

THE UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 2

200 EAST 81st RESTAURANT CORP.
D/B/A BEYOGLU

and

Case No. 02-CA-115871

MARJAN ARSOVSKI, an Individual

BRIEF IN SUPPORT OF EXCEPTIONS
OF 200 EAST 81st RESTAURANT CORP. ("Beyoglu")

STATEMENT OF THE CASE

This case involves a dispute between 200 East 81st Restaurant Corp., (“Beyoglu”), a small Turkish restaurant, located on East 80th Street in Manhattan and Petitioner, Marjan Arsovski. Arsovski is a former employee of Beyoglu and worked as a waiter. The Administrative Law Judge (“ALJ”) found that Beyoglu violated Section 7 of the National Labor Relations Act (“The Act”) by wrongfully terminating Arsovski.

In connection with this finding, the ALJ recommended that Beyoglu cease and desist from a) discharging employees because they engage in protected concerted activities, including the filing of a lawsuit regarding the wages of themselves and other employees; b) in any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act. The ALJ also recommended that a) Arsovski be reinstated to his former job or if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or to any other rights previously enjoyed; b) make Arsovski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him; c) reimburse Arsovski an amount equal to the difference in taxes owed upon receipt of a lump sum back pay payment and taxes that would have been owed had there been no discrimination against him; d) submit appropriate documentation to the Social Security Administration so that when back pay is paid to Arsovski it will be allocated to the appropriate periods; and e) remove from its files any reference to the unlawful action against Arsovski and notify Arsovski that this has been done and will not be used against him in any way. Finally, the ALJ recommended that Beyoglu provide a reasonable place designated for the Regional Director, for good cause shown, to review all payroll records, social security payment records, time cards, personnel records and reports, and all other records,

including an electric copy of such records, if stored in electronic form, necessary to analyze the amount of back pay due under the terms of the Order and that Beyoglu post Notices and mail copies to former and current employees of Beyoglu.

The record compiled at the March 10, 2013 hearing demonstrates that none of the findings or conclusions of law has merit.

The ALJ specifically found that during the periods in question that Arsovski conceded that he was involved with Anna, the bookkeeper in control of Arsovski's financial records. Moreover, the ALJ conceded that this scenario could give rise to a problem because the bookkeeper could manipulate the books in Arsovski's favor. Despite this finding, the ALJ erroneously concluded that, here, this did not happen.

The ALJ also specifically determined that Arsovski was not engaged in protected, concerted activity when he filed the FLSA action. He concluded, that based on Arsovski's own admissions, he did not file the FLSA suit on behalf of other employees of Beyoglu, or with their authorization or consent. Despite this finding the ALJ erroneously concluded that the termination was, nonetheless, unlawful.

The cases cited by the ALJ, despite being out dated, do not support the conclusions asserted in the ALJ decision, and do not address the dispositive issues. Therefore, his decision should be reversed in its entirety as a matter of law, and the Claim should be denied in its entirety.

QUESTIONS PRESENTED

1. Whether the ALJ erred in determining that Beyoglu violated Section 7 of the Act by firing Petitioner, despite the fact that the ALJ determined that Petitioner was not engaged in concerted protected activity. See Exceptions 1, 8, & 9.

2. Whether the ALJ erred in determining that Beyoglu violated the act by firing Petitioner for filing the FLSA suit, despite the fact that Petitioner was terminated for cause. See exceptions 8 and 9.

STATEMENT OF FACTS

CASE HISTORY & BOARD PROCEEDINGS

Respondent refers to the transcript of the testimony at the March 10, 2014 NLRB hearing (“T.”) and the April 19, 2014 Administrative Law Judge Decision (“D.”) for specific factual support. Petitioner was employed as a waiter at Beyoglu from January 2012 through the spring of 2013. [T. p.92, l. 9-15]. During the months of May and June 2013, the owner of Beyoglu, Yulian Betulovici, was out of the United States, in Poland. [T. p. 13, l. 25]. Throughout this period, Mr. Betulovici, a hands on owner, regularly spoke on the telephone numerous times a day with Josip Raspudic, the restaurant manager, and Anna Ungureana, the restaurant bookkeeper. [T. p. 15, l. 5-23]. Although, in Mr. Betulovici’s absence, Raspudic was responsible for managing the waitstaff, and Anna was responsible for managing the books, Mr. Betulovici is the sole person who can decide whether to hire or fire employees. [T. p. 126, l. 23]. Raspudic confirmed that he did not have the authority to hire or fire employees without Mr. Betulovic’s consent. [T. pp. 29-30]. On or about May, 25, 2013, Mr. Betulovic had a conversation with

Raspudic, and communicated his decision to fire Petitioner. At the March 10, 2014 hearing, Mr. Betulovici explained that, earlier in May 2103, his former bookkeeper Anna, had called him in Poland and had given him a two-week notice of her resignation. Mr. Betulovici then called his previous bookkeeper Marta Sikora and asked her to return to the bookkeeping position until he could find a replacement. Upon Marta's return in late May 2013, she discovered that Petitioner's personnel file, containing records of, among other financial documents, records of payment receipts signed by Petitioner, and that Petitioner was involved in a sexual relationship with the former bookkeeper Anna. [T. p. 128, l. 2-22]. Upon learning of the intimate nature of the relationship between Petitioner and Anna, Mr. Betulovici grew concerned that a waiter was in a relationship with the person in charge of his salary and tips, especially in light of the fact that his personnel files containing the related financial records were missing. He called Petitioner on the phone and asked for the return of the files. At this point, on May 25, 2013, he called Raspudic, the restaurant manager, and told him to fire petitioner due to his improper relationship with the bookkeeper, theft of restaurant property and the reported hostile behavior of Petitioner towards Marta. [T. p. 126-132]. Despite these direct instructions, Mr. Raspudic continued to allow Petitioner to come to work, feeling uncomfortable in firing Petitioner because they had been co-workers. [T. p. 79, l. 21-25]. Later, prior to the restaurants receipt of the lawsuit, based on a belief that Petitioner was harassing Marta, regarding the issues regarding the missing files, Mr. Betulovici told Mr. Raspudic to tell the Petitioner to stay home and not return to the restaurant until Mr. Betulovici returned from Poland. [T. p. 134-136]. The testimony of Josip Raspudic confirms the above. [T. p. 82 l. 1-8 and p. 78, l.11-15].

It is undisputed that there was no employment contract between Beyoglu and Petitioner. [T. p. 166, l. 23]. Mr. Betulovici testified that he believed, that if an employee was involved in an improper relationship that resulted in theft of restaurant property, that he was legally permitted to fire such an employee. [T. p. 166, l. 24 – p. 167, l. 3].

It is equally undisputed that Petitioner confirmed during direct examination, that he was involved in an improper relationship with Anna, the bookkeeper in charge of his personnel file, salary and tips. [T. p. 107, l. 12-14]. Petitioner also confirmed during cross-examination that, at the time he filed the FLSA suit, he was not filing the action on behalf of any other employee of the restaurant or on the authority of any other employee, and that no other employee had joined the law suit. [T. p. 133 l. 17-25].

THE AJL DECISION

In the Administrative Law Decision (“ALD”), the ALJ made specific factual findings and conclusions of law. Respondent excepts to these findings and conclusions of law. Specifically, the ALJ determined that the restaurant manager, Mr. Raspudic, is a supervisor within the meaning of Section 2 (11) of the Act. (D. 2:5). As explained above, the testimony at the March 10, 2014 hearing establishes that Mr. Raspudic did not have the individual authority to fire employees. [T. p. 126, l. 23].

The record established that Petitioner was involved in a personal relationship with the bookkeeper [T. p. 107, l. 12-14]. The record further established that Petitioner’s personnel file was the only employee’s file discovered to be missing when the former bookkeeper Marta Sikora returned to take over for Anna. [T. p. 128, l. 2-22].

The ALJ further determined that Petitioner continued to work without incident from May 25, 2014, the date when Mr. Betulovici told Raspudic to fire Petitioner, and June 25, 2013. [D. 2:40]. Petitioner remained hostile to Marta regarding the issues of the bookkeeper and the missing files. [T. pp. 134-136].

The ALJ also determined that Petitioner was first taken off the work schedule on June 25, 2013. [3:20-4:10]. However, the record shows that Petitioner was supposed to have been terminated on May 25, 2013 and was terminated on or about June 23, 2013. [T. p. 126-132].

The ALJ further concluded that the transgressions which occurred in May 2013, were not sufficient to fire Petitioner, and that Petitioner was fired for filing the FLSA suit. [D. 4:20-25]. Clearly, an employee, who is admittedly involved in a relationship with the person in custody of his financial records, is sufficient grounds to warrant termination. [T. p. 166-167]. Betulovici fired Petitioner for, among other transgressions, engaging in prohibited sexual conduct. [T. 126-132].

SUMMARY OF ARGUMENT

The ALJ erred in determining that Petitioner's termination was unlawful. The ALJ concluded that, although Petitioner was **not** engaged in protected concerted activity, his termination was lawful because Respondent believed, albeit incorrectly, that Petitioner was engaged in protected concerted activity when he filed the FLSA action and this argument is both factually and legally flawed. There is no evidence that Respondent read the FLSA Complaint. At the time the restaurant was served, the restaurant owner, Mr. Betulovici, was still in Poland. He was informed, via phone, that Petitioner filed a

lawsuit. The ALJ is in no position to conclude that Mr. Betulovici believed that Petitioner was engaged in protected activity and the record is devoid of evidence of said conclusion. Regardless, Mr. Betulovici's state of mind is irrelevant.

More importantly, the ALJ misstates the applicable case law. In determining whether an employer has engaged in wrongful termination in retaliation for protected concerted activity, a burden-shifting framework is applied. First the General Counsel of the National Labor Relations Board ("NLRB") must demonstrate that (1) the employee was engaged in protected activity, (2) the employer was aware of this activity, and (3) the employee's protected [union] activity was a substantial or motivating factor behind the employer's decision to take the adverse employment action. NLRB v. Matros Automated Electrical Construction Corp., 366 Fed. Appx. 184 (2d Cir. 2010); Fernbach ex.rel. NLRB v. Raz Dairy, Inc. The Second Circuit is clear; the General Counsel must demonstrate that the employee was engaged in protected activity before the employer's state of mind becomes an issue. Here, the ALJ erroneously concluded that Petitioner was not engaged in protected activity. Therefore, the termination was not unlawful. As a matter of law, the analysis should have concluded at this initial stage, and the complaint should have been dismissed.

If the General Counsel meets its initial burden of establishing that a termination was the result of an employee's protected activity, which he has not done in the instant case, the employer may raise as an affirmative defense, that the employer, would have terminated the employee despite the alleged protected activity. NLRB v. Transportation Management Corp.; 462 U.S. 393 (S.Ct. 1983); Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (S. Ct. 1977), NLRB v. Matros, supra, Wrightline, a

Division of Wrightline Inc. and Bernard Lamourex, 21 NLRB 1083 (1980). The ALJ erred in determining that the only reason for Petitioner's termination was his filing of a FLSA action. The record clearly establishes that even if the filing of the FLSA suit was a last straw, Petitioner would have been fired anyway and the termination was therefore lawful. See Transportation Management, supra.

ARGUMENT

POINT I

PETITIONER WAS NOT ENGAGED IN PROTECTED CONCERTED ACTIVITY; THEREFORE, HIS TERMINATION DID NOT VIOLATE THE ACT

The Act sets forth the parameters for protected concerted activity as it relates to the actions of a single employee. Specifically, a single employee may engage in protected concerted activity, if her or she, is acting on the authority of other employees to induce or prepare for group action. In the instant case, the ALJ determined that Petitioner was **not** engaged in protected activity. NLRB decisions and the ALD in the instant case fully support this conclusion.

In a recent decision, the Board has indicated, that where a single employee initiates an action, the activity is protected **only** if he or she seeks to initiate or to induce or prepare for group action. D.H.R. Horton, Inc., 357 NLRB 184.

As explained above, this is not the case in the present circumstances. Despite the fact that the Petitioner alleged in his Complaint, that he filed his FLSA case on behalf of similarly situated employees, his testimony at the March 10, 2014 NLRB hearing and the April 19, 2014 ALD completely contradicts this. On cross-examination, Petitioner confirmed that (a) he did not file the FLSA lawsuit on behalf of any other employee of

Beyoglu; and (b) he did not file the FLSA lawsuit on the authority of any other employee of Beyoglu. [T. p. 1331. 17-25].

Moreover, the ALJ determined that “Clearly, the evidence in this case does not establish that Arsovski acted in concert with or on the authority of any of the other employees. His lawsuit was not filed with their consent, or except perhaps in one case, even with their knowledge”. His conclusion that “it could perhaps be argued that Arsovski sought to initiate group action” is misplaced. The burden is on the General Counsel to establish by a preponderance of the evidence that Petitioner was engaged in protected activity. See Matros, supra. Counsel has failed to do so. Therefore, the ALJ correctly concluded that the record did not establish that Petitioner was engaged in concerted protected activity.

The ALJ’s conclusion that, if Petitioner’s discharge was motivated because the employer believed or suspected that the employee is engaged in protected activity, the discharge would be unlawful, even if that belief were mistaken, is not supported by the applicable case law. The cases NLRB v. Scrivner, 405 U.S. 177 (S.Ct. 1972) and Treyco of S.C., 297 NLRB 630 (1990), do not address this specific conclusion, and regardless, The Second Circuit does not apply this standard.

The applicable standard in the Second Circuit for determining whether a termination is lawful is that, first, the General Counsel of the National Labor Relations Board (“NLRB”) must demonstrate that (1) the employee was engaged in protected activity, (2) the employer was aware of this activity, and (3) the employees protected [union] activity was a substantial or motivating factor behind the employer’s decision to take the adverse employment action. NLRB v. Matros Automated Electrical Construction

Corp., 366 Fed. Appx. 184 (2d Cir. 2010); Fernbach ex.rel. NLRB v. Raz Dairy, Inc. The Second Circuit has made it clear that the General Counsel must demonstrate that the employee was engaged in protected activity before the employer's state of mind becomes relevant. Therefore, the ALJ erred in determining that Petitioner's termination was unlawful based on some unsubstantiated belief on the part of Mr. Betulovici.

It is confirmed by the record and the ALD that Petitioner Arsovski was not engaged in protected concerted activity in filing the FLSA action. Therefore, his termination was lawful. The ALD should be reversed, and the complaint should be dismissed in its entirety.

POINT II

PETITIONER WAS NOT TERMINATED FOR FILING THE FLSA SUIT; PETITIONER WAS FIRED FOR MISCONDUCT

As established above, it is undisputed in the record and in the ALD that Petitioner was not engaged in protected activity. Therefore, further analysis regarding the basis of his termination is unnecessary. Regardless, the ALJ erroneously concluded that Petitioner's termination was unlawful, because the "transgressions" that occurred in May 2013 were insufficient reasons to fire Petitioner.

As set forth above, Petitioner was terminated for engaging in an improper relationship with the bookkeeper, with whom he conspired to steal his personnel file that contained, among other documents, signed receipts of his salary and tips. There is no

dispute on the record that Petitioner engaged in misconduct that warranted dismissal. Petitioner confirmed during cross-examination that he was engaged in a sexual relationship with the bookkeeper, that he was aware that his personnel file was missing, and that Mr. Betulovici expressed his professional displeasure regarding these events. The determination that Petitioner's employment would be terminated was made in May 2103, approximately a month prior to the filing by the Petitioner of the FLSA suit.

It was also established at the hearing that Petitioner did not have an employment contract. He was an at-will-employee. An establishment owner, such as Mr. Betulovici, believing that an employee's actions, of engaging in a sexual relationship with another employee and together removing personnel files from the premises are inappropriate and a risk to the morale and well-being of his establishment, was well within his rights to terminate Petitioner. Some misconduct is so egregious that warnings are not pre-conditions to termination.

The fact that the restaurant manager failed to obey Mr. Betulovici's directive that he terminate Petitioner on May 25, 2013 does not negate the fact that his misconduct was the reason for his eventual termination. It does show, that despite Mr. Betulovici's reservations regarding Petitioner, he was trying to maintain peace at his restaurant while he was away. Since he could not fly home from Poland to fire him, he planned do so upon his return. When he was informed in late June that Arsovski was still harassing Marta Sikora, he told Mr. Raspudic to ask him to stay home and not return to the

restaurant until he returned from Europe. It is unclear whether Mr. Raspudic told Petitioner to stay at home until Mr. Betulovici's return happened on the days prior to the restaurant's receipt of the lawsuit or on the day of receipt of the lawsuit. However, the exact date of his termination is irrelevant. The record is clear that Petitioner would have been fired, and was to have been fired, and in fact was fired, regardless of the FLSA suit.

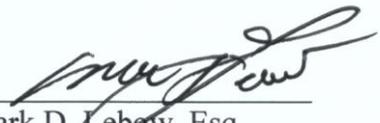
Therefore, the termination was lawful. Since Petitioner was fired for wholly permissible reasons, the existence of an impermissible motivation is irrelevant. NLRB v. Transportation Management Corp., supra. See also Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (S. Ct. 1977), NLRB v. Matros, supra, Wrightline, a Division of Wrightline Inc. and Bernard Lamourex, 21 NLRB 1083 (1980).

CONCLUSION

For the reasons stated, the ALJ erred in its findings against Beyoglu, and the Complaint should be dismissed in its entirety.

Dated: New York, New York
May 23, 2014

Respectfully submitted,

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