

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: April 23, 2018

TO: John J. Walsh, Jr., Regional Director
Region 2

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Libra Services, Inc.
Case 02-CA-204176

5012-5072-0100
5012-5072-8600

This case was submitted for advice as to whether the Employer violated Section 8(a)(1) by discharging the Charging Party because (b) (6), (b) (7)(C) questioned (b) (6), (b) (7)(C) asserted status as an independent contractor. We conclude that the Employer's discharge of the Charging Party did not violate Section 8(a)(1) because the Charging Party was not engaged in protected concerted activity when (b) (6), (b) (7)(C) questioned the Employer about (b) (6), (b) (7)(C) independent contractor classification, nor is there evidence that the Charging Party intended to engage in such activity in the future. The Region should therefore dismiss the charge, absent withdrawal.¹

FACTS

Libra Services (Employer) is a small technology software company that employs 10 individuals, including the Charging Party who worked as a software developer. The Employer's offer letter dated April 7, 2017² stated the Charging Party would be an independent contractor for approximately 90 days, after which "(b) (6), (b) (7)(C) contractor position may convert to a full time position" if warranted by (b) (6), (b) (7)(C) performance. The offer letter also set forth the Charging Party's salary, location, and start date of April 17. The Charging Party was required to sign a "consulting agreement" that described (b) (6), (b) (7)(C) as an independent contractor and allowed (b) (6), (b) (7)(C) to employ "assistants" but prohibited (b) (6), (b) (7)(C) from working for the Employer's competitors without prior approval from the Employer. The Charging Party was the only designated independent contractor working in the Employer's New York office; although there is one other

¹ Because we conclude that the Region should dismiss the charge, absent withdrawal, it is not necessary to decide the issue of whether the Employer is engaged in interstate commerce and thus subject to the Board's jurisdiction.

² All dates are in 2017.

individual designated by the Employer as an independent contractor working in its Boston office, there is no evidence that the Charging Party talked with or knew of [REDACTED].

On May 22, about a month after starting work, the Charging Party emailed the Employer's acting CFO challenging the Employer's classification of the Charging Party as an independent contractor. The Charging Party specified that [REDACTED] was "[n]ot trying to 'rock the boat' or anything, but I am trying to look out for myself, and get myself proper health, dental, and vision insurance." Two days later, the Charging Party emailed the Employer's CEO [REDACTED] concern about [REDACTED] independent contractor classification, noting that the Employer could be exposed to liability if it was ever audited by the IRS, and again noting that health insurance was a priority for [REDACTED]. The Employer terminated the Charging Party two days after [REDACTED] email, ostensibly for poor performance.³

The Region has concluded that the Charging Party is a statutory employee. There is no evidence that the Charging Party knew of any similarly-situated individuals employed by the Employer and/or discussed the Employer's independent contractor misclassification and attendant lack of health insurance and other benefits with them.

ACTION

We conclude that the Employer did not discharge the Charging Party in violation of Section 8(a)(1) because [REDACTED] was not engaged in protected concerted activity when [REDACTED] questioned [REDACTED] independent contractor status, and there is no evidence that [REDACTED] intended to engage in such activity in the future. The Region should therefore dismiss the charge, absent withdrawal.

The General Counsel would be unable to prove that the Employer violated Section 8(a)(1) by discharging the Charging Party in retaliation for engaging in protected concerted activity, because the Charging Party has not engaged in any protected concerted activity. Although the Employer discharged the Charging Party shortly after [REDACTED] asked about [REDACTED] independent contractor status, [REDACTED] inquiry had been specifically on behalf of only [REDACTED], as evidenced by the Charging Party's reassurance to the Employer that [REDACTED] was "[n]ot trying to 'rock the boat' or anything, but ... trying to look out for myself."⁴ Indeed, the Charging Party did not discuss [REDACTED]

³ The Employer has not provided the Region with internal documents supporting its discharge decision.

⁴ See *Matrix Equities, Inc.*, 365 NLRB No. 69, slip op. at 3 (May 15, 2017) (many issues raised in employee's letter to employer amounted to individual complaints).

independent contractor classification with other similarly-situated workers as (b) (6) was the only asserted independent contractor in (b) (6), (b) (7) New York office and was unaware of the only other ostensible independent contractor working in the Employer's Boston office. As such, the Charging Party's questions to the Employer concerning (b) (6), (b) (7) own independent contractor status did not constitute concerted activity for the purpose of mutual aid or protection.

The General Counsel also cannot prove that the Employer unlawfully terminated the Charging Party as a "preemptive strike" to prevent (b) (6), (b) (7) from engaging in future protected concerted activity, as suggested by the Region.⁵ There is no evidence of any such unlawful intent, and there is not even evidence that the Charging Party intended to induce group action over the Employer's alleged misclassification. Indeed, the Charging Party knew of no other asserted independent contractors working for the Employer, and (b) (6) specifically stated that (b) (6) was only concerned about (b) (6), (b) (7) own misclassification. In these circumstances, the General Counsel would be unable to prove that the Employer's discharge of the Charging Party had the intent or effect of suppressing future protected concerted activity.⁶

Accordingly, the Region should dismiss the charge, absent withdrawal.

/s/
J.L.S.

ADV.02-CA-204176.Response.libra (b) (6), (b) (7)

⁵ See, e.g., *Parexel Int'l*, 356 NLRB 516, 517, 519 (2011).

⁶ See *Matrix Equities, Inc.*, 365 NLRB No. 69, slip op. at 3 (employer lawfully discharged employee the same day he submitted letter communicating his dissatisfaction with workplace issues, many of which amounted to individual complaints, and "without any discernible suggestion that in response [the employee] planned to take action protected by Section 7"). To the extent that *Parexel*, supra, suggests that a violation can be found whenever an employer's action could have an effect on future protected concerted activity, notwithstanding the absence of any discriminatory intent to suppress such activity, the General Counsel does not agree with that legal principle. Here, even assuming that *Parexel* established that principle, the Employer's conduct did not violate the Act.