

## OFFICE OF THE GENERAL COUNSEL

MEMORANDUM GC 06-09 Revised

October 12, 2006

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

FROM: Ronald Meisburg, General Counsel

SUBJECT: The General Counsel's Burden under Wright Line

### I. INTRODUCTION

Under Wright Line,<sup>1</sup> the General Counsel has the burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against that employee. In a number of recent decisions the Board has characterized that burden as being met when the General Counsel shows that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer had animus toward the union. The burden of persuasion then shifts to the employer to prove that it would have taken the same adverse employment action notwithstanding the employee's protected activity.<sup>2</sup> In those cases, the Board used evidence of pretext<sup>3</sup> solely to counter and diminish the respondent's ability to meet its burden of persuasion.<sup>4</sup> Recently, in Detroit Newspaper Agency v. NLRB,<sup>5</sup> the D.C. Circuit criticized this approach and remanded that case for clarification and further consideration.

The purpose of this memorandum is to clarify the General Counsel's overall burden of persuasion in Wright Line cases. This memorandum is not a directive concerning the order in which evidence is to be adduced at trial but rather how the evidence in a case is to be analyzed and argued to both the administrative law judge

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<sup>1</sup> 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

<sup>2</sup> See, e.g., Lee Builders, Inc., 345 NLRB No. 32, slip op. at 2 (2005); Willamette Industries, Inc., 341 NLRB 560, 562, 563 (2004); Donaldson Bros. Ready Mix, Inc., 341 NLRB 958, 961 (2004).

<sup>3</sup> The different types of evidence that establish pretext are listed in Section IV of this memorandum.

<sup>4</sup> Elsewhere the Board has held that evidence of pretext can be used to support the General Counsel's burden of persuasion. See, e.g., Ellis Electric, 315 NLRB 1187, 1187 n.2 (1994); Active Transportation, 296 NLRB 431, 432 (1989), enfd. per curiam 924 F.2d 1057 (6th Cir. 1991) (unpublished table decision).

<sup>5</sup> 435 F.3d 302 (D.C. Cir. 2006), petition for reh'g. and reh'g. en banc denied (April 10, 2006), remanding 342 NLRB 1268 (2004).

and the Board. As a general rule, however, Counsel for the General Counsel should present all available evidence during the case in chief, if we intend to rely on this evidence to satisfy our initial Wright Line burden.<sup>6</sup> Thus, the litigation and briefing of a Wright Line case should focus on introducing and arguing that all the evidence of activity, knowledge, animus, and pretext presented by the General Counsel establishes that an employee's protected activity was a motivating factor in the adverse action taken against that employee.

This memorandum should be the subject of a Regional Office training session.

## II. RECENT CIRCUIT COURT DECISION

Detroit Newspaper Agency involved an employer that had reinstated a striker to his old position two and a half years after the end of an unsuccessful economic strike, but discharged him for insubordination eleven days later.<sup>7</sup> The Board found the discharge violated Section 8(a)(3) and (1).<sup>8</sup>

The Board majority relied on three elements to conclude that the General Counsel had satisfied his initial burden of proving that anti-union sentiment motivated the discharge. First, the Board majority relied on a general "backdrop" of anti-union sentiment at the facility that stemmed from the earlier economic strike, which had been "prolonged and bitter" and had resulted in numerous unfair labor practice charges.<sup>9</sup> Second, the Board majority concluded that the claim of insubordination was false because, although the alleged discriminatee had informed his supervisor that he would not perform a specific task in the future, he never had failed to perform the task.<sup>10</sup> Finally, the Board majority concluded that the employer had failed to fully investigate the alleged misconduct and had failed to apply its progressive discipline policy.<sup>11</sup> Based on these three elements, the Board majority held that the burden had shifted to the employer to prove that it would have discharged the alleged discriminatee notwithstanding his protected activities.<sup>12</sup>

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<sup>6</sup> Despite this general rule, we leave to the Regions' discretion decisions in particular cases about whether to examine respondent witnesses on Rule 611(c) of the Federal Rules of Evidence or adduce evidence negating a proffered reason for the adverse action in response to evidence the respondent adduces in presenting its case.

<sup>7</sup> 342 NLRB at 1268-69.

<sup>8</sup> Id. at 1273.

<sup>9</sup> Id. at 1270.

<sup>10</sup> Id. at 1271.

<sup>11</sup> Id.

<sup>12</sup> Id. at 1271-72.

The circuit court examined the three elements the Board majority relied on and held that they could not support a finding of anti-union motive. The court first stated it was disingenuous for the Board majority to conclude that the alleged discriminatee had not been insubordinate because he clearly informed management that he would not perform a required task.<sup>13</sup> The court then said there was no backdrop of anti-union sentiment at the facility because the strike had ended two and a half years earlier, the alleged discriminatee was not a union leader who had been singled out for harsh treatment, and there was no evidence of a pattern of discrimination against returning strikers.<sup>14</sup> And finally, as to the third element on which the Board majority relied, the court found the employer did not have an established termination procedure and had not promulgated a progressive discipline policy.<sup>15</sup> As a result, the court held, under the Board's method of analysis the General Counsel had not satisfied his initial burden under Wright Line and, therefore, the burden had not shifted to the employer to prove its affirmative defense.<sup>16</sup>

Based on arguments by the Board's appellate counsel, however, the court acknowledged that the Board majority also had considered evidence of disparate treatment that could support a finding of anti-union motivation.<sup>17</sup> The court stated the problem was that the Board did not discuss that evidence until it dealt with the second part of Wright Line, i.e., whether the employer had satisfied its burden and shown that it would have taken the same adverse action absent any protected activities.<sup>18</sup> In that context, the Board majority found that the employer had engaged in disparate treatment by disciplining the alleged discriminatee more harshly than non-strikers who had engaged in similar misconduct. Because the court had found that the General Counsel had not satisfied his initial burden, however, there was no need to examine the employer's affirmative defense or, more importantly, the evidence disproving that defense. Nevertheless, the court remanded the case to the Board to explain, among other things, if it meant to consider disparate treatment in concluding that the General Counsel had met his initial burden.<sup>19</sup>

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<sup>13</sup> See 435 F.3d at 309.

<sup>14</sup> Id. at 310.

<sup>15</sup> Id.

<sup>16</sup> Id. at 311.

<sup>17</sup> Id. (quoting 342 NLRB at 1272).

<sup>18</sup> Id.

<sup>19</sup> Id. at 312. One circuit judge dissented on this aspect of the case and would have denied enforcement without remand. Id. at 313-315.

### III. THE PROPER FOCUS IN WRIGHT LINE CASES

In NLRB v. Transportation Management Corp., the Supreme Court explicitly approved of the Wright Line two-part test.<sup>20</sup> The Court reaffirmed that test in Director, Office of Workers' Compensation Programs v. Greenwich Collieries, but made clear that the Administrative Procedure Act required that the overall burden of persuasion in a Section 8(a)(3) case remains with the General Counsel.<sup>21</sup> Thus, to establish that an employer's adverse action has violated Section 8(a)(3), Wright Line requires the General Counsel to first prove by a preponderance of the evidence that the employee's protected activities were a motivating factor in the employer's decision to take the adverse employment action.<sup>22</sup> Once that is established, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse action even in the absence of the protected activities.<sup>23</sup> This two-part test applies in both dual-motive cases, where the employer's proffered legitimate explanation for the adverse personnel action has at least some merit, and pretext cases, where the employer's proffered legitimate explanation is without merit.<sup>24</sup>

Although this burden shifting scheme is clear and established, there is some confusion, as Detroit Newspaper Agency indicates, as to whether evidence showing that the employer has proffered a false or pretextual explanation should be utilized only to rebut the employer's defense or both to satisfy the General Counsel's initial burden and rebut the defense. Despite some recent Board cases that would suggest to the contrary,<sup>25</sup> evidence that the legitimate explanation proffered by the employer is either false or pretextual is evidence of an anti-union motive and, thus, should be used to support the General Counsel's initial burden as well as to rebut a defense.<sup>26</sup>

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<sup>20</sup> 462 U.S. 393, 401-402 (1983).

<sup>21</sup> 512 U.S. 267, 276-278 (1994).

<sup>22</sup> 251 NLRB at 1089.

<sup>23</sup> Id.

<sup>24</sup> See, e.g., Frank Black Mechanical Services, Inc., 271 NLRB 1302, 1302 n.2 (1984); Limestone Apparel Corp., 255 NLRB 722, 722 (1981), *enfd.* 705 F.2d 799 (6th Cir. 1982); Wright Line, 251 NLRB at 1083, n.4 ("there is no real need to distinguish between pretext and dual motive cases").

<sup>25</sup> See footnote 2, supra.

<sup>26</sup> See, e.g., Southwest Merchandising Corp. v. NLRB, 53 F.3d 1334, 1340 (D.C. Cir. 1995); Union-Tribune Publishing Co. v. NLRB, 1 F.3d 486, 490-491 (7th Cir. 1993); Holo-Krome Co. v. NLRB, 954 F.2d 108, 113 (2d Cir. 1992) (panel rehearing); Precision Industries, Inc., 320 NLRB 661, 662 n.7 (1996), *enfd.* sub nom. Pace Industries, Inc. v. NLRB, 118 F.3d 585 (8th Cir. 1997), *cert. denied* 523 U.S. 1020 (1998); Greco & Haines, Inc., 306 NLRB 634, 634 (1992); Wright Line, 251 NLRB at 1088, n.12 ("The absence of any legitimate basis for an action, of course, may form part of the proof of the General Counsel's case.").

The General Counsel's overall burden of persuasion for a Section 8(a)(3) allegation is identical to the initial burden under Wright Line.<sup>27</sup> Although the Board commonly refers to this burden as the "prima facie case," this should not be confused with how that phrase is used in Title VII cases. In Title VII discriminatory-treatment cases, the phrase "prima facie case" refers to the initial stage in a framework of shifting evidentiary burdens. At that initial stage, a Title VII plaintiff generally must present facts showing that: (1) he or she is a member of a protected class, (2) he or she is qualified for the sought after position, (3) he or she was subjected to an adverse employment action, and (4) the sought after position remained open and was subsequently filled.<sup>28</sup> If the plaintiff establishes a prima facie case, a presumption of discrimination arises and the defendant-employer, to rebut the presumption and avoid liability, must produce evidence of a legitimate, non-discriminatory reason for the adverse employment action.<sup>29</sup> This is merely a burden of production, not persuasion, which is satisfied by admissible evidence that is not subject to credibility assessment.<sup>30</sup> If the employer satisfies its burden of production, the presumption of discrimination disappears and the plaintiff must then prove discriminatory motive by a preponderance of the evidence, including that the legitimate reason proffered by the employer was a mere pretext.<sup>31</sup> Thus, the meaning of "prima facie case" in Title VII cases differs from its meaning in Wright Line cases, where the phrase refers to the overall burden of persuading the factfinder that the employer engaged in unlawful discrimination.<sup>32</sup> As a result, some circuit courts have suggested that the Board stop referring to the General Counsel's burden as the "prima facie case" because of the different meaning associated with that phrase in the Title VII context.<sup>33</sup>

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<sup>27</sup> See Manno Electric, Inc., 321 NLRB 278, 280 n.12 (1996), enfd. mem. 127 F.3d 34 (5th Cir. 1997).

<sup>28</sup> See, e.g., Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. 133, 142 (2000) (applying Title VII framework to ADEA case); St. Mary's Honor Center v. Hicks, 509 U.S. 502, 506 (1993); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973).

<sup>29</sup> See St. Mary's Honor Center v. Hicks, 509 U.S. at 506-507.

<sup>30</sup> Id. at 507, 509; Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. at 142.

<sup>31</sup> See Reeves v. Sanderson Plumbing Products, Inc., 530 U.S. at 142-143; St. Mary's Honor Center v. Hicks, 509 U.S. at 510-511 (evidence of prima facie case along with evidence undermining employer's legitimate explanation permit factfinder to infer ultimate fact of intentional discrimination, but do not compel that result).

<sup>32</sup> See Valmont Industries, Inc. v. NLRB, 244 F.3d 454, 464 n.2 (5th Cir. 2001); NLRB v. CWI of Maryland, Inc., 127 F.3d 319, 331 & n.7 (4th Cir. 1997).

<sup>33</sup> See, e.g., Valmont Industries, Inc. v. NLRB, 244 F.3d at 464, n.2 (suggesting that Board no longer use phrase "prima facie case" to describe General Counsel's burden); NLRB v. CWI of Maryland, Inc., 127 F.3d at 331, n.7 (same); Schaeff, Inc. v. NLRB, 113 F.3d 264, 266 n.5 (D.C. Cir. 1997) (same); Southwest Merchandising Corp. v. NLRB, 53 F.3d at 1340, n.8 (same); Holo-Krome Co. v. NLRB, 954 F.2d at 112 (same).

#### IV. EVIDENCE ESTABLISHING THE GENERAL COUNSEL'S WRIGHT LINE BURDEN

In meeting this burden of persuasion, the General Counsel must establish that the alleged discriminatee had engaged in protected activity, that the employer had knowledge of that activity, and that the employer carried out the adverse employment action because of the employee's union activity. The challenge in each case is how to establish that, more likely than not, hostility to Union activity was a causal factor in the adverse employment action. Evidence that may establish a discriminatory motive includes the timing of the employer's adverse action in relationship to the employee's protected activity,<sup>34</sup> the presence of other unfair labor practices,<sup>35</sup> statements and actions showing the employer's general and specific anti-union sentiment,<sup>36</sup> and evidence demonstrating that the employer's proffered explanation for the adverse action is a pretext.<sup>37</sup> Evidence of pretext includes the employer's disparate treatment of the alleged discriminatee,<sup>38</sup> departure from past practice when imposing the adverse action,<sup>39</sup> providing shifting explanations for the adverse action,<sup>40</sup> failure to investigate whether the alleged discriminatee engaged in the alleged misconduct justifying the

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<sup>34</sup> See, e.g., Reno Hilton Resorts v. NLRB, 196 F.3d 1275, 1283 (D.C. Cir. 1999); Hall v. NLRB, 941 F.2d 684, 688 (8th Cir. 1991); NLRB v. Rain-Ware, Inc., 732 F.2d 1349, 1354 (7th Cir. 1984) ("Timing alone may suggest anti-union animus as a motivating factor in an employer's action.").

<sup>35</sup> See, e.g., Mid-Mountain Foods, Inc., 332 NLRB 251, 251 n.2, 260 (2000), enfd. mem. 169 LRRM 2448 (4th Cir. 2001); Richardson Bros. South, 312 NLRB 534, 534 (1993).

<sup>36</sup> See NLRB v. Vemco, Inc., 989 F.2d 1468, 1473-75 (6th Cir. 1993) (anti-union statements, even if lawful, serve as background evidence of animus); Affiliated Foods, Inc., 328 NLRB 1107, 1107 (1999) (same). But see, e.g., NLRB v. Lampi, LLC, 240 F.3d 931, 936 (11th Cir. 2001) (lawful anti-union statements cannot be used as direct evidence of animus).

<sup>37</sup> See footnote 26, supra.

<sup>38</sup> See, e.g., NLRB v. ADCO Electric, Inc., 6 F.3d 1110, 1119 (5th Cir. 1993) (employer discharged only union supporter for failing to report for overtime duties); Regal Recycling, Inc., 329 NLRB 355, 356-357 (1999) (employer required only supporters of disfavored union to produce immigration documents); Naomi Knitting Plant, 328 NLRB 1279, 1283 (1999) (employer disciplined only open union supporter for same conduct engaged in by two other employees).

<sup>39</sup> See, e.g., Hunter Douglas, Inc. v. NLRB, 804 F.2d 808, 814 (3d Cir. 1986), cert. denied 481 U.S. 1069 (1987); Birch Run Welding & Fabricating, Inc. v. NLRB, 761 F.2d 1175, 1181 (6th Cir. 1985); JAMCO, 294 NLRB 896, 905 (1989), affd. mem. 927 F.2d 614 (11th Cir.), cert. denied 502 U.S. 814 (1991).

<sup>40</sup> See, e.g., Abbey's Transportation Services, Inc. v. NLRB, 837 F.2d 575, 581 (2d Cir. 1988); Royal Development Co. v. NLRB, 703 F.2d 363, 372 (9th Cir. 1983); Seminole Fire Protection, Inc., 306 NLRB 590, 592 (1992).

adverse action,<sup>41</sup> or proffering a non-discriminatory explanation that is not true.<sup>42</sup> Also, Regions should argue the reasonable inferences that can be drawn from all of the evidence supporting a finding of unlawful discrimination.<sup>43</sup>

Finally, evidence that supports the General Counsel's burden may also be relevant to discredit the employer's claim that it would have taken the same action absent the protected activity.<sup>44</sup> Thus, in Wright Line, the Board first relied, in part, on evidence of disparate treatment to find that the General Counsel had satisfied his burden of proving that protected activity was a motivating factor for the employer's adverse action.<sup>45</sup> It then relied on that same evidence to hold that the employer had not established that it would have taken the same adverse action absent the employee's protected activity.<sup>46</sup>

In summary, in briefing Wright Line cases, do not proceed on the assumption that proof of knowledge, animus, and timing invariably suffice to shift the burden to the respondent. Instead, marshal all the relevant evidence that convincingly supports the proposition that, on the record as a whole, a preponderance of the evidence establishes that union or other protected activity was a motivating factor in the adverse employment decision at issue.

/s/  
R.M.

cc: NLRBU  
Release to the Public

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<sup>41</sup> See, e.g., W.W. Grainger, Inc. v. NLRB, 582 F.2d 1118, 1121 (7th Cir. 1978).

<sup>42</sup> See, e.g., Cincinnati Truck Center, 315 NLRB 554, 556-557 (1994), enfd. sub nom. NLRB v. Transmart, Inc., 117 F.3d 1421 (6th Cir. 1997) (unpublished table decision); Active Transportation, 296 NLRB at 432, nn.7 & 8.

<sup>43</sup> See, e.g., W.F. Bolin Co. v. NLRB, 70 F.3d 863, 871, 872 (6th Cir. 1995) (listing several factors from which reasonable inference of unlawful motive can be drawn; here, timing of layoffs, among other factors, supported inference of unlawful motive); Laro Maintenance Corp. v. NLRB, 56 F.3d 224, 229, 230-231 (D.C. Cir. 1995) (noting substantial deference to be given inferences drawn by Board; here, falsity of employer's explanation, among other things, supported inference of unlawful motive); Davis Supermarkets, Inc. v. NLRB, 2 F.3d 1162, 1168 (D.C. Cir. 1993) (timing of discharges supported inference of unlawful motive), cert. denied 511 U.S. 1003 (1994); Abbey's Transportation Services, Inc. v. NLRB, 837 F.2d at 579-581 (employer's shifting explanations strengthened inference of unlawful motive).

<sup>44</sup> See, e.g., Detroit Newspaper Agency v. NLRB, 435 F.3d at 311.

<sup>45</sup> See 251 NLRB at 1090.

<sup>46</sup> Id. at 1091.