

Federal Labor Laws

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Revised, July 2011

XIV. Retaliation for Participating in Board Proceedings

A. General Considerations

1. Section 8(a)(4)¹ of the NLRA makes it an unfair labor practice for an employer to discharge or otherwise discriminate against an employee for filing charges or giving testimony under the Act. Section 8(b)(1)(A) has been interpreted to prevent union retaliation for the same reasons.
2. The essential elements of a violation of Section 8(a)(4) are discriminatory treatment and motive. Proof of motive is necessary for a showing of an unfair labor practice under Section 8(a)(4). The discriminatory action against an employee must be in retaliation for exercising rights under the statute.

B. Examples of Potential § 8(a)(4) Cases

1. While Section 8(a)(4) specifically mentions filing charges or giving testimony, the protection extends to other forms of participation in the Board proceedings as well. Giving a statement to a Board agent is protected even if no charge is filed or testimony given.² Appearing at a hearing in response to a subpoena is protected, even if the worker is not called to testify.³
2. Making the employees' continued employment or reinstatement dependent on their withdrawal of a ULP charge is a violation.⁴ Including provisions in a severance agreement that would preclude a terminated worker from pursuing a claim with the Board would also constitute a violation.⁵

¹ 29 U.S.C. § 158(a)(4).

² *NLRB v. Scrivener*, 405 U.S. 117 (1972).

³ *Williamhouse of California*, 317 NLRB 699 (1995).

⁴ *Robin Transportation, Ltd.*, 310 NLRB 411 (1993); *Maspeth Trucking Service, Inc.*, 240 NLRB 1225 (1979).

⁵ *Metro Networks, Inc.*, 336 NLRB 63 (2001).

3. Refusing to assist the employer in its preparation of a defense to NLRB charges is also protected.⁶ Similarly, firing an employee who refuses to give false testimony to the Board is a violation.⁷
4. An employer that files a baseless lawsuit against a worker or union in retaliation for filing charges or otherwise exercising rights under the NLRA may be in violation of § 8(a)(4). Evaluation of such lawsuits presents unusual remedial problems.⁸
 - a. If the lawsuit is clearly baseless and filed for retaliatory purposes, the Board can enjoin the employer from maintaining the suit. This is an extreme remedy and can be justified only if the Board does a thorough assessment of the merits of the case. If there are material issues in dispute, the lawsuit should be allowed to proceed, and the unfair labor practice charge considered only after the suit has been resolved.
 - b. If the lawsuit is pursued and the employer loses, the Board can then hear and decide the unfair labor practice issue. If it is determined that the suit was clearly baseless and retaliatory, the Board can order the employer to reimburse the charging party's legal fees and expenses in addition to other remedies.
5. The protection of the right to give testimony includes protection of testimony that is false, unless that testimony is willingly and knowingly false and given with the intent to deceive.⁹
6. Deliberately filing false charges with the NLRB is unprotected activity,¹⁰ and there is no right to time off the job to attend a Board hearing as a spectator.¹¹

C. Enforcement and Remedies

1. As with other "mixed motive" cases under § 8(a)(3), the *Wright Line*¹² analysis applies to the proof of a § 8(a)(4) violation. The General Counsel has the initial burden of establishing a prima facie

⁶ *NLRB v. Retail Clerks Local 876 (Pennacchini)*, 570 F.2d 586 (6th Cir. 1978).

⁷ *J.C. Penney Co.*, 237 NLRB 643 (1978).

⁸ *BE & K Construction Co.*, 351 NLRB No. 29 (2007), on remand from *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002); *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983).

⁹ *Superior Protection, Inc.*, 339 NLRB 954 (2003); *Glover Bottled Gas Co.*, 275 NLRB 658 (1985).

¹⁰ *NLRB v. Brake Parts Co.*, 447 F.2d 503 (7th Cir. 1971).

¹¹ *Ohmite Mfg. Co.*, 290 NLRB 1036 (1988).

¹² 251 NLRB 1083 (1980).

case of unlawful discrimination. If that burden is met, the employer has the opportunity to establish that it had a legitimate justification for taking disciplinary action against the worker involved. The ultimate burden then shifts back to the General Counsel to prove that the stated reason for disciplinary action is in fact a pretext for unlawful discrimination under § 8(a)(4).

2. The basic remedy for violation of § 8(a)(4) is to make the victim whole through a cease and desist order, reinstatement and back pay and benefits. The same remedial problems that may arise under § 8(a)(1) and § 8(a)(3) may arise in § 8(a)(4) cases. For example, termination of undocumented workers in retaliation for voting in a Board election may violate § 8(a)(1), but such workers may not be eligible for back pay.¹³
3. The deferral doctrine does not apply to alleged violations of Section 8(a)(4).

¹³ *Concrete Form Walls, Inc.*, 346 NLRB 831 (2006).