

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

In the Matter of:

TERENCE FLYNN

Case No. OIG-I-468

Investigative Interview of:

TERENCE FLYNN

was held at the National Labor Relations Board, 1099 14th Street, N.W., 9th Floor, Washington, D.C., on Thursday, March 15, 2012, at 2:00 p.m.

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24**On behalf of the National Labor Relations Board:**

DAVID P. BERRY, Inspector General
National Labor Relations Board
1099 14th Street, N.W., Suite 9820
Washington, DC 20573
(202) 273-1960

On behalf of the Witness:

BARRY COBURN
KIMBERLY JANDRAIN
Coburn & Greenbaum
1710 Rhode Island Avenue, N.W., 2nd Floor
Washington, DC 20036
(202) 657-4490

GLENN FINE
Dechert LLP
1775 I Street, N.W.
Washington, DC 20006-2401
(202) 261-3300

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1 time it is finalized or disseminated to anyone. We would
2 appreciate that very much if you'd be kind enough to give it
3 to us.

4 MR. BERRY: In response to your request for the e-mails,
5 I'd like to state that I noted that Mr. Flynn has had
6 available to him the e-mails since he was notified of the
7 investigation back in December. At that time, we told him
8 the nature of the investigation. I told you on a number of
9 occasions exactly which categories of e-mails that we were
10 interested in, particularly the ones to former Member Peter
11 Kirsanow, former Member Peter Schaumber, Ken Lopatka, and any
12 that went to Mr. Flynn's prior law firm. So all the e-mails
13 that we were looking at were available to Mr. Flynn, have
14 been available to Mr. Flynn for almost three months. And he
15 was certainly free to give those to you or -- and I think I
16 told you that about a month ago.

17 MR. COBURN: I don't dispute the fact that you told us
18 the subject matter, like I said, just the particular e-mails
19 we requested, which you had declined to provide. And that's
20 understood.

21 MR. BERRY: All right. Okay. Okay, Mr. Flynn, before
22 we get started with actually questions, I'd just like to
23 inform you that this is a voluntary interview. You are free
24 to answer or not answer any questions. If you don't answer a
25 particular question, though, we ask that you state the basis

1 for your refusal to answer that. That's in line with the
2 National Labor Relations Board regulations.

3 Do you have any questions about the nature of the
4 interview before we get started?

5 THE WITNESS: No.

6 MR. BERRY: So, again, if you decide not to answer a
7 question, please so state on the record. Okay.

8 **EXAMINATION**

9 Q. BY MR. BERRY: So, first of all, just for background,
10 can you please give a brief description of your employment
11 prior to coming to the National Labor Relations Board?

12 A. I was in private practice in Washington, D.C., from 1990
13 through 2003.

14 Q. Okay. And what was the name of the firm you were in
15 private practice?

16 A. I started with the firm called, then called Reid &
17 Priest. I also worked at a firm called David, Hagner, Kuney
18 & Krupin. And I also worked at a firm called Crowell &
19 Moring.

20 Q. And what type of law did you practice?

21 A. Labor and employment law.

22 Q. When you came to the National Labor Relations Board,
23 what was your position?

24 A. Chief Counsel to Board Member Peter Schaumber.

25 Q. And about how long did you serve in that capacity?

- 1 A. From December of 2003 until my appointment, swearing in
2 as a Board Member on January of this year.
- 3 Q. Perhaps we can clarify that a little bit.
4 Mr. Schaumber's term ended in August 2010?
- 5 A. That's correct.
- 6 Q. Okay. So what happened after his term ended?
- 7 A. Member Schaumber's staff, including myself, were
8 detailed to Member Brian Hayes.
- 9 Q. And did you continue to serve in a Chief Counsel
10 capacity to Member Hayes?
- 11 A. I served as Chief Counsel to the former Member
12 Schaumber's staff, which was detailed to Board Member Hayes.
- 13 Q. Are you familiar with the notice that was or I think
14 what we call the notice posting rule that was issued on
15 August 30, 2011?
- 16 A. I assume that's the rule you're referring is the notice
17 of employee rights.
- 18 Q. Okay. Are you familiar with that rule?
- 19 A. I am.
- 20 Q. Now, have you had any conversations with Peter Kirsanow
21 about that rule?
- 22 A. I don't recall any specific conversations with
23 Peter Kirsanow about that rule.
- 24 Q. Do you recall discussing with Mr. Kirsanow litigation
25 involving that rule?

1 MR. COBURN: Can I just ask? It appears you're looking
2 at a document when you're asking these questions. Are you
3 asking him about e-mail communications or verbal
4 communications?

5 MR. BERRY: Right now I'm asking about verbal
6 communication.

7 MR. COBURN: Verbal, okay. Thanks.

8 MR. BERRY: Or oral.

9 THE WITNESS: The only conversation I had with
10 Peter Kirsanow was when Peter called me to ask me if I knew
11 whether our library maintained a record of the prior
12 healthcare rulemaking procedures. And I told him that I did
13 not know whether we kept that, I would check with our
14 librarian. I checked with our librarian, who told me that we
15 didn't have a pleadings file here; there was one offsite
16 somewhere that would be difficult to get a hold of. I
17 informed Member Kirsanow we do not keep that, it would be
18 difficult to get a hold of; you're going to have to get it
19 from some other source.

20 Q. BY MR. BERRY: Did you do any legal research for
21 Mr. Kirsanow?

22 A. I did not do any legal research for Mr. Kirsanow. The
23 librarian forwarded to me a response to my request, the
24 underlying case that was involved in the earlier rulemaking
25 litigation.

1 Q. Did you inform the librarian that you were requesting
2 this on behalf of Mr. Kirsanow?

3 A. I don't recall.

4 Q. How did you request it from the librarian?

5 A. I believe I sent [redacted Librarian] an e-mail that said do we have
6 this information.

7 Q. I'm going to show you what we're calling Investigative
8 Exhibit 3. Oh, sorry. Do you recognize that?

9 **(Investigative Exhibit 3 marked for identification.)**

10 MR. COBURN: It looks like you don't have exhibit
11 stickers on these, huh? So, okay, do you mind if I just say
12 for the record this is an e-mail dated Tuesday, September 6,
13 2011, 7:39 a.m., from [redacted Librarian] to Terry Flynn?

14 MR. BERRY: That's fine. I can do that for all the
15 other exhibits.

16 MR. COBURN: That would be great. Thanks.

17 THE WITNESS: Yes, this appears to be the e-mail I sent
18 to [redacted Librarian].

19 Q. BY MR. BERRY: Thank you. And do you know why
20 Mr. Kirsanow was requesting that information?

21 A. I don't know why. At the time, I don't believe I did.

22 Q. Do you know how Mr. Kirsanow is currently employed?

23 A. He's an attorney.

24 Q. And do you know where?

25 A. I do not know where.

1 Q. Is he an attorney in private practice?

2 A. Yes, he is.

3 Q. Did you know that he was an attorney in private practice
4 at the time you requested that information from the law
5 librarian?

6 A. Yes, I did.

7 Q. I'm going to show you another exhibit which we're
8 calling Investigative Exhibit 5, which is an e-mail that you
9 sent to Mr. Kirsanow on Wednesday, September 7, 2011, at 8:12
10 p.m. Would you look at that e-mail?

11 **(Investigative Exhibit 5 marked for identification.)**

12 MR. COBURN: Kim, you can come closer and take a gander
13 at it, too, if you want.

14 THE WITNESS: Okay.

15 Q. BY MR. BERRY: Do you recall that e-mail?

16 A. I don't specifically recall this e-mail.

17 Q. It would appear, correct me if I'm wrong, but that
18 appears to be the results of research on Westlaw, which is a
19 legal database.

20 A. Actually, it looks as though the search was for the
21 petition that was identified by [redacted Librarian] in his earlier
22 correspondence to me.

23 Q. Okay.

24 A. [redacted Librarian] our librarian.

25 Q. Right. That's not from [redacted Librarian] though.

- 1 A. No, it's from me.
- 2 Q. Right. So it would appear that you are the one who
3 found that in Westlaw.
- 4 A. Well, [redacted Librarian] had found it and gave me the cite. And,
5 yes, it appears that I printed it off there.
- 6 Q. And why did you do that?
- 7 A. Because he asked me.
- 8 Q. Who is he?
- 9 A. Member Kirsanow.
- 10 Q. How did he ask you?
- 11 A. Well, he had asked me for whether we had any information
12 relating to that case. And I told him what our librarian
13 told us. And I sent him a copy of that based upon what
14 [redacted Librarian] had sent me.
- 15 Q. There seems to be, okay, do you know why Mr. Kirsanow
16 was asking you for this information?
- 17 A. I don't know at the time whether I did. I subsequently
18 learned. I don't know if it was at that time or after that
19 he was involved in the litigation against the rulemaking.
- 20 Q. Mr. Kirsanow had submitted comments against the rule or
21 in opposition to the rule.
- 22 A. I don't remember that.
- 23 Q. You don't remember that now or didn't remember that
24 then?
- 25 A. Well, I don't remember that Peter had done that now and

1 I don't remember it then. I think there were I don't know
2 how many thousand comments that were submitted in opposition
3 to that rule. And I didn't read many of them.

4 Q. Did you send any other e-mails that could be to
5 Mr. Kirsanow involving that litigation?

6 A. I don't know.

7 **(Investigative Exhibit 8 marked for identification.)**

8 Q. BY MR. BERRY: I'm showing you what we're calling
9 Investigative Exhibit 8, which is an e-mail dated Monday,
10 September 19, 2011, at 4:11 p.m., from you to Mr. Kirsanow.
11 Take a look at that.

12 A. Okay.

13 Q. Do you know why you sent that to Mr. Kirsanow?

14 A. Probably because by that point I was aware of the fact
15 that he was involved in this litigation, so what I sent to
16 him was a copy of a publicly available filed complaint for
17 declaratory injunctive relief that had been filed in the U.S.
18 District Court -- Legal Defense and Education Foundation and
19 the National Federation of Independent Business.

20 Q. Why would you send that to him?

21 A. Probably because he was interested in the case.

22 Q. Okay. Well, he was the lead attorney in the case,
23 right?

24 A. I'm not sure. Is that the case? Wasn't there more than
25 one piece of litigation pending in --

1 Q. Yeah, this is his case.

2 A. Okay.

3 Q. So I'd like you to keep this because I have several
4 questions about this.

5 COURT REPORTER: We have a phone on.

6 MR. COBURN: That's me, actually. I've actually got a
7 little issue in another matter which I was just trying to
8 forward an e-mail which I had promised to do.

9 COURT REPORTER: Oh, I'm sorry.

10 MR. COBURN: No, worry. I'll get it right out, so no
11 problem. I didn't realize you would hear that.

12 COURT REPORTER: Did you hear it?

13 MR. COBURN: Yeah, I heard it, it was feedback on you.
14 That's amazing, really.

15 Q. BY MR. BERRY: Okay. Now, this e-mail, although -- no,
16 that's not the piece I'm actually interested in. This e-mail
17 that I showed you and I identified as Investigative Exhibit 8
18 is actually several e-mails. The date is the last in a chain
19 of e-mails. So right now I'd like to draw your attention to
20 the second e-mail in the chain, the one that's dated Monday,
21 September 9, 2011, at 3:47 p.m. Do you know --

22 MR. COBURN: That's the same exhibit we were looking at
23 a minute ago?

24 MR. BERRY: Yes, it is still. But it's just an earlier
25 e-mail.

- 1 Q. BY MR. BERRY: Okay. Do you recognize who that e-mail
2 is from? Can you see it?
- 3 A. [REDACTED] Attorney
- 4 Q. And who is [REDACTED] Attorney
- 5 A. I don't know.
- 6 Q. You don't know, okay. Who is the e-mail to?
- 7 A. To Lafe Solomon.
- 8 Q. And who is Lafe Solomon?
- 9 A. He is the Acting General Counsel.
- 10 Q. Okay.
- 11 A. Well, I mean the e-mail speaks for itself as to who it
12 is to.
- 13 Q. Well, if you don't mind, we can just go through it. Who
14 else is it to?
- 15 A. Do you want me to read it?
- 16 Q. I would like to establish that you know who these
17 individuals are. I believe that that's --
- 18 MR. FINE: Well, why don't you just ask him if he knows
19 who the individuals are?
- 20 Q. BY MR. BERRY: Well, do you know -- well, I --
- 21 A. I know some of the individuals who are listed on that.
- 22 Q. Okay. Les Heltzer?
- 23 A. Yes, I know Les Heltzer.
- 24 Q. You know him as the Executive Secretary?
- 25 A. Yes.

1 Q. And John Ferguson?

2 A. Yes.

3 Q. And what is John Ferguson's job here?

4 A. I don't know what John's title is, I don't remember, but
5 he is in the Enforcement Litigation Branch.

6 Q. And what does the Enforcement Litigation Branch do?

7 A. Enforcement litigation.

8 Q. Does it represent the Agency in District Court and
9 Appellate Court matters?

10 A. Appellate Court matters.

11 Q. And Marge Lieber?

12 A. I don't know who Marge Lieber is.

13 Q. Really?

14 A. I don't. I don't. I mean I recognize the name, but I
15 don't.

16 Q. Eric Moskowitz?

17 A. I think Eric is in Enforcement Litigation.

18 Q. And do you know [Attorney]

19 A. Yes, I do know [Attorney].

20 Q. Okay. And what does [Attorney] do?

21 A. I think [Attorney] is in the Special Litigation Branch.

22 Q. And do you know what the Special Litigation Branch does?

23 A. Special litigation.

24 Q. Do they litigate for the Agency?

25 A. They do.

1 Q. And you know that now?

2 A. I know that now.

3 Q. And did you know it back in November?

4 A. I would have known that in November.

5 Q. I'm sorry, September?

6 A. I knew in September.

7 Q. Okay. I'd like you to take a look at the second
8 paragraph of that e-mail. Now, earlier you said you were
9 forwarding an e-mail that contained public information. Is
10 that second paragraph public information?

11 A. I'm just reading it now. Well, I can read the paragraph
12 to you.

13 Q. No. I'm just asking you a question. Would you consider
14 that public information? You can read it, if you want to
15 identify it. I didn't mean to interrupt you. But --

16 A. It says Attorney and I are considering whether to file a
17 motion for a consolidation of the two cases. It should not
18 be opposed because the plaintiffs in the second case listed
19 the NAM as a related case in the other attachment. Also,
20 both cases have been assigned to Judge Berman.

21 Some of that information would not be I guess
22 technically public information. Other parts of it would be.

23 Q. If it's not public information, were you authorized to
24 release it?

25 MR. COBURN: Well, there you are asking him for a legal

1 conclusion.

2 MR. BERRY: I'm asking him what he believes his
3 authorization was.

4 Q. BY MR. BERRY: Do you believe you were authorized to
5 release that?

6 A. I'll be honest. I don't believe I was even focused on
7 what was in this e-mail. I was simply sending the complaint.

8 MR. COBURN: Can you give us a second? We just want to
9 take a quick break, okay?

10 MR. BERRY: Sure.

11 MR. COBURN: Thanks a lot.

12 **(Off the record from 2:23 p.m. to 2:25 p.m.)**

13 Q. BY MR. BERRY: When we took that short break, I was
14 asking you about the e-mail which I think you have returned.
15 Now, in your prior jobs, were you in litigation?

16 A. I did do litigation.

17 Q. And so you are familiar with what is discoverable and
18 what is not discoverable in litigation?

19 A. Well, that's a highly complex area. So I mean I know
20 generally the issues related to it, but --

21 Q. Well, you're aware that generally attorney work product
22 would not be discoverable in litigation?

23 MR. COBURN: I'm just going to note another objection to
24 that.

25 MR. BERRY: That's fine.

1 MR. COBURN: It just calls for a legal conclusion. And
2 I don't think it's actually always the case, either.

3 Q. BY MR. BERRY: Can you answer my question, please?

4 A. Could you repeat the question?

5 Q. Are you aware that generally attorney work product is
6 not discoverable in litigation?

7 COURT REPORTER: Coming right through.

8 MR. COBURN: Again?

9 COURT REPORTER: Yeah.

10 MR. COBURN: Okay. Thanks a lot. I'm not getting a
11 connection anyway, so it's no big deal.

12 THE WITNESS: I know that work product can be excluded
13 from discovery.

14 Q. BY MR. BERRY: Did you ask permission from anybody
15 before sending that e-mail to Mr. Kirsanow?

16 A. I wasn't aware that I needed it.

17 Q. So is the answer, no, you did not ask permission?

18 A. The answer would be no.

19 Q. I'm going to show you another e-mail which is dated
20 Friday, November 18, 2011, at 11:23 a.m., to a
21 Mr. Kenneth Lopatka.

22 MR. COBURN: What's the investigative exhibit number on
23 this one?

24 MR. BERRY: I'm sorry.

25 MR. COBURN: That's okay.