

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

COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT'S EXCEPTIONS

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

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I. PROCEDURAL HISTORY

On October 29, 2013, Marjan Arsovski (Arsovksi) filed a charge alleging that 200 East 81st Restaurant Corporation d/b/a Beyoglu (Respondent) terminated him because he had filed a federal court lawsuit under the FLSA, in violation of Section 8(a)(1) of the National Labor Relations Act, 29 U.S.C. § 158(a)(1). (GC Ex. 1(a)). On December 13, 2013, the Regional Director, Region 2, issued a Complaint and Notice of Hearing, which Respondent answered, denying the violations. (GC Ex. 1(c) and (e)). The Complaint alleges that on or about June 25, 2013, Respondent discharged Arsovski because he engaged in concerted activities with other employees for the purpose of mutual aid and protection by filing a collective civil action in the United States District Court, Southern District of New York, alleging violations of the Fair Labor Standards Act and the New York Labor Law. (GC Ex. 1(c)). Pursuant to the Complaint, a hearing was held before Administrative Law Judge (ALJ) Raymond P. Green on March 10, 2014.

On April 29, 2014, the ALJ issued a decision (ALJD) concluding that Respondent discharged Arsovski because of his protected concerted activities, including the filing of a lawsuit regarding the wages of his and other employees, in violation of Section 8(a)(1) of the Act. On May 22, 2014, Respondent filed exceptions to certain findings and conclusions in the ALJD.

Counsel for the General Counsel submits this brief in support of ALJ Green's findings and conclusions and respectfully requests that the Board affirm the decision and adopt the recommended Order.

II. SUMMARY OF CASE

The issue presented in this case is whether 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. The Board answered in the affirmative in *D.R. Horton, Inc.*, 357 NLRB No. 184 (2012), observing 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.” Moreover, the Courts and the Board have all made clear that the Act protects individuals who attempt to initiate or induce group activity in opposition to terms and conditions of employment.

The ALJ correctly found that largely undisputed evidence supported a finding that Respondent terminated Arsovski based solely on this protected conduct. To wit, Respondent admitted to learning on June 25, 2013 that Arsovksi had filed a collective action lawsuit and that it removed him from the schedule that same day because of the lawsuit. Respondent’s arguments here cannot alter its failure to present persuasive evidence at the hearing permitting any other conclusion. Thus, for the reasons stated herein, each of Respondent’s arguments is without merit and should be rejected, and the ALJ’s factual findings and conclusions of law should be affirmed.

III. FACTS

A. Respondent's operations and management hierarchy

Beyoglu is a Turkish and Mediterranean restaurant on the Upper East Side in New York City. (ALJD 1; Raspudic Tr. 30:12-14.)¹ In June 2013 Respondent employed between twenty and thirty floor staff, including eight to ten waiters. (ALJD 2:15-16; Raspudic Tr. 33:12-23.) Charging Party Arsovksi and Burak Sunar ("Sunar") were two of those waiters. (ALJD 2:15; Raspudic Tr. 33:22-34:16.)

Julian Betulovici ("Betulovici") is both Respondent's owner and President and Josip Raspudic ("Raspudic") is the General Manager. (ALJD 1-2:1; Betulovici Tr. 12:1-3; Raspudic 30:11.) The General Manager reports directly to Betulovici. (Raspudic Tr. 35:1-14, 36:20-21.) The floor staff, including waiters, report to the General Manager. (ALJD 2:3-4; Raspudic Tr. 35:1-10.) As the direct supervisor for the floor staff, Raspudic was responsible for ensuring their compliance with the Employer's rules and policies. (Raspudic Tr. 38:2-12.) He also prepared their schedules and dealt with customer complaints. (Raspudic Tr. 30:25-31:3, 39:2-9.)

Betulovici left for Poland a few days after promoting Raspudic to the position of General Manager in May 2013 and did not return to New York until the first or second week of July. (Betulovici Tr. 156:4-5; Raspudic Tr. 45:15-15.) Betulovici was also out of state or the country for additional and extensive periods of unknown duration in 2013. (Raspudic Tr. 47:2—48:20.) In his absence, Raspudic was responsible for the operation

¹ 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]."

of the restaurant floor. (ALJD 2:5-7; Betulovici Tr. 15:5-13.) Betulovici, however, remained in close contact when he was away, speaking with both Raspudic and the bookkeeper on the phone “every single day, twice a day.” (ALJD 2:5-7; Betulovici Tr. 15:16; Raspudic 48:21-49:1.)

B. Arsovski files an FLSA lawsuit

On June 20, 2013, Charging Party Arsovski filed a collective action lawsuit in the United States Court for the Southern District of New York alleging violations of the Fair Labor Standards Act (“FLSA”), 29 U.S.C. 201, et seq., and New York State Labor Law, N.Y. Lab. Law § 190, et seq. (ALJD 2:46-47; 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 Arsovski as an individual and on behalf of “all others similarly situated,” and seeks unpaid wages, unpaid overtime wages, unpaid spread of hours pay, and unlawful deductions. (ALJD 2:46-3:2; J. Exh. 2.) Although no other employee had authorized Arsovski to file the lawsuit on their behalf, the lawsuit itself seeks the inclusion of other employees through issuance of a notice informing them that the action had been filed and explaining their right to opt into the lawsuit.² (ALJD 3:1-10; J. Exh. 2 at p. 13; Arsovski Tr. 113:22-25.) A copy of the lawsuit was served on the Employer on June 25, 2013. (ALJD 3:13; G.C. Exh. 4.)

Prior to filing the lawsuit, Arsovski had spoken with a few other waiters, including Sunar, about the Employer’s pay practices. (ALJD 2:42-43; Arsovski Tr.

² The FLSA permits employees to sue under that statute both individually and on behalf of “other employees similarly situated,” provided that “[n]o employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party.” See 29 U.S.C. 216(b). Because of the written consent requirement in 29 U.S.C. 216(b), class actions under the FLSA are known as collective actions where an employee must “opt in” to be a party to the action.

111:10-17.) Arsovski also told Sunar that he was filing a lawsuit and invited him to join in the lawsuit. (ALJD 2:43-44; Arsovski Tr. 111:19-22.) Later, after Arsovski was discharged on June 25, he told Sunar that he had been removed from the schedule. (Arsovski Tr. 112:22-113:2.) No other employee joined the lawsuit after Arsovski's discharge. (Arsovski Tr. 113:22-2, 113:17-21.)

C. Respondent discharges Arsovski

Betulovici first learned of Arsovski's lawsuit on June 25, 2013 (the date it was served on Respondent). He discussed it that day with both Raspudic and Bookkeeper Marta Sikora (Sikora) over the telephone.³ (ALJD 3:13-15; Betulovici Tr. 142:3-16.) Respondent had recently settled an FLSA lawsuit from a different employee.⁴ Raspudic corroborates Betulovici's account, admitting that he had more than two phone conversations with him about the lawsuit that day. (Raspudic Tr. 66:12-18, 68:12-16.) Betulovici told Raspudic to take Arsovski off the schedule (Betulovici Tr. 160:2-5) and that he "didn't want [Arsovski] to be in the restaurant when [Betulovici's] not there" (Raspudic Tr. 71:2-3). Neither Betulovici nor Raspudic's account of these conversations reference any reason other than the lawsuit for the decision to remove Arsovski. Betulovici also asked Raspudic and Sikora to meet with Arsovski and inform him of the decision. (Betulovici Tr. 142:16-23.)

During the morning of June 25, Sikora called Arsovski. Sikora told Arsovski that

³ Sikora was the Bookkeeper until about January 2013 and then again on a temporary basis beginning in late May 2013. (ALJD 2:9-11, 2:27-29; Betulovici 134:12-22; Raspudic Tr. 20:13-14.)

⁴ Segundo Roldan, a kitchen employee, had filed a lawsuit against Respondent and Betulovici in Federal Court alleging violations of the FLSA and New York Labor Laws in March 2012. (Betulovici Tr. 120:12; Tr. 151:16-24.) Respondent and Roldan later reached a settlement in that matter. (Betulovici Tr. 149:21.)

the Employer had received a letter from his lawyer and wanted to know what Arsovski wanted. Arsovski replied that it was perfectly clear and that he wanted to be paid for his work. Sikora told Arsovski that Respondent was “very shocked” by Arsovski’s actions. (ALJD 3:15-17; Arsovski Tr. 95:9-21.) Sikora did not testify and Arsovski’s testimony about this telephone conversation is uncontroverted.

Arsovski was scheduled to work the dinner shift that evening. (ALJD 3:19; Arsovski Tr. 94:11-12.) Respondent, by its Answer in this matter, admits 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).

When Arsovski arrived at work to begin his shift, he checked the schedule at the bar and saw that he had not been assigned a section. (ALJD 3:20-21; Arsovski Tr. 99:24-100:6.) Sikora, who was at the end of the bar, laughed and told him “don’t even try it.” (Arsovski Tr. 101:4-7.) A few moments later, Raspudic approached them and told Arsovski that they needed to talk. (Arsovski Tr. 101:8-10.) Arsovski, Raspudic, and Sikora then went up to the dining area on the second floor. (Arsovski Tr. 101:11-13.)

Raspudic began the meeting by telling Arsovski that Respondent had received a letter from Arsovski’s lawyer, that from that point the parties would communicate through their lawyers, and “that’s it.” (ALJD 3:21-23; Arsovski Tr. 102:7-9.) Arsovski asked “[T]hat’s it what? Are you firing me?” Arsovski then asked Raspudic why he had been removed from the schedule. Raspudic explained that Betulovici had specifically requested that Arsovski not be in the restaurant until he came back from vacation. (ALJD 3:23-25; Arsovski Tr. 102:12-17.) Arsovski wondered that Betulovici would remove him from the schedule “just because he wants to just like that?” (Arsovski Tr. 102:24-25.)

To which Raspudic answered: “Well, you’re filing a lawsuit. What do you expect? To work?” (ALJD 3:23-27; Arsovski Tr. 102:24-103:2.) This testimony is uncontroverted. Raspudic then told Arsovski that Betulovici was “done with [him]” and had removed him from schedule because he filed the lawsuit. (ALJD 3:28-29; Arsovski Tr. 103:5-9.) This testimony is also uncontroverted.⁵

Raspudic’s testimony is consistent with Arsovski’s account. Raspudic admitted to meeting with Arsovski and Sikora on the second floor that day and testified that he told Arsovski:

Okay, listen, we have this lawsuit here we got in the restaurant. I don’t know what is it about, honestly, but I spoke to Julian [Betulovici] about it. He doesn’t want you in the restaurant right now. He’s going to deal with this when he comes back.

(ALJD 3:35-38; Raspudic Tr. 78:11-15.) With regard to the apparent conditional nature of the removal suggested by Raspudic’s phrasing, specifically that Betulovici would deal with Arsovski when he came back, Respondent concedes that Betulovici returned to New York in the first or second week of July 2013 and that it did not contact Arsovski after his return. (ALJD 4:12-13; Betulovici Tr. 156:4-5.)

Thus, Respondent admits to learning of the lawsuit on June 25 and that Betulovici instructed Raspudic and Sikora to remove Arsovski from the schedule because of the lawsuit when he reported to work that day.

Respondent has offered shifting defenses to explain the discharge. Raspudic testified that Arsovski was fired because “[h]e was engaged in a personal relationship

⁵ When asked during cross examination, Raspudic testified that he did not remember whether he told Arsovski that Betulovici had said he was “done with [Arsovski]” (Raspudic Tr. 78:16-18.) Raspudic also could not recall whether he told Arsovski that the owner had removed him from the schedule because he was filing a lawsuit. (Raspudic Tr. 78:19-23.) Raspudic agreed, however, that: “Probably that was the spirit.” (Raspudic Tr. 78:25-79:1.)

with the bookkeeper.”⁶ (Raspudic Tr. 79:8-9, 80:1-4, 81:23-82:3.) Raspudic admitted, however, that this reason was not mentioned during his meeting with Arsovski on June 25. (Raspudic Tr. 79:7-12.) Betulovici, on the other hand, testified that the problem was “the money issues and the files were stolen.” (Betulovici Tr. 153:4.) Thus, in contrast to Raspudic’s testimony, according to Betulovici the relationship as such was “not that big” and it was instead that if “you give [that] right that how your money for the waiters (sic), he can steal.” (Betulovici Tr. 153:7-9.)

During the hearing, Betulovici also testified that he had decided to fire Arsovski before June 25, i.e., the date he learned about Arsovski’s protected activity. Respondent offered various dates in support of this defense. For example, Betulovici testified during direct examination that he told Sikora to take Arsovski off the schedule on June 23. (Betulovici Tr. 165:21-166:18.) It is undisputed, however that Arsovski worked on June 23. (G.C. Exh. 7.) When confronted by a pay record showing this, Betulovici testified: “23rd, I see. So I guess I told her to tell him the 24rd when his offd date (sic). I’m not sure.” (Betulovici Tr. 170:15-16.) Betulovici also testified that he decided to fire Arsovski on May 25 and Respondent, in a position letter for this case, has also claimed that Arsovski was employed until June 18, 2013. See Betulovici Tr. 127:8-9 and J. Exh. 1 at p. 2. At any rate, Betulovici knew that Arsovski was still working at the restaurant on June 25, since he directed Raspudic to remove him from the schedule that day.

⁶ Raspudic did testify that the Betulovici told him there were some missing documents. (Raspudic Tr. 61:3-4.) He did not however mention this as a basis for the discharge. The omission is significant because Raspudic’s testimony shows that he had significant involvement and authority with regard to decisions to hire and fire. For example, Betulovici delegated to him the decision of whether to fire a waitress after Raspudic explained that he had issues with the employee’s attendance. (Raspudic Tr. 40:20-23.) He and not Betulovici interviewed the approximately twenty new hires, though he consulted with Betulovici before hiring hired them. (Raspudic Tr. 38:5-20.)

D. The bookkeepers and the “missing files”

In late December 2012 or early January 2013, Marta Sikora, Respondent’s then bookkeeper, resigned. (Raspudic Tr. 50:1-14.) Betulovici appointed Georgina Ungureanu as her replacement. (Raspudic Tr. 50:17-19.) Arsovski was romantically involved with Ungureanu. (Arsovski Tr. 107:12-14.) The record does not show when this relationship began, but Raspudic testifies that he knew about their affair before May 2013. He learned about it from then General Manager Georghiou. Raspudic was already the Assistant Manager at the time. (Raspudic Tr. 51:17-52:2.)

On May 20 or 23, 2013, Ungureanu told Betulovici that she was resigning because she had found other employment and gave either two or three weeks notice. (Betulovici Tr. 132:18-19, 144:11-19; 148:8-9; Raspudic Tr. 53:6-20, 57:5-7.) Betulovici called Raspudic and told him that Ungureanu was leaving. (Betulovici Tr. 143:14-114:2.) According to Raspudic, on the same day that Ungureanu resigned, Betulovici asked him whether he knew that Ungureanu and Arsovski were together. (Raspudic Tr. 81:23-24; 83:14-84:4.) When Raspudic answered that he did, Betulovici told him to fire Arsovski. (Raspudic Tr. 81:23-82:3.) Betulovici said the reason was because Arsovski and Ungureanu were romantically involved. (Raspudic Tr. 80:1-9.) Betulovici testifies that this conversation took place on May 24 or 25, 2013. (Betulovici Tr. 141:3-4.)

According to Raspudic, he did not fire Arsovski because he was “uncomfortable” with the order, but did tell him that same day what Betulovici had said. (Raspudic Tr. 82:5-8, 83:14-15.) Also that day, according to Raspudic, Betulovici asked Raspudic to put Arsovski on the phone. (Raspudic Tr. 83:21-84:4.) Both Arsovski and Betulovici testified about their subsequent telephone conversation. The testimony, as described

below, suggests that Ungureanu had in her possession a black book, called the “cash book”, belonging to the restaurant.

Arsovski testified that Betulovici began by telling him he hadn’t known about the affair and would do things differently. Betulovici added that as owner he could fire whoever he wanted and didn’t need a reason. Arsovski said he didn’t know why he was involved and that it was between Betulovici and Ungureanu. Arsovski noted that Ungureanu was upset because she had given a three week notice and Betulovici had fired her the next day. Arsovski explained that Ungureanu had been counting on those three weeks pay. Betulovici said that Ungureanu had the restaurant’s cash book and that he would give her a week’s pay then and a second week when he returned from vacation. Arsovski told Betulovici not to worry and that he would fix it for him. (Arsovski Tr. 108:1-109:20.)

Betulovici’s account, on the other hand, is that he told Arsovski that “if he can fix and bring me our files” and “checkbook” then he could “continue to work.” (Betulovici Tr. 129:9-11, 130:13-16.) Betulovici testified that he called his bank later that day, learned that there was a discrepancy in Respondent’s account, and only then told Raspudic to fire Arsovski. (Betulovici Tr. 130:21-24.) Betulovici alternatively testified that, after he learned that Ungureanu was resigning and had called the bank, he called former bookkeeper Sikora and asked her to travel to New York. (Raspudic Tr. 128:8-1.) According to Betulovici, Sikora after her arrival reported that Respondent’s “cash book”, “payroll files” and “checkbook” were missing and it was that point he told Raspudic to fire Arsovski.⁷ (Raspudic Tr. 127:8-25, 128:10-22.)

⁷ According to Betulovici, he personally searched the restaurant’s files after his return to New York in July 2013 and found that Arsovski’s payroll file was missing. (Betulovici Tr. 156:12-

In any event, Betulovici, after speaking with Arsovski, told Raspudic that Arsovski would stay because he was trying to fix the problem. (Raspudic Tr. 85:4-14.) Ungureanu subsequently returned the cash book to the restaurant. (Arsovski Tr. 108:1-109:20; Raspudic Tr. 58:22-23, 59:3-5.) Arsovski continued to work throughout this period and until June 25, 2013. (Raspudic Tr. 85:4-6.) Betulovici knew from Sikora that Arsovski remained employed at the restaurant after May 25. (Betulovici Tr. 160:17-24.)

IV. ARGUMENT

A. **The ALJ properly found that Raspudic is a supervisor within the meaning of Section 2(11) of the Act (Exception No. 1)**

Respondent excepts to the finding that Raspudic, the General Manager, is a supervisor within the meaning of Section 2(11) of the Act. Respondent, however, admitted to this in its answer to the complaint.⁸ *Compare* Gov. Exhs. 1(c) *with* Gov. Exh. 1(e). An admission in the answer is a confessional pleading and is conclusive upon the party making it. *Boydston Electric, Inc.*, 331 NLRB 1450 (2000) (quoting *Academy of Art College*, 241 NLRB 454, 455 (1979), *enfd.* 620 F.2d 720 (9th Cir. 1980)). Accordingly, Respondent is bound by its admission that Raspudic is a supervisor within the meaning of Section 2(11) of the Act and this exception must be rejected.

157:2.) He “presumed” Arsovski was responsible. (Betulovici Tr. 157:15-18.) Thus, by Respondent’s account, it obtained no new evidence as to the allegedly missing documents after about May 25, 2013.

⁸ Section 102.20 of the Board’s Rules and Regulations provides, in part: “All allegations in the complaint, if no answer is filed, or any allegation in the complaint not specifically denied or explained in an answer filed, unless the respondent shall state in the answer that he is without knowledge, shall be deemed to be admitted to be true and shall be so found by the Board, unless good cause to the contrary is shown.” Here, Respondent entered the following in its Answer relating to Raspudic’s supervisory status: “Paragraph number ‘4’ of the Complaint asserts legal conclusions to which no answer is required, however to the extent that an answer is required, Respondent admits that Yulian Betulovici and Josip Raspudic were either agents or supervisors of Respondent.”

B. The ALJ correctly found that Respondent terminated Arsovski on June 25, 2013 because of his protected activity (Exception Nos. 2 through 7)

In Exceptions 2 through 7, Respondent takes issue with the ALJ's rejection of its affirmative defenses. Respondent, for example, objects to the ALJ's failure to recognize that Arsovski's relationship with the bookkeeper gave rise to a problem because she was in control of Respondent's books (Exception No. 2), the finding that Arsovski remained employed until June 25, 2013 (Exception Nos. 3, 4 and 5), and the conclusions that Arsovski was fired because he filed a lawsuit rather than his relationship with the bookkeeper or because he stole his personnel file (Exception Nos. 6 and 7).

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 1089.⁹

⁹ The *Wright Line* standard upheld in *Transportation Management* and clarified in *Greenwich Collieries* 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

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 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

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.

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 affirmative defenses, Respondent asserts that Arsovski's affair with Ungureanu was a "problem" because she was in control of Respondent's books (Exception No. 2) and that Respondent discharged Arsovski for engaging in prohibited sexual conduct¹⁰ with her and for conspiring with her to steal his personnel file. (Exception Nos. 6 and 7). The evidence shows that these purported reasons are pretextual. By offering only pretextual justifications for the discharge, Respondent failed to show that it would have fired Arsovski absent his concerted activity

The defense that Arsovski was discharged on June 25 because of his affair with Ungureanu fails because Raspudic admitted that both he and his predecessor as General Manager knew about the relationship long before May 2013. (Raspudic Tr. 51:17-52:2.) The testimony suggesting that Betulovici, as the ultimate authority, only learned of the affair on May 25 does not require a different result because Respondent concedes that Arsovski remained employed until June 25, a month later. Lastly, there is no evidence Arsovski violated any related rule after May 25 because Ungureanu was no longer employed. The undisputed evidence therefore shows Respondent condoned the relationship until it learned of Arsovski's protected activities. This reliance upon

¹⁰ Respondent does not have an employee handbook, manual or any written personnel policies. (Betulovici Tr. 17:23-18:1.) According to Betulovici, he did not prohibit romantic relationships between the bookkeeper and "another supervisor" or between waiters, but it was "impossible" for a waiter to have relationship with a waiter. Respondent admits that it did not advise Arsovski of this "policy" before late May 2013 and then only after bookkeeper Georgina Ungureanu had resigned. (Arsovski Tr. 111:23-14; Betulovici 154:13; Raspudic Tr.52:3-53:3.)

previously condoned conduct is a clear indication that the defense is pretextual. See *Cincinnati Penthouse Club, Inc.*, 168 NLRB 969, 979 (1967) (Employee discharged because of her complaints over working conditions and not for dating night manager where employer had previously condoned their relationship.) Accordingly, the evidence provides a sound basis for the ALJ's rejection of the defense that Arsovski was discharged for misconduct relating to his affair with the bookkeeper. (ALJD 4:20-22.)

The defense that Arsovski was fired because of stolen documents is also pretextual. To summarize, Respondent witnesses Betulovici and Raspudic testified that Sikora, a former bookkeeper, discovered that there were documents missing on May 25 and that Betulovici fired Arsovski on that date because the "cash book", checkbook, and Arsovski's payroll files were missing. (Betulovici Tr. 127:8-25, 128:10-22, 141:3-4; Raspudic Tr. 80:1-9, 81:23-82:3.) As noted above, however, Arsovski continued to work until he engaged in protected activity one month later. It is highly improbable under this record that Respondent would have tolerated Arsovski's continued employment if it had any reason to believe he had taken employer property. In this regard, the evidence shows that Betulovici was actively involved in the restaurant's operation during the intervening period, speaking with Raspudic and Sikora twice a day. (ALJD 2:5-7; Betulovici Tr. 15:16; Raspudic 48:21-49:1.) It is simply implausible that they would not have discussed missing records, whether a personnel file, a checkbook, or any other records. Yet Raspudic, who had sufficient authority to hire and fire over twenty employees while Betulovici was away, testified that he was unaware of what if any other documents were allegedly missing after Ungureanu returned the cash book. (Raspudic Tr. 58:22-23, 59:3-5.) Therefore, the evidence again supports the ALJ's rejection of the defense that

Arsovski was discharged allegedly taking records from the restaurant. (ALJD 4:20-22.)

Finally, Respondent asserts that Arsovski was discharged for the above alleged misconduct on either May 25 or June 23, 2013 (Exception Nos. 4 and 5). As suggested by Respondent's very exceptions, its positions from the outset on this issue are inconsistent. Indeed, Respondent claimed over the course of this proceeding that Arsovski was fired on various dates prior to June 25, such as May 25, June 18, June 23, and June 24. Thus, Respondent initially claimed that Arsovski was employed until June 18, 2013. (J. Exh. 1 at p. 2.) Then, at the hearing, Betulovici testified during direct examination that he told Sikora to take Arsovski off the schedule on June 23. (Betulovici Tr. 165:21-166:18.) It is undisputed, however that Arsovski worked on June 23. (G.C. Exh. 7.) When confronted by a pay record showing this, Betulovici testified: "23rd, I see. So I guess I told her to tell him the 24rd when his offd date (sic). I'm not sure." (Betulovici Tr. 170:15-16.) Betulovici also testified that he decided to fire Arsovski on May 25. (Betulovici Tr. 127:8-9.) The one common thread between all these dates, of course, is that they preceded service of the collective lawsuit. In contrast, the ALJ relied on evidence showing that Respondent first learned about the lawsuit on June 25, 2013, as shown by an affidavit of service (ALJD 3:13; G.C. Exh. 4; Betulovici Tr. 142:3-16), Betulovici and Raspudic's admissions that Betulovici instructed Raspudic to removing Arsovski from the schedule after discussing Arsovski's lawsuit (Betulovici Tr. 160:2-5; Raspudic Tr. 71:2-3), and Raspudic's admission that he told Arsovski that same day that he was being sent home because of the lawsuit (ALJD 3:35-38; Raspudic Tr. 78:11-15.) Thus, substantial evidence supports the ALJ's conclusion that Respondent terminated Arsovski on June 25 after it received a copy of the lawsuit. (ALJD 4:18-20.) Moreover,

Respondents varied and uncertain positions to the contrary support a further finding of pretext.

In conclusion, then, Respondent fails to satisfy its burden to show Arsovski would have been discharged even in the absence of the protected activity. Accordingly, the Board should adopt the ALJ's conclusion that he was fired because he filed the collective lawsuit.

C. ALJ properly concluded that Respondent's decision to terminate Arsovski was motivated by a mistaken belief that the lawsuit was concerted group activity (Exception Nos. 8 and 9)

The ALJ reasonably found, in the alternative, that Respondent's decision to discharge Arsovski was motivated by a mistaken belief that Arsovski was engaged in concerted group action because the lawsuit states that it represents an action on behalf of a class of present and former employees. (ALJD 5:11-16.) There is no merit to Respondent's claim that this alternative finding is contrary to the applicable case law (Exception No. 9.)

Respondent, citing *NLRB v. Matros Automated Elec. Const. Corp.*, 366 F. App'x 184, 187 (2d Cir. 2010) for the *Wright Line* analysis, mistakenly insists that General Counsel must in all cases demonstrate concerted activity. To the contrary, it is well settled that a discharge motivated by a mistaken belief that an employee engaged in union and/or protected concerted activity violates Section 8(a)(1) and/or (3) of the Act¹¹. See *Liberty Ashes & Rubbish Co., Inc.*, 323 NLRB 9, 11 (1997) (discharge unlawful where based on mistaken belief that employee engaged in protected concerted activity); *Salisbury Hotel*, 283 NLRB 685, 686 (1987). In such cases, it is unnecessary to also

¹¹ Respondent is correct that the two cases cited by the ALJ---*NLRB v. Scrivener*, 405 U.S. 117 (1972) and *Trayco of S.C.*, 297 NLRB 630 (1990)---do not squarely stand for this proposition. Those cases instead address a mistaken belief than an employee had given testimony to the Board.

determine whether the employee was in fact engaged in concerted activity. *Liberty Ashes*, 323 at 11. Here, as noted by the ALJ, the lawsuit on its face asserts that the wage claims therein were brought by Arsovksi as an individual and on behalf of “all others similarly situated”, making it a group complaint.¹² (ALJD 2:46-47; J. Exh. 2.) The ALJ concluded that a discharge based on such mistaken belief would be unlawful even if the lawsuit alone was not conduct seeking to initiate or induce group action. Accordingly, Respondent’s exception regarding the ALJ’s alternate finding must be disregarded.

D. The remedies sought in the complaint are appropriate and within the scope of the Board’s authority (Exception Nos. 10 through 17)

Finally, Respondent excepts to the remedies recommended by the ALJ (Exception Nos. 10 through 17), but provides no argument except that there is no appropriate remedy as there was no violation of the Act.

Section 10(c) of the Act, 29 U.S.C. 160(c), expressly authorizes the Board, upon finding a violation of the Act, to order the violator “to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement with or without backpay, as will effectuate the policies of the Act.” Here, the ALJ properly found that Arsovski protected concerted activities were a motivating factor in Respondent’s decision to fire him and that Respondent’s stated justification for the termination were pretextual. The ALJ recommended the standard remedies for an unlawfully motivated discharge, including reinstatement, backpay, and a notice posting. These standard remedies are authorized by the Act and within the Board’s broad discretionary powers to fashion appropriate remedies. See e.g., *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014) For

¹² Although the evidence does not show whether Betulovici received a copy of the document that day, there is no basis in the record for Respondent’s assertion in Exception No. 8 that he was unable to do so “because the fax machine was down.”

these reasons, the Board should reject these exceptions.

V. CONCLUSION

For all the reasons discussed above, the Board should reject Respondent's exceptions and adopt the ALJ's recommended order in its entirety.

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



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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

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

and
MARJAN ARSOVSKI, an Individual

Case No. 02-CA-115871

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 COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS, 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