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

GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING ARGUMENT

Dated at New York, New York
This 10th day of June, 2014

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Pursuant to Section 102.46(e) of the National Labor Relations Board's Rules and Regulations, the General Counsel (GC or General Counsel), by its Counsel Simon-Jon H. Koike, files the following cross exceptions, with supporting argument,[1] to the Decision and Recommended Order of Administrative Law Judge Raymond P. Green (ALJD).

CROSS-EXCEPTIONS AND SUPPORTING ARGUMENT

1. **The Administrative Law Judge ("ALJ") erred as a matter of law to the extent he failed to explicitly find that an individual who files a class or collective action regarding wages, hours or working conditions seeks to initiate or induce group action and is engaged in conduct protected by Section 7 of the Act, 29 U.S.C. § 157. (ALJD 5:11-16.)**[2]

The ALJD shows that the ALJ first agreed that "it could be argued" that filing a collective action lawsuit, such as the Fair Labor Standards Act ("FLSA"), 29 U.S.C. 201, et seq., lawsuit at issue here, is conduct that sought "to initiate or to induce or to prepare for group action" and then found that 200 East 81st Restaurant Corporation d/b/a Beyoglu ("Respondent") had unlawfully discharged Charging Party Marjan Arsovksi ("Arsovksi") because he had engaged in that protected concerted activity. (ALJD 5:11-16 and 5:33-42.) The GC agrees with this finding of law. Its exception is limited to the ALJ's failure to explicitly find that the conduct was protected concerted activity, given that the ALJ also concluded, in an intervening paragraph, that Respondent had a mistaken belief that Arsovski had engaged in concerted group action based on language in his FLSA complaint asserting that it was brought on behalf of a class of present and former

[1] The General Counsel combines its cross-exceptions and argument pursuant to § 102.46(b)(1) of the NLRB's Rules and Regulations, which states in part that "[i]f no supporting brief is filed the exceptions document shall also include the citation of authorities and argument in support of the exceptions, . . ."

[2] References to the ALJ's Decision will follow the format "ALJD [page number(s)]: [line number(s)]". References to the transcript shall be "[Witness name] Tr. [page:line number]". References to Counsel for the General Counsel's exhibits shall be "GC Exh. [number]. References to Joint exhibits shall be "J. Exh. [number]."

employees. (ALJD 5:18-26.)

Section 216(b) of the FLSA provides a private right of action "to recover unpaid overtime compensation and liquidated damages from employers who violate the Act's overtime provisions." *Gjurovich v. Emmanuel's Marketplace, Inc.*, 282 F.Supp.2d 101, 103 (S.D.N.Y 2003) (citing *Hoffmann v. Sbarro, Inc.*, 982 F.Supp. 249, 260 (S.D.N.Y.1997) (Sotomayor, J.)). Section 216(b) allows such a case to be brought as a collective action, that is, an action by "one or more employees for and in behalf of himself [or herself] or themselves and other employees similarly situated." 29 U.S.C. 216(b). Unlike a class action lawsuit brought pursuant to Federal Rule of Civil Procedure 23, in a FLSA collective action only potential plaintiffs who "opt in" can be "bound by the judgment" or "benefit from it." *Sbarro,* 982 F.Supp. at 260. Although Section 216(b) has no provision for issuing notice to similarly situated employees in a collective action, it is "well settled" that district courts have the power to authorize an FLSA plaintiff to send such notice to other potential plaintiffs. *Sbarro,* 982 F.Supp. at 261 (citing *Hoffmann–La Roche, Inc. v. Sperling,* 493 U.S. 165 (1989)).

Section 7 of the Act guarantees employees the right "to engage in ... concerted activities" for the purpose of "mutual aid or protection." The Board, with court approval, has broadly construed the term "concerted activities" to include "those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). *See NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends

to induce group activity"). *Accord NLRB v. Caval Tool Div.*, 262 F.3d 184, 188 (2d Cir. 2001). Longstanding Board doctrine protects such individual activity because it is "an indispensable preliminary step" to concerted activity. *Meyers II*, 281 NLRB at 887 (quoting *Root-Carlin, Inc.*, 92 NLRB 1313, 1314 (1951).

Accordingly, the Board, with court approval, has inferred a concerted objective where a single employee expresses dissatisfaction with working conditions to fellow employees in writing. See e.g. *NLRB v. Empire Gas, Inc.*, 566 F.2d 681, 687 (10th Cir. 1977) (employee writing and sending out letter to his fellow employees urging them to refrain from pumping gas at certain times was protected concerted activity); *Dreis & Krump Manufacturing Company, Inc. v. NLRB*, 544 F.2d 320, 327-328 (7th Cir. 1976) (single employee's leafleting activity directed toward eliciting support of other employees to aid in the resolution of his grievance was protected concerted activity). The fact that an employee acts alone in initiating, inducing or preparing for group action does not preclude treatment of his action as protected activity under the Act. *TM Group, Inc.*, 357 NLRB No. 98, slip op. at p. 28 (2011); *Compuware Corp.*, 320 NLRB 101, 103 (1995). Thus, the linkage between individual employee action and group activity may exist even if the employee has not been formally chosen as a spokesperson by the other employees. See *Plaza Auto Center*, 355 NLRB 493 (2010); *Cibao Meat Products*, 338 NLRB 934 (2003); *Whittaker Corp.*, 289 NLRB 933, 934 (1988).

The Supreme Court, Courts of Appeals, and the Board have also recognized that collective or concerted legal action regarding working conditions, and especially wages, is activity protected by Section 7 of the Act. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 566 (1978); *Mohave Elec. Co-op v. NLRB*, 206 F.3d 1183, 1189 (D.C. Cir. 2000); *Saigon*

Gourmet Restaurant, 353 NLRB No. 110 (2009) (FLSA lawsuit protected concerted activity); *U Ocean Palace Pavilion, Inc.*, 345 NLRB 1162 (2005) (same); *Le Madri Restaurant*, 331 NLRB 269 (2000) (same).

Consistent with these principles, the Board recently noted in dictum: "Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." *D.R. Horton, Inc.*, 357 NLRB No. 184, Slip Op. at 4 (2012).

In this case, Charging Party Arsovski first spoke with other employees about their wages and invited employee Burak Sunar to join his lawsuit.[3] (ALJD 2:42-44; Arsovski Tr. 111:10-22.) He then filed an FLSA collective action in the United States Court for the Southern District of New York alleging violations of the FLSA and New York State Labor Law, N.Y. Lab. Law § 190, et seq. (ALJD 2:46-3:6; J. Exh. 2.) The lawsuit, *Marjan Arsovski v. 200 East 81st Restaurant Corp. d/b/a Beyoglu and Yulian Betulovici*, 13 CV 4295 (AKH), was filed on behalf of Arsovksi as an individual and "all others similarly situated," and seeks unpaid wages, unpaid overtime wages, unpaid spread of hours pay, and unlawful deductions. (Id.) It also requested that the Court issue a notice to similarly situated employees informing them that the action had been filed and explaining their right to opt into the lawsuit. (ALJD 3:8-11; Exh. 2; Arsovski Tr. 113:22-25.) It was therefore, albeit through the medium of a court authorized notice, addressed to both Respondent and fellow employees. Because Arsovski's wage complaint was addressed to fellow employees and included an invitation to participate in

[3] For a complete summary of the facts, General Counsel respectfully refers the Board to the Answering Brief to Respondent's Exceptions dated June 10, 2014.

the claim, it was an inducement to those employees to take group action for the purpose of mutual aid or protection, and, thus, protected concerted activity. *Meyers II,* 281 NLRB at 887.

2. **The Administrative Law Judge ("ALJ") erred as a matter of law to the extent he failed to find that Respondent discharged Arsovski because he engaged in the protected conduct of filing a collective action relating to group wages which sought to induce employees to join that action, in violation of Section 8(a)(1) of the Act.**

Section 8(a)(1) of the Act, 29 U.S.C. § 158(a)(1), makes it an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of [their Section 7] rights." In this case, for the reasons set forth in the preceding section, Arsovski exercised his Section 7 rights by filing a FLSA lawsuit that had "the objective of initiating or inducing ... group action" in response to Respondent's pay practices. Accordingly, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act when it discharged Arsovski because he filed the lawsuit. (ALJD. 4:18-19, 5:38-39.) The GC agrees with this finding of law. Its exception is again limited to the ALJ's failure to explicitly find that the discharge was unlawful because the lawsuit was an inducement to employees to take group action for the purpose of mutual aid or protection.

To determine whether an adverse employment action violates Section 8(a)(1) of the Act, the Board examines the employer's motive, using the test articulated in *Wright Line*, 251 NLRB 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981) (*Wright Line*), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397-98, 400-03 (1983). Under that test, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, that the employer had knowledge of that activity, and that the employer's hostility to that activity "contributed to" its decision to take an adverse action against the employee.

Director, Office of Workers' Comp. Programs v. Greenwich Collieries, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Management*, 462 U.S. at 395, 403 n.7 (1983); *Wright Line*, 251 NLRB at 1089.[4]

Evidence that may establish a discriminatory motive - i.e., that the employer's hostility to protected activity "contributed to" its decision to take adverse action against the employee - includes: (1) statements of animus directed to the employee or about the employee's protected activities (see, e.g., *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1 (Dec. 30, 2010) (unlawful motivation found where HR director directly interrogated and threatened union activist, and supervisors told activist that management was "after her" because of her union activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (see, e.g., *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between

[4] The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Colleries* proceeds in a different manner than the "prima facie case" standard utilized in other statutory contexts. See *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 142-143 (2000) (applying Title VII framework to ADEA case). In those other contexts, "prima facie case" refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's "prima facie case" or "initial burden" are not quite accurate, and can lead to confusion, as General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

discovery of the employee's protected activities and the discipline (see, e.g., *Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); or (4) evidence that the employer's asserted reason for the employee's discipline was pretextual, e.g., disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless (see, e.g., *Lucky Cab Company*, 360 NLRB No. 43 (Feb. 20, 2014); *ManorCare Health Services – Easton,* 356 NLRB No. 39, slip op. at p. 3 (Dec. 1, 2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati Truck Center*, 315 NLRB 554, 556-557 (1994), enfd. sub nom. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997))

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision, the employer can nevertheless defeat a finding of a violation by establishing, as an affirmative defense, that it would have taken the same adverse action even in the absence of the protected activity. See *NLRB v. Transportation Management*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id.*

In this case, the ALJ found and Respondent does not dispute that the lawsuit was served on Respondent on June 25, 2013 (ALJD 3:13; Betulovici Tr. 142:3-16), that

Arsovski was scheduled to work that day (ALJD 3:19; Arsovski Tr. 94:11-12), and that Respondent told Arsovski when he arrived to begin his shift that he had been removed from the schedule because of the lawsuit (ALJD 319-29; Arsovski Tr. 102:24-103:2; Raspudic Tr. 71:2-3). Respondent, by its Answer, also admitted that it discharged Arsovski on or about June 25, 2013 and that it has not since offered him reinstatement to his former position. *Compare* Gov. Exhs. 1(c) *with* Gov. Exh. 1(e). In sum, a preponderance of the evidence supports the conclusion that the lawsuit was a substantial or motivating factor for Arsovski's discharge. The timing of the discharge, only hours after Respondent learned about the lawsuit, corroborates this conclusion. Accordingly, the ALJ concluded that Respondent violated Section 8(a)(1) of the Act when it discharged Arsovski because he filed the lawsuit. (ALJD. 4:18-19, 5:38-39.)

Turning to the Employer's affirmative defenses, the ALJ rejected the contention that Arsovski was discharged for any conduct prior to May 25, 2013 because Arsovski continued to work until he filed the FLSA lawsuit on June 25, 2013.[5] (ALJD 4:20-27.) Respondent therefore failed to show that it would have taken the same action against Arsovski even in the absence of his protected conduct.

[5] For a complete discussion of Respondent's affirmative defenses, the General Counsel respectfully refers the Board to the Answering Brief to Respondent's Exceptions dated June 10, 2014.

CONCLUSION

For the reasons advanced above, the General Counsel urges the Board to correct the ALJ's failure to find that an individual employee who files a collective action regarding wages seeks to initiate or induce group action and is therefore engaged in conduct protected by Section 7 of the Act and that Respondent discharged Arsovski on June 25, 2013 because he engaged in that protected conduct, in violation of Section 8(a)(1) of the Act.

Dated at New York, New York
This 10th day of June, 2014

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NLRB-877

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AFFIDAVIT OF SERVICE

I, the undersigned employee of the National Labor Relations Board, being duly sworn, depose and say that on the date indicated below I filed GENERAL COUNSEL'S CROSS-EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION AND SUPPORTING ARGUMENT, electronically through the NLRB E-File system and served the document via email upon the following persons, addressed to them at the following addresses:

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Subscribed and Sworn to this:
10th day of June, 2014

Designated Agent:

National Labor Relations Board