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

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

and Case No. 02-CA-115871

MARJAN ARSOVSKI, an Individual

BRIEF IN OPPOSITION TO PETITIONER'S CROSS EXCEPTIONS
AND IN FURTHER SUPPORT OF RESPONDENT'S EXCEPTIONS

STATEMENT OF THE CASE

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

The record compiled at the March 10, 2013 hearing demonstrates that finding that the ALJ's finding that Arsovski was wrongfully terminated lacks merit.

The ALJ correctly found that, during the specific periods in question, Arsovski, despite the restaurant forbidding such relationships, conceded that he was sexually involved with the bookkeeper in control of Arsovski's financial records. The ALJ conceded that this scenario could justify termination, because the bookkeeper could manipulate the books in Arsovski's favor. Despite this finding, the ALJ erroneously concluded that no manipulation occurred, so that firing Arsovski was unjustified.

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

The cases cited by the ALJ and General Counsel for the NLRB ("General Counsel") to support this holding are not followed by the Second Circuit or the District Courts in New York State. Therefore, his decision that Arsovski was wrongfully terminated should be reversed, and the Claim should be denied in its entirety.

STATEMENT OF FACTS

CASE HISTORY & BOARD PROCEEDINGS

Respondent refers to the transcript of NLRB hearing on March 10, 2014. NLRB hearing ("T."). Petitioner ("Arsovski") 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 ("Betulovici"), a hands-on owner, regularly spoke on the telephone with Josip Raspudic ("Raspudic'), the restaurant manager, and Anna Ungureana ("Anna"), the restaurant bookkeeper [T. p. 15, l. 5-23]. In Betulovici's absence, Raspudic was responsible for managing the wait staff and Anna was responsible for managing the books, However, Betulovici was the sole person who could 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 Betulovici's consent [T. pp. 29-30].

At the March 10, 2014 hearing, Betulovici explained that, earlier in May 2013, his former bookkeeper Anna, had called him in Poland and had given him a two-week notice of her resignation. Betulovici then called his previous bookkeeper, Marta Sikora ("Marta"), 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 Arsovski's personnel file, contained records of, among other financial documents, records of payment receipts signed by Arsovski, and that Arsovski was involved in a sexual relationship with the former bookkeeper Anna [T. p. 128, l. 2-22]. Upon learning of the

intimate relationship between Arsovski and Anna, Betulovici determined that Arsovski was in a relationship with the person in charge of his salary and tips, that his personnel files containing the related financial records were missing and that this scenario posed a threat to the restaurant. Betulovici called Arsovski on the phone and asked for the return of the files. Arsovski said that if Anna received severance pay he would "see about the missing files", but the files were never returned.

On May 25, 2013, Betulovici called Raspudic, the restaurant manager, and told him to fire Arsovski due to his improper relationship with the bookkeeper, theft of restaurant property and Arsovski's hostile behavior [T. p. 126-132]. Nonetheless, 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].

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

It is equally undisputed that Arsovski 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]. Arsovski 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 lawsuit [T. p. 133 l. 17-25].

AJL DECISION

Respondent refers to the April 19, 2014 decision of the Administrative Law Judge ["D]. Respondent excepted to the determination that Arsovski was wrongfully terminated. The ALJ determined that the restaurant manager, Raspudic, is a supervisor within the meaning of Section 2 (11) of the Act. (D. 2:5). The testimony at the March 10, 2014 hearing establishes that Betulovici is the sole person with the authority to hire and fire employees [T. p. 126, l. 23].

While the ALJ determined that relationships between waiters and bookkeepers could be justification for Arsovski's termination, he found that there was no justification in the instant case. [D. 2:20]. The record established that Arsovski was involved in a personal relationship with the bookkeeper [T. p. 107, l. 12-14]. The record further established that Arsovski's personnel file was the only file missing from the bookkeepers records [T. p. 128, l. 2-22].

The ALJ further erroneously found that Arsovski continued to work without further misconduct from May 25, 2014, until his termination in June [D. 2:40]. As explained above, this was not the case. The testimony established that after May 25, 2013, Arsovski remained hostile to other employees [T. pp. 134-136].

The ALJ concluded that the transgressions that occurred in May 2013, were not sufficient to fire Arsovski and that as a result, the filing the FLSA suit was the only reason for Arsovski's termination [D. 4:20-25]. This conclusion is incorrect. Clearly, an employee, who is admittedly involved in a relationship with the person in custody of his financial records and in charge of his salary and tips, is sufficient to warrant termination.

[T. p. 166-167]. Betulovici fired Arsovski for engaging in prohibited sexual conduct with a supervisor [T. 126-132].

POST DECISION PROCEEDINGS

On May 22, 2014 Respondent filed exceptions to the ALD's holding that Arsovski was wrongly terminated. On June 10, 2014 General Counsel filed cross-exceptions to the ALD and a brief in support of General Counsel's cross exceptions and in support of the ALD that Arsovski was wrongfully terminated. Specifically, General Counsel objected to the ALJ finding that Arsovski was not engaged in protected activity when he filed the FLSA suit.

SUMMARY OF ARGUMENT

The two issues in this case are (i) whether Arsovski was engaged in protected concerted activity when he filed the FLSA action and (ii) whether Beyoglu had a justified reason for firing Arsovski.

General Counsel relies on D.R. Horton, 357 NLRB No. 184 (2012) for the proposition that where an individual files a class or collective action regarding wages, hours or working conditions he seeks to initiate or induce group action and thus, is engaged in conduct protected by Section 7 of the Act. This is a misinterpretation of the holding in D.R. Horton, Inc., supra. This decision noted that the filing of a collective action by an individual employee shows an inference of intent on the part of the individual employee to initiate or induce group action. In the instant case, Arsovski's testimony directly contradicts any inference of intent, on the part of Arsovski, to initiate

group action. The ALJ correctly found that Arsovski was not engaged in protected activity when he filed the lawsuit. The ALJ held "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." Thus, based on the applicable NLRB decisions and Second Circuit case law, the determination by the ALJ that Arsovski was not engaged in protected activity is correct and should be upheld.

The ALJ erroneously found that Arsovski's termination was unlawful because Betulovici believed, albeit incorrectly, that Arsovski was engaged in protected concerted activity when he filed the FLSA action. This argument is both factually and legally flawed. There is no evidence that Betulovici read the FLSA Complaint. At the time the restaurant was served Betulovici was still in Poland. He was informed, via phone, that Arsovski filed a lawsuit. The ALJ was in no position to conclude that Betulovici believed that Arsovski was engaged in protected activity. Regardless, Betulovici's state of mind was irrelevant.

The ALJ determined that Arsovski was not engaged in protected activity. Therefore, further analysis regarding the basis of Arsovski's activity in unnecessary. Regardless, the ALJ erroneously concluded that Petitioner's termination was unlawful. Arsovski was fired for cause, thus the existence of an impermissible motivation for his termination is irrelevant. Mt. Healthy City School District Board of Education v. Doyle, 429 U.S. 274 (S. Ct. 1977).

ARGUMENT

POINT 1

ARSOVSKI WAS NOT ENGAGED IN PROTECTED CONCERTED ACTIVITY; THEREFORE, HIS TERMINATION DID NOT VIOLATE SECTION 7 OF THE ACT, 29 U.S.C. § 157.

Section 7 of the Act, 29 U.S.C. § 157 ("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 be engaging in protected concerted activity, if he 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 Arsovski was **not** engaged in protected activity when he filed the FLSA action. This determination should be upheld.

In his brief opposing the ALJ determination that Arsovski was not engaged in protected activity, General Counsel incorrectly relied on D.H. Horton, supra. He cited this case for the proposition that if an individual employee files a FLSA action, he or she seeks to initiate protected activity even if the individual employee is not acting on the authority of other employees. General Counsel relies on Arsovski's testimony that he discussed pay practices informally with other employees and that he informed one employee that he was filing the lawsuit, to support a finding that Arsovski was engaged in protected activity. As explained above D.H. Horton, supra, only indicates that the filing of a FLSA action implies intent to initiate protected activity. Arsovski's testimony that he was not acting on the authority of or on behalf of any other employee of Beyoglu rebuts any inference that he sought to initiate group action.

Similarly, despite the fact that the Arsovski alleged in his FLSA Complaint, that he filed his case on behalf of similarly situated employees, his testimony at the March 10, 2014 NLRB hearing completely contradicts the inference that he was engaged in concerted activity. On cross-examination, Arsovski 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. Thus, Arsovski was not acting on the authority of other employees to induce or prepare for group action

The ALJ correctly determined that "His lawsuit was not filed with their consent, or except perhaps in one case, even with their knowledge." The facts in the instant circumstance clearly contradict any reasonable conclusion that Arsovski was acting on behalf of other employees to induce group action when he filed the FLSA action. See Meyers Industries, 281 NLRB 882, 885 (1986).

The ALJ conclusion, that Arsovski's discharge was unlawful because it was motivated by Betulovici's mistaken belief that Arsovski was engaged in protected activity when he filed the FLSA action is without merit. This conclusion is not supported by the applicable case law. The cases NLRB v. Scrivener, 405 U.S. 177 (S.Ct. 1972) and Treyco of S.C., 297 NLRB 630 (1990), cited by the ALJ do not address this specific conclusion, and the Second Circuit does not apply this standard. General Counsel concedes this fact on page 18 of Petitioner's Brief dated June 10, 2014. (See footnote 11, "Respondent is correct that the two cases cited by the ALJ…do not squarely stand for this proposition.)

In a misplaced effort to correct the ALJ's oversight, General Counsel cites Liberty Ashes & Rubbish Co., Inc., 323 NLRB 9 (1997) and Salisbury Hotel, 283 NLRB 685

(1987) to support the argument that Betulovici's state of mind regarding the issue of whether Arsovski was engaged in protected activity is relevant. Both of these cases are outdated NLRB decisions. These decisions are many years prior to the Second Circuit decisions that set forth the standards regarding unlawful termination. The Second Circuit supersedes the cases that General Counsel cites for the proposition that Respondent's state of mind has any relevance to the determination of whether Arsovski was engaged in protected activity when he was terminated.

The applicable standard in the Second Circuit for determining whether a termination is lawful is that the General Counsel 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 actually engaged in protected activity before the employer's state of mind becomes relevant. Therefore, the ALJ erred in determining that Arsovski's termination was unlawful.

The record establishes and the ALD determined that Arsovski was not engaged in protected concerted activity in filing the FLSA action. Therefore, Arsovski's termination was lawful, and the ALD finding of unlawful termination should be reversed and the complaint should be dismissed in its entirety.

POINT II

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

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

As set forth above, Arsovski 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. The record established that Arsovski engaged in misconduct that warranted dismissal.

The determination that Arsovski's employment would be terminated was made in May 2013, approximately a month prior to the filing by the Petitioner of the FLSA suit.

General Counsel argues that Betulovici did not conclusively establish that Arsovski conspired with the bookkeeper to steal his books and records. However, Arsovski confirmed during his testimony, that he was engaged in a sexual relationship with the bookkeeper, that he was aware that his personnel file was missing, and that Betulovici expressed his professional displeasure regarding these events. Clearly, a reasonable inference can be made that under the circumstances, that Arsovski conspired with the bookkeeper to steal his file.

Arsovski did not have an employment contract. He was an at-will-employee. An establishment owner, such as Betulovici, believing that an employee's actions, including

engaging in a relationship with another employee and 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 Arsovski. Some misconduct is so egregious that warnings are not pre-conditions to termination.

General Counsel tries to pin point the exact day of Arsovski's termination in an effort to establish that the filing of the lawsuit was the single motivation for Petitioner's termination. The proximity of time of a termination as related to "protected" activity is not dispositive of an employer's motive. Here, Arsovski's improper activity began in late May 2013 and continued up until the date of his eventual termination in June. In this case the justifiable reasons for Arsovski's termination are so close to Arsovski's filing of the FLSA suit that the Board must focus on Betulovici's justifiable reasons for terminating Arsovski, not the timeline.

General Counsel's argument that Betulovici knew about Arsovski's behavior "long before" his termination and "condoned" said activity is without merit. As soon as Betulovici learned of Arsovski's improper behavior he immediately told Raspudic to fire him.

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

Betulovici returned from Europe. It is unclear whether Raspudic's communication to Arsovski to stay at home until Betulovici's occurred prior to the restaurant's receipt of the lawsuit or on the day of receipt of the lawsuit. However, the exact date of Arsovski's termination is irrelevant. Arsovski would have been fired, and was to have been fired, and in fact was fired, regardless of the FLSA suit.

Based on the foregoing the termination was lawful. Since Arsovski was fired for wholly permissible reasons, the existence of a possible impermissible motivation for Arsovski's termination 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.

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
June 13, 2014

Respectfully submitted,

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MARJAN ARSOVSKI, an Individual

AFFIDAVIT OF SERVICE

Gail Weiner, attorney for the Respondent. Being duly sworn, deposes and says that on the date indicated below, I filed Respondent's Brief in Opposition to Petitioner's Cross-Exceptions and in further Support of Respondent's Exceptions, electronically through the NLRB E-File system and served the document via email upon the following persons:

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Sworn to before me this 24th day of June, 2014

Lydia A Cirrito
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