

OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 20-14

September 18, 2020

TO: All Regional Directors, Officers-in-Charge,
and Resident Officers

FROM: Peter B. Robb, General Counsel

SUBJECT: Summaries of Advice Merit Determinations Related to Coronavirus
Disease 2019 Issues

As the Coronavirus Disease 2019 (“COVID-19”) pandemic was unfolding, on March 27, 2020, I issued Memorandum GC-20-04 to make the public aware of several cases in which the Board considered the duty to bargain during emergency situations. That memo was issued in response to the many questions parties and practitioners were raising in the relatively early stages of the COVID-19 pandemic.

During the last six months, a variety of issues related to the virus have arisen in unfair labor practice charges filed across the country. Some cases, where the Division of Advice determined that there was no merit to the allegations, were dismissed or withdrawn and, pursuant to Agency guidelines, these Advice determinations became available on the Agency’s website. A list of those cases is attached. However, during that same period, Advice determined to issue complaint in other cases and, pursuant to Agency guidelines, any “go” determination memorandum will not be released publicly until the case is closed. Given the inability to release these memoranda, in order to convey a better understanding of my office’s approach to these issues, I am providing a summary of some of the cases related to COVID-19, where I have either found merit or otherwise explained critical positions I have directed Regional offices to take. Because these cases are in active litigation, no additional information will be provided, except through the litigation process, until the case is closed.

Protected Concerted Activity – This case involves the actions of an employee who worked at a health care provider, where she and several co-workers drafted a letter to the Employer requesting that they have more input on how to provide services to clients after the Employer announced that some in-person therapy services would continue during the pandemic. After receiving the letter, the Employer coercively questioned the employee about how she became involved with the letter and what she had contributed to it. The Employer also repeatedly admonished the employee not to discuss her management interactions with co-workers, to contact only supervisors and managers about work problems, that only management could effect change, and that taking problems to her co-workers makes matters worse. The Employer conveyed to her that

her failure to follow those directives would indicate she did not want to continue working for the Employer. I directed the Region to issue complaint absent settlement alleging Section 8(a)(1) interrogation, threats to discharge, impression of surveillance and the constructive discharge of the employee, who was given the “Hobson’s Choice” of either keeping her job and agreeing not to engage in protected concerted activity or resigning. Upon submission from the Regional office, Advice’s Injunction Litigation Branch will consider whether to recommend seeking Board authorization to pursue Section 10(j) relief.

Protected Concerted Activity – Here, after a group of employees protested a food delivery establishment’s alleged failure to provide personal protective equipment (PPE), such as gloves, masks and hand sanitizer, and to enforce social distancing guidelines, they exercised the option to take leave without pay. When they asked several days later if they remained employed, all were permitted to resume working except for two employees, including the leader of the protest. The Region has been directed to issue complaint absent settlement alleging that the Employer violated Section 8(a)(1) of the Act by unlawfully discharging the employee who led protected concerted efforts to secure PPE and to enforce social distancing. The Injunction Litigation Branch will consider recommending Section 10(j) relief upon submission from the Region.

Weingarten – In another case, which arose early in the pandemic and involved an Employer in the casino industry, I determined that a bargaining unit employee seen wearing a face mask in guest areas was unlawfully questioned about whether he would agree to only wear the mask when required by work duties, after he had asserted *Weingarten* rights. He was suspended for the remainder of the day and issued discipline for, in effect, what the Employer claims was his uncooperativeness during the investigative interview. The Region was directed to seek a make whole remedy in view of the nexus between the *Weingarten* violation and the resulting discipline.

Discriminatory Layoff – In another case, I directed the Region to issue complaint against an Employer for an alleged discriminatory layoff in violation of Section 8(a)(3) of the Act. When the pandemic forced the facility’s closure, the Employer selected two employees in a recently-certified two-person unit for layoff, while retaining a number of employees subordinate to the two and who did not possess the same skills and expertise. The selection of the only two employees in the certified unit for layoff manifested an effort to erode their bargaining unit, an intention the Employer made clear at the bargaining table.

Discriminatory Recall – In this case, the Region has been directed to issue a complaint alleging, *inter alia*, that the Employer, which operates a hotel, violated Section 8(a)(3) of the Act when it discriminatorily withheld recall rights from 20 unit employees it permanently laid off in mid-March, the large majority of whom are known Union supporters, while offering recall rights to 12 other employees who were merely temporarily laid off, the large majority of whom do not support the Union. The Employer had expressed anti-union animus during a recent union campaign. The Injunction

Litigation Branch will consider recommending Section 10(j) relief upon submission from the Region.

Bargaining – One bargaining case arose in the context of a Governor’s order that certain schools be closed, prompting the Employer, which operates schools covered by the order, to move to a remote learning environment. Generally, an employer is permitted to, at least initially, act unilaterally during emergencies such as COVID-19 so long as its actions are reasonably related to the emergency situation. However, the employer must negotiate over the decision (to the extent there is a decisional bargaining obligation) and its effects within a reasonable time thereafter. Here, I determined the Employer had no obligation to bargain over the decision to transition to remote learning since it was mandated by the state. However, the Region was directed to, *inter alia*, investigate (1) whether the changes related to that decision were reasonably related to the COVID-19 emergency and (2) whether those changes were material, substantial, and significant adjustments to employees’ preexisting terms.

Bargaining – In another bargaining case, the Region was given authorization to pursue an allegation that a nursing home operator unlawfully failed to bargain for an extended period of time for a successor collective bargaining agreement. I found that the pandemic did not privilege the Employer to refuse to hold bargaining sessions (including by teleconference) from mid-March to mid-May, nor to fail to respond to Union proposals over email for over two months. In addition, I found the Employer unlawfully refused to consider or discuss a proposal for a memorandum of understanding (MOU) over hazard pay for employees working during the pandemic, where, as here, there was no contract in effect.

Bargaining – Another bargaining case involved the unilateral elimination of furloughed employees’ health insurance and vacation leave balances in the midst of uncertainty caused by the pandemic and related government restrictions on reopening. Although the pandemic and related government orders may have created significant financial pressure for this Employer, which operates a cultural institution, those conditions did not preclude it from engaging in pre-implementation bargaining, nor did the economic concerns rise to the level of an exigency that would excuse it from bargaining. Although the Employer was operating at a loss on a monthly basis, with revenues down by about 60 percent, it continued to shoulder health insurance costs for more than three weeks after it implemented the decision. Under the circumstances of this case, there was ample time to bargain over the discrete changes at issue, and the Employer’s need was not so pressing as to excuse any pre-implementation bargaining.

Refusal to Provide Information – This case concerned a COVID-19-related layoff. Here, I directed the Region to issue complaint against the Employer for failing to furnish a seniority list of affected employees, paid time off accruals for affected employees, communications to bargaining unit members about the decision, information about the expected return date, information relied upon in making the layoff decision, and

communications with clients that supported the need for layoffs. The Employer did not object to providing any of the information on relevancy grounds.

COVID-19 has resulted in unprecedented challenges for employees, their employers and unions. It is my hope that these summaries will offer readers an understanding of the contours of doctrinal law and its application to this unique situation.

/s/
P.B.R.

Attachment

Attachment A to Memorandum GC 20-14

List of Cases, as Referenced in Memorandum GC 20-14:

1. Children School Services, 05-CA-258669
2. Mercy Health General Campus, 07-CA-258425
3. United States Postal Service, 14-CA-258516
4. RS Electric Corp., 14-CA-260142
5. Larry Peel Co., 16-CA-259403
6. Hornell Gardens, 03-CA-258740
7. ABM Business, 13-CA-259139
8. Crown Plaza O'Hare, 13-CA-259749
9. Memphis Ready Mix, 15-CA-259749
10. Marek Brothers Drywall, 16-CA-258507
11. Comcast Cable, 22-CA-259093
12. Mercy Health Partners, 07-CA-258220

