Supreme Court Rules that Reasonably Based, Unsuccessful Suit Brought for Retaliatory Purpose is not an Unfair Labor Practice
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On June 24, 2002, the U.S. Supreme Court ruled that the National Labor Relations Board (the "NLRB") applied an invalid standard in finding that an employer committed an unfair labor practice by bringing an unsuccessful lawsuit against a group of unions. *BE&K Constr. Co. v. NLRB*, No. 01-518 (June 24, 2002). The employer, BE&K Construction Company, brought suit against the unions in federal court, alleging anti-trust and secondary boycott violations. After the suit was dismissed, the unions filed unfair labor practice charges with the NLRB, which found that the lawsuit had been filed for a retaliatory purpose, and that the filing of the suit therefore violated section 8(a)(1) of the National Labor Relations Act (the "NLRA"), which prohibits employers from restraining, coercing, or restraining employees in the exercise of union activity. The Supreme Court ruled that the bringing of an unsuccessful lawsuit, even for a retaliatory purpose, cannot constitute an unfair labor practice, absent a finding that the suit was not merely unsuccessful but was "objectively baseless."

Factual Background

BE&K is an industrial general contractor that received a contract to modernize a California steel mill. Several unions attempted to delay the project because BE&K's employees were not unionized. BE&K filed a suit against those unions in federal court. In its original and amended complaints, BE&K asserted a litany of claims under the Sherman Anti-Trust Act and federal labor law, based on allegations that: (1) the unions lobbied for enforcement of an emissions standard without any legitimate concern, (2) the unions handbilled and picketed at BE&K's site without revealing reasons for disagreement, (3) the unions had filed an action in state court in order to delay the project and increase costs, and (4) the unions had launched grievance proceedings against BE&K's partner based on inapplicable collective bargaining agreements. Ultimately, all of BE&K's claims were either withdrawn or dismissed by the district court. The court also imposed sanctions on BE&K under Rule 11 of the Federal Rules of Civil Procedure (which prohibits the filing or pursuit of frivolous litigation).

BE&K appealed. The U.S. Court of Appeals for the Ninth Circuit reversed the Rule 11 sanctions, but upheld the dismissal of all of BE&K's claims. In the meantime, two of the unions targeted in BE&K's lawsuit filed charges against BE&K with the NLRB. The NLRB found that by filing and maintaining the federal lawsuit BE&K had violated section 8(a)(1) of the NLRA, which prohibits employers from restraining, coercing or interfering with employees' exercise of rights related to self-organization, collective bargaining, and other concerted activities. The NLRB reasoned that since all BE&K's claims were dismissed or voluntarily withdrawn, those claims must have been
without merit. The NLRB found, moreover, that the lawsuit had been filed to retaliate against the unions for engaging in activities protected under the NLRA. Based on its finding that BE&K committed an unfair labor practice by bringing a suit which was unsuccessful and retaliatory, the NLRB ordered BE&K to pay the legal fees and expenses incurred by the unions in defending the federal suit.

An appeal to the U.S. Court of Appeals for the Sixth Circuit ensued. The Court of Appeals enforced the NLRB's order, relying on the Supreme Court's 1983 decision in *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983). That case involved an attempt by the NLRB to enjoin an employer's prosecution of a lawsuit in state court where the NLRB found that the filing of the lawsuit was an unfair labor practice. The Supreme Court ruled that the NLRB could enjoin such a suit only if the suit both lacked a reasonable basis in fact or law and was brought for a retaliatory motive. Applying *Bill Johnson's Restaurants*, the Sixth Circuit found that since BE&K's claims against the unions had already been found to be unmeritorious, evidence of a retaliatory motive on the part of BE&K in bringing the suit was all that was necessary to prove the commission of an unfair labor practice. The court therefore upheld the NLRB's decision, including its award of attorney's fees against BE&K.

The Supreme Court's Decision

The key issue before the Supreme Court was whether the fact that BE&K's retaliatory suit was dismissed as without merit by the federal court merit provided a sufficient basis upon which the NLRB could impose liability, or whether the filing of the suit could constitute an unfair labor practice only if the suit was not merely unsuccessful but "objectively baseless." The Court ruled that the NLRB's standard for imposing liability was invalid, and it therefore reversed the NLRB's decision finding BE&K guilty of an unfair labor practice.

The Supreme Court based its decision on an earlier case arising in the anti-trust context, *Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49 (2002). In that case, the Court ruled that the bringing of sham anti-trust litigation could itself constitute an anti-trust violation only where a two-part test is met: (1) the litigation was objectively baseless such that no reasonable litigant could realistically expect success on the merits; and (2) the litigant's subjective motivation was to interfere directly with a competitor's business relationship through the use of the judicial process as an anti-competitive weapon. In the Court's view, the same standard should apply to allegedly sham litigation claimed to violate the NLRA. That is, a lawsuit brought for retaliatory purposes can constitute an unfair labor practice only if it not only lacks merit but is "objectively baseless."
This decision is significant because it gives employers greater "breathing room" to assert legal challenges against union practices that the employer reasonably believes are unlawful or otherwise not protected. The Supreme Court recognized that there may be a narrow category of reasonably based lawsuits that can constitute an unfair labor practice, if the suit "would not have been filed but for a motive to impose the costs of the litigation process, regardless of the outcome, in retaliation for NLRA protected activity." However, in most cases, provided that the employer's claims are not "objectively baseless," the employer may assert them -- even if ultimately unsuccessful -- without a fear that by doing so it will be guilty of an unfair labor practice.