plant. In addition, Perez was represented by her own attorney who had the right to object if he believed the questions were irrelevant or sought privileged information. The nature of the questioning related to the claim Perez had filed. As the Board noted in *Maritz Communications*, Perez having filed her claim, she should have known that she would be questioned about matters related to that claim, including the identity of witnesses who could corroborate her claims. See 274 NLRB at 201–202. Moreover, the stipulated record here does not disclose a history of employer hostility toward employees' exercise of Section 7 rights. The Charging Party's argument to the contrary is based upon a settlement agreement containing a non-admissions clause which, as noted above, does not establish that violations of the Act have occurred. Finally, the fact that Perez, with the assistance of her own attorney, answered these questions truthfully tends to show that she was not coerced under the circumstances here.

Having considered the stipulated evidence in the record, the applicable legal precedent and the parties' arguments, I conclude that the Respondent did not violate the Act when the attorney defending it in Perez' workers' compensation case asked her, during a deposition, for the identity of other employees who were present with her at the Union's office during the period she claimed to be suffering from a work-related injury. As noted above, I have found that the questions asked were relevant to the issues raised in the workers' compensation proceeding under the law of the forum. I have found further that the Respondent did not have an illegal objective in asking Perez these questions. Under all the circumstances, the questioning was not coercive. Accordingly, I shall recommend that the complaint be dismissed.

CONCLUSION OF LAW

The Respondent did not violate Section 8(a)(1) of the Act when, during a deposition in a workers' compensation case, its attorney asked the employee who filed the workers' compensation claim for the names of employees who were with her at the Union's office during the time she claimed to be injured.

[Recommended Order for dismissal omitted from publication.]