200 East 81st Restaurant Corp. d/b/a Beyoglu *and* Marjan Arsovski. Case 02–CA–115871

July 29, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On April 29, 2014, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed exceptions and a supporting brief; the General Counsel filed cross-exceptions with supporting argument; and the General Counsel and the Respondent each filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions[2] and to adopt the recommended Order as modified and set forth in full below.[3]

The judge found that the Respondent discharged employee Marjan (Mario) Arsovski after it received notice on June 25, 2013, that Arsovski had filed a lawsuit in the United States District Court for the Southern District of New York, on behalf of himself and other similarly situated employees, which alleged certain violations of the Fair Labor Standards Act (FLSA).[4] The judge found that the Respondent discharged Arsovski because he had filed the lawsuit and dismissed the Respondent's other asserted reasons for terminating Arsovski as pretextual.

We agree with the judge, for the reasons he stated, that the Respondent discharged Arsovski because he filed a FLSA collective action. Because the Respondent has not asserted any other nonpretextual reasons for discharging Arsovski, the lawfulness of Arsovski's discharge turns on whether Arsovski was engaged in protected concerted activity when he filed the FLSA lawsuit.

Although the complaint filed in the FLSA lawsuit alleges that it was filed on behalf of a class of similarly situated employees who work or have worked for the Respondent over a 3-year period of time, the judge found that Arsovski filed the lawsuit without the consent of any other employees.[5] But in light of the wording of the complaint, the judge also found that, whether or not Arsovski's filing was concerted activity, it was reasonable to conclude that the Respondent believed or at least suspected that Arsovski was engaged in concerted group action.[6]

The Board has long held that the filing of a lawsuit by a *group* of employees is protected activity. See *D. R. Horton*, 357 NLRB 2277, 2278 fn. 4 and cited cases (2012), enf. denied in part 737 F.3d 344 (5th Cir. 2013). However, the Board has never been squarely presented with the question presented here: whether a single employee who files a lawsuit ostensibly on behalf of himself and other employees is engaged in protected concerted activity. We hold that he is, based on the reasoning of two recent Board decisions.

In *D. R. Horton*, supra, the Board was asked to decide whether an employer unlawfully maintained a mandatory arbitration agreement.[7] In the context of discussing the concertedness of collective legal action, the Board stated, "[c]learly, an individual who files a class or collective action regarding wages, hours or working conditions,

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] The Respondent excepts to the judge's finding that General Manager Josip Raspudic was a supervisor. Par. 4 of the complaint alleges that Raspudic was, at all material times, a statutory supervisor within the meaning of Sec. 2(11) of the Act, and the Respondent in its answer admitted this allegation. At no time did the Respondent retract its admission. The issue of Raspudic's supervisory status was not litigated at the hearing because the General Counsel was entitled to rely on the Respondent's admission. Raspudic's supervisory status is therefore established. See *Liberty Natural Products*, 314 NLRB 630, 630 (1994), enfd. mem. 73 F.3d 369 (9th Cir. 1995), cert. denied 518 U.S. 1007 (1996).

[3] In adopting the judge's substantive findings, we provide below formal "Conclusions of Law" and a formal "Remedy" section, which the judge inadvertently omitted from his decision. We shall modify the judge's recommended Order to conform to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[4] Par. 10 of the FLSA complaint states that it is brought by "Plaintiff on behalf of himself and similarly situated persons who are current and former tipped employees . . . who elect to opt-in to this action . . . ." Par. 11 states that the "FLSA Collective consists of approximately forty (40) similarly situated current and former employees of Beyoglu, who, over the last three years, have been victims of Defendants' common policy and practices that have violated their rights under the FLSA, by, inter alia, willfully denying them overtime wages."

[5] Arsovski testified that he invited fellow employee Burak Sunar to join in the lawsuit, but Sunar refused. The judge found that no other employees had knowledge of the lawsuit before it was filed "except perhaps in one case." The General Counsel does not allege that Arsovksi's purported conversation with Sunar constituted concerted activity and, because the judge made no explicit findings on the existence or content of the conversation, we do not include it in our analysis of whether Arsovski engaged in concerted activity.

[6] An employer may violate the Act when it retaliates against an employee in the belief that the employee engaged in protected concerted activity. See, e.g., *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1205 (2014).

[7] Because the allegation in *D. R. Horton* was that the employer maintained a mandatory arbitration agreement that was unlawful on its face, the Board was not called on to decide if any employees there had actually engaged in protected concerted activity.

whether in court or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7." Id. at 3.[8]

The Board reaffirmed and applied the rationale of *D. R. Horton* in *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014), addressing an allegation that an employer had unlawfully maintained and enforced a mandatory arbitration agreement that prohibited employees from exercising their Section 7 right to litigate employment-related claims concertedly. In discussing the protected nature of joint, class, or collective legal activity, the Board addressed—and rejected—the argument that the filing of a class action lawsuit is not protected concerted activity if only one employee is immediately involved.[9] The Board observed:

> By definition, such an action is predicated on a statute that grants rights to the employee's coworkers, and it seeks to make the employee the representative of his colleagues for the purpose of asserting their claims, in addition to his own. Plainly, the filing of the action contemplates—and may well lead to—active or effective *group* participation by employees in the suit, whether by opting in, by not opting out, or by otherwise permitting the individual employee to serve as a representative of his coworkers. It is this potential "to initiate or to induce or to prepare for group action," in the phrase of *Meyers II* [*Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)]—collectively seeking legal redress—that satisfies the concert requirement of Section 7.

Id. at 13 (emphasis in original).

We apply here the principles of *Meyers II*, as articulated in both *D. R. Horton* and *Murphy Oil*. Specifically, we hold that the filing of an employment-related class or collective action by an individual employee is an attempt to initiate, to induce, or to prepare for group action and is therefore conduct protected by Section 7.[10]

Thus, we find that Arsovski engaged in protected concerted activity when he filed the FLSA lawsuit on behalf of himself and other similarly-situated employees. Because, as the judge found, the Respondent discharged Arsovski for engaging in this protected concerted activity, the Respondent thereby violated Section 8(a)(1) of the Act.[11]

CONCLUSIONS OF LAW

1. The Respondent is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent has interfered with, restrained, and coerced its employees in the exercise of the rights guaranteed in Section 7 of the Act, in violation of Section 8(a)(1) of the Act, by discharging Marjan (Mario) Arsovski because he engaged in protected concerted activity by filing a lawsuit in U.S. District Court, on behalf of himself and other similarly situated employees, which alleged certain violations of the Fair Labor Standards Act.

3. The unfair labor practice set out in paragraph 2 affects commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in an unfair labor practice, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

Having found that the Respondent violated Section 8(a)(1) by discharging Marjan (Mario) Arsovski, we shall order the Respondent to offer Arsovski reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position without prejudice to his seniority or other rights and privileges. We shall further order the Respondent to make Mario Arsovski whole for any loss of earnings or other benefits suffered as a result of the Respondent's unlawful actions against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

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[8] Under *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988), concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." Id. at 887. See also *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 834–835 (1984) (upholding Board rule that individual employee's assertion of right under collective-bargaining agreement was protected concerted activity).

[9] The FLSA collective action at issue in *Murphy Oil* was filed by four employees, thus presenting a different fact pattern than the current case.

[10] Given this holding, we need not decide whether the retaliatory discharge of an employee who individually files such a lawsuit would be unlawful under the "preemptive strike" theory endorsed in *Parexel International, LLC*, 356 NLRB 516, 518–519 (2011) (employer violated Act when it terminated employee who had not engaged in protected concerted activity, to prevent employee from engaging in future protected concerted activity).

[11] For the reasons stated in the judge's decision, Chairman Pearce would also find that the Respondent's discharge of Arsovski violated Sec. 8(a)(1) because the Respondent acted on its belief that Arsovski had engaged in concerted group action when he filed the collective action. Member McFerran finds it unnecessary to address whether the Respondent could be held liable simply because it believed that Arsovski's conduct was concerted.

Additionally, we shall order the Respondent to compensate Mario Arsovski for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. See *Don Chavas LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014).

Further, we shall order the Respondent to remove from its files all references to the unlawful discharge of Mario Arsovski and to notify Arsovski in writing that this has been done and that the unlawful discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, 200 East 81st Restaurant Corp., d/b/a Beyoglu, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities, including filing lawsuits on behalf of themselves and other employees relating to their wages.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Marjan (Mario) Arsovski full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Mario Arsovski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Compensate Mario Arsovski for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Mario Arsovski, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 25, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

MEMBER MISCIMARRA, dissenting.

My colleagues hold today that, whenever a single employee pursues a class or collective action claim or complaint over which the NLRB has no jurisdiction—in this case, the complaint involves the Fair Labor Standards Act (FLSA)—the employee automatically engages in protected concerted activity under Section 7 of the National Labor Relations Act (NLRA or Act).

I disagree with my colleagues' view that every non-NLRA class or collective action claim, arising under statutes over which the NLRB has no jurisdiction, triggers an automatic overlay of NLRA rights and restrictions.[1] As expressed at length in my dissenting opin-

[12] If this Order is enforced by a judgment of the United States court of appeals, the words in the notice reading, "Posted by Order of the National Labor Relations Board" shall read, "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

[1] My colleagues here adopt a proposition that the Board assumed—I believe incorrectly—in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012), enf. denied in pertinent part 737 F.3d 344 (5th Cir. 2013), and *Murphy Oil USA, Inc.*, 361 NLRB 774 (2014). In *D. R. Horton* and *Murphy Oil*, the Board asserted that a single employee's pursuit of a non-NLRA class or collective action lawsuit, though based on a non-NLRA statute

ions in *Murphy Oil*[2] and *Fresh & Easy Neighborhood Market*,[3] the presence or absence of protected concerted activity for purposes of the NLRA turns on whether Section 7's statutory requirements are met—i.e., is there "concerted" activity by two or more employees engaged in "for the purpose of collective bargaining or other mutual aid or protection."[4] See generally *Meyers Industries*, 268 NLRB 493 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), on remand *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988); *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). If the record reveals that these requirements are satisfied, I agree that a broad range of concerted activities by two or more employees regarding a non-NLRA claim may be protected under the NLRA. However, I believe our statute makes it immaterial whether or not the non-NLRA claim is styled as a class or collective action. As I explained previously:

> When an individual files a class or collective action, there is no involvement by *any* other employees, the act of filing does not constitute an *appeal* to other employees, there is no assurance that other employees will *participate* in the matter (indeed, the point of class action litigation is to bind nonparticipants), and there is no certainty that the court or other adjudicator will find that "class" or "collective" treatment is appropriate. . . . Sec. 7 on its face and controlling Board precedent make clear that the Act's protection is triggered only where the evidence proves that "concerted" activities—defined as conduct that, at the least, looks toward "*group* action"—is being undertaken for the "purpose" of "*mutual* aid or protection." . . . In my view, the filing of a legal claim or complaint by a single employee – regardless of what procedural treatment the person may desire – does not instantly convert the endeavor into "concerted" or "group" action, nor does it necessarily establish a "purpose" of "mutual aid or protection" by and between multiple employees.[5]

In short, depending on the facts, some conduct by employees regarding a non-NLRA claim *will* trigger NLRA protection even if the claim is *not* a class or collective action, and other conduct regarding a non-NLRA claim, though it *is* a class or collective action, may *lack* NLRA protection.

Here, employee Mario Arsovski testified that he mentioned filing a lawsuit against the Respondent to one coworker, Burak Sunar, who declined his invitation to join. The judge did not resolve whether Arsovski's testimony was credible. If Arsovski asked coworker Sunar to join his Fair Labor Standards Act (FLSA) lawsuit, that activity might have been concerted and protected under Section 7, not because of the class-type procedure applicable to the lawsuit, but because Arsovski's appeal to Sunar involved an effort to initiate or induce group action. See *Altex Ready Mixed Concrete Corp. v. NLRB*, 542 F.2d 295, 297 (5th Cir. 1976) (finding that "filing by employees of a labor related civil action is protected activity under section 7").

However, this does not end the inquiry in this case, which involves whether the Respondent *terminated* Arsovski's employment in violation of NLRA Section 8(a)(1), which makes it unlawful for an employer "to interfere with, restrain, or coerce employees *in the exercise of the rights guaranteed in section 7*" (emphasis added). As to this allegation, there is no evidence that the Respondent *knew* about the Arsovski-Sunar conversation, much less discharged Arsovski for it. And putting aside the Arsovski-Sunar conversation, there is no other evidence that Arsovski engaged in any other type of "concerted" activity for "mutual aid or protection." There is only Arsovski's individual act of filing an FLSA lawsuit, which was not concerted activity.[6]

The judge found, and I agree, that the evidence supports a conclusion that Respondent discharged Arsovski

over which the Board has no jurisdiction, inherently involved "concerted" activity involving two or more employees for "mutual aid or protection" for purposes of NLRA Section 7. See, e.g., *Murphy Oil*, supra at 778 (stating that "bringing joint, class, or collective workplace claims in any forum" constitutes "the exercise of the *substantive* right to act concertedly for mutual aid or protection that is central to the [NLRA]"); *D. R. Horton*, supra at 279 ("[A]n 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."). I disagree with this proposition for the reasons stated in the text and in my dissenting opinion in *Murphy Oil*, supra, slip op. at 22–35 (Member Miscimarra, dissenting in part).

[2] See *Murphy Oil*, supra at 795–808 (Member Miscimarra, dissenting in part).

[3] 361 NLRB 151, 161–173 (2014) (Member Miscimarra, dissenting in part).

[4] See *Murphy Oil*, supra 798 fn. 23 (Member Miscimarra, dissenting); *Fresh & Easy*, supra at 163 (Member Miscimarra, dissenting in part).

[5] *Murphy Oil*, supra at 799 fn. 28 (Member Miscimarra, dissenting), quoting *Meyers I* and *Meyers II*, supra, and *Mushroom Transportation*, supra, 330 F.2d at 685.

[6] Nor, contrary to the judge's decision, is there any evidence that the Respondent interfered with the exercise of Sec. 7 rights by discharging Arsovski because it *believed* that his lawsuit constituted concerted activity for mutual aid or protection. The district court complaint the Respondent saw only indicated that Arsovski sought collective-action procedural treatment for his claim, not that any concerted activity was occurring or had occurred.

in retaliation for the FLSA lawsuit. However, such retaliation is not prohibited under our statute. Rather, it is directly prohibited by FLSA Section 15(a)(3), which makes it unlawful for any person to "discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this Act. . . ." The NLRB has no jurisdiction over alleged violations of FLSA Section 15(a)(3). And because the record does not support any finding that Respondent had knowledge of the only "concerted" conduct by Arsovski that is protected by NLRA Section 7—namely, the Arsovski-Sunar conversation—I believe the Board cannot properly find that Respondent's actions were prohibited by NLRA Section 8(a)(1).

Again, this does not mean that Arsovski lacked an effective remedy for Respondent's retaliation, since the FLSA directly prohibits an individual's employment termination based on the filing of an FLSA complaint. FLSA Section 15(a)(3); see also *Kasten v. Saint-Gobain Performance Plastics Corp.*, 131 S.Ct. 1325 (2011) (applying 29 U.S.C. § 215(a)(3)). But we are not permitted to "tak[e] it upon ourselves to assist in the enforcement of other statutes. The Board was not intended to be a forum in which to rectify all the injustices in the workplace." *Meyers II*, 281 NLRB at 888.

In the circumstances presented here, I believe Congress intended Respondent's conduct to be redressed pursuant to the FLSA. And I believe my colleagues incorrectly interpret the record and our statute when they find that Respondent violated NLRA Section 8(a)(1).

Accordingly, I respectfully dissent.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge you for engaging in protected concerted activities, including filing lawsuits on behalf of yourselves and other employees relating to your wages.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Marjan (Mario) Arsovski full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Mario Arsovski whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Mario Arsovski for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Mario Arsovski and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

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

The Board's decision can be found at www.nlrb.gov/case/02-CA-115871 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Simon-Jon H. Koike, Esq., for the General Counsel.
Gail Weiner, Esq., for the Respondent.
Jessica N. Tischler, Esq. and *Mark D. Lebow, Esq.,* for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in New York, New York, on March 10, 2014. The charge in this case was filed on October 29, 2013. The complaint which issued on December 18, 2013, and alleged that on or about June 25, 2013, the Respondent discharged Marjan Arsovski because he, in concert with other employees, filed a lawsuit alleging violations of the Fair Labor Standards Act and the New York Labor Law.

On the entire record,[1] including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent is a retail establishment which, during the calendar year ending November 13, 2013, derived gross revenue in excess of $500,000 and purchased and received at its New York place of business, goods and supplies valued in excess of $5000 directly from points located outside the State of New York. I therefore find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the National Labor Relations Act (the Act). *Carolina Supplies & Cement Co.*, 122 NLRB 88 (1958).

II. ALLEGED UNFAIR LABOR PRACTICES

The Respondent is a restaurant on the upper east side of Manhattan. The owner is Julian Betulovici, who in part for medical reasons, spends a large part of the year outside of New York. At the time of the events herein, the general manager was Josip Raspudic, who in May 2013 had replaced Alexander Georghiou. It is admitted that Raspudic is a supervisor within the meaning of Section 2(11) of the Act. The evidence shows that Raspudic is the person who supervises the restaurant's noncooking staff. The evidence further shows that because Betulovici is away for a good part of the year, Raspudic is the main person who runs the restaurant, albeit he and Betulovici are in daily contact with each other, either by phone or email when the latter is either in Poland or Florida.

Also at around the same time period, Anna Urgureanu was hired to be the new bookkeeper. In this regard, she replaced Marta Sikora, a long-term employee, who had resigned in December 2012 or January 2013 and moved to California. It is conceded that Urgureanu was also a supervisor within the meaning of the Act. However, her main job was to account for and register the daily receipts and expenditures for the restaurant.

The Charging Party, Arsovski, was 1 of about 8 to 10 waiters who worked at the restaurant. As a waiter, a substantial proportion of his income was based on tips; mainly obtained from credit cards payments.

At the time of these events, Arsovski was having an affair with Urgureanu. Since she was the bookkeeper and therefore the person who was responsible for tallying up the income each day and figuring out what tips should go to what person, this could theoretically give rise to a problem because she would be in a position to juggle the records so that Arsovski would be able to obtain more in tips than he was entitled to. There is however, no evidence in this case that this occurred.

Some time between May 20 and 23, Urgureanu gave notice of her intention to resign. This was communicated to Betulovici who was in Poland at the time and he asked Marta Sikora to return to the bookkeeping position until he could find a replacement. She agreed.

According to Betulovici, after Sikora returned in late May, she informed him that Arsovski was having an affair with Urgureanu and that Arsovski's personnel file was missing. She also told him that a notebook containing a record of receipts and payments was missing. Betulovici testified that when he found out what was going on between Arsovski and Urgureanu, he phoned Raspudic on May 25 and told him to fire Arsovski.

Despite the claim by Betulovici that he decided to terminate Arsovski on May 25 because of his inappropriate relationship with Urgureanu and the missing records, this did not, in fact, occur. Raspudic did not tell Arsovski that he was being terminated and Arsovski continued to work without incident until June 25, 2013.

Arsovski testified that in May and June he spoke to a few of the other waiters about wages. He also testified that he told another employee named Burak Sunar that he was going to file a lawsuit. According to Arsovski, he asked Sunar to join in the lawsuit, but Sunar refused.[2]

On June 20, 2013, Arsovski, through legal counsel, filed a lawsuit in the U.S. District Court which alleged certain violations of the Fair Labor Standards Act (FLSA). At paragraph 10 of the complaint, it states that it is brought by "Plaintiff on behalf of himself and similarly situated persons who are current and former tipped employees. . . , who elect to opt in to this action. . . ." At paragraph 11, it states that the "FLSA Collective consists of approximately 40 similarly situated current and former employees of Beyoglu, who over the last three years, have been victims of Defendants' common policy and practices that have violated their rights under the FLSA, by, inter alia, willfully denying them overtime wages."

Notwithstanding the complaint's assertion that Arsovski was acting on behalf of other similarly situated or affected employees, he did not obtain any kind of authorizations from any present or past employee to file this lawsuit. That is, if he was acting on their behalf, he was doing so without their prior authorization.

The complaint was served on the Respondent on the morning of June 25, 2013. This then generated a series of phone calls between Betulovici, Raspudic, and Sikora about the lawsuit.

[1] The General Counsel's unopposed Motion to correct the record is granted.

[2] This employee was not called as a witness.

(Betulovici was still in Poland.) Also on this morning, Sikora opened a letter from Arsovski's lawyer and apparently after communicating its contents to Betulovici, had a phone conversation with Arsovski where she told him that they were "shocked" at Arsovski's actions.

As Arsovski was scheduled to work the dinner shift on June 25, he arrived at the restaurant in the afternoon. When he arrived he saw that his name was not on the work schedule. Thereafter, he, Raspudic and Sikora went upstairs to have a chat. According to Arsovski, Raspudic told him that the company had received a letter from his lawyer and that from that point on, the parties would communicate only through their lawyers. When Arsovski asked why had been removed from the schedule, Raspudic stated that Betulovici had told him that he didn't want Arsovski at the restaurant until he returned from his vacation. (He was scheduled to return in 2 weeks.) According to Arsovski, when he again asked why he was being removed from the schedule, Raspudic said; "Well, you're filing a lawsuit. What do you expect? To work?" Arsovski also testified that Raspudic said that Betulovici was "done with him."

Arsovski's account of this meeting was largely corroborated by Raspudic who testified as follows:

> Q. Okay. So the three of you walk upstairs and then how does it begin? I mean.
>
> A. I start the conversation. I said 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 about it. He don't want you in the restaurant right now. He's going to deal with this when he comes back.
>
> Q. Okay. Did he say he—did you tell him that Mr. Betulovici was done with Mario? Did—
>
> A. I don't remember.
>
> Q. Okay. And so did you tell Mario that the owner had removed him from the schedule because he was filing a lawsuit?
>
> JUDGE GREEN: Use those words?
>
> THE WITNESS: I don't remember if I used those words.
>
> BY MR. KOIKE:
>
> Q. But that was the spirit?
>
> A. Probably that was the spirit. That was not the reason why he's getting fired–why he got fired.
>
> Q. Oh, so did he get fired?
>
> A. Sir that was not the reason why he got fired.
>
> Q. Okay. What was the reason why he got fired?
>
> A. He was engaged in a personal relationship with the bookkeeper.
>
> Q. Okay. Well, did you mention this during this meeting with Mister—
>
> A. Not at this meeting, no. I mention it before that.
>
> Q. You mentioned it before that with Mario?
>
> A. When Anna was resigning we had this little drama incident in the restaurant. The owner discovered that they were in a relationship. He wanted him to be fired. He told me that over the phone.
>
> JUDGE GREEN: But that sound like its back in May.
>
> THE WITNESS: That's back before this lawsuit, yes.

After the meeting described above, Arsovski went home. Betulovici returned at some point in early July. At no time, did any one contact Arsovski and tell him that he could return to work. In my opinion, Arsovski was, in fact fired, even if those or similar words were not used on June 25, 2013.[3] Indeed, the Respondent's brief admits that Arsovski was terminated.

Analysis

I have no doubt and conclude that Arsovski was fired because he filed an FLSA lawsuit that was received by the Respondent on the morning of June 25, 2013; the very day that his employment was terminated. I reject the contention that he was discharged for any prior misconduct relating to his affair with the former bookkeeper or with her alleged taking of certain records from the restaurant. The Respondent's owner became aware of those situations a month before June 25, but Arsovski remained employed. Indeed he continued to work, clearly with the knowledge of Betulovici, who was in daily contact with Raspudic after he allegedly told Raspudic to fire Arsovski on May 25. Thus, whatever transgressions may have occurred in May 2013, it is clear to me that these were not deemed by the Respondent to be sufficient reasons to fire Arsovski *until he filed his lawsuit*.[4]

The legal question here is whether in filing the FLSA lawsuit relating to wages, Arsovski was engaged in concerted activity within the meaning of Section 7 of the Act. Or was he acting solely in pursuit of his own interests?

The General Counsel cites the Board's decision in *D. R. Horton, Inc.*, 357 NLRB 2277 (2012). However, the holding of that case did not involve a situation like this. Rather, the actual holding in *Horton* was that an employer violated Section 8(a)(1) when it compelled its employees, as a condition of hire, to sign an agreement that "precluded them from filing joint, class, or collective claims addressing their wages, hours or other working conditions . . . in any forum, arbitral or judicial." Nevertheless, the General Counsel relies on that portion of the decision that states:

> To be protected by Section 7, activity must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 281 NLRB 882, 885 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). When multiple named-employee plaintiffs initiate the action, their activity is clearly concerted. In addition, the Board has long held that concerted activity includes conduct by a single employee if he or she "seek[s] to initiate or to induce or to prepare for group action." *Meyers*, supra at 887. Clearly, an individual who files a class or collective action regarding wages, hours or working conditions, whether in court

[3] In order for a discharge to be found, it is not necessary that the words, "discharged" "fired" or "laid off" be used. The test is whether an employer's statements would reasonably lead an employee to believe that he had been discharged. *Dublin Town Ltd*., 282 NLRB 307, 308 (1986).

[4] The issue here is whether the employer discriminated against Arsovski because he filed a lawsuit challenging certain of the Respondent's wage and hour policies. I have no opinion and make no conclusions as to the merits of any claims or counterclaims in that lawsuit.

> or before an arbitrator, seeks to initiate or induce group action and is engaged in conduct protected by Section 7.

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. On the other hand, his complaint does allege that it was filed on behalf of a class of similarly situated employees who work or have worked at the Respondent over a 3-year period of time. In this regard, it could be argued that Arsovski sought "to initiate or to induce or to prepare for group action."

Moreover, I think that it is reasonable to conclude that when the FLSA complaint was received and read, the Respondent believed or at least suspected that Arsovski was engaged in concerted group action. This is because the document states, clearly and unequivocally, that it represents an action on behalf of a class of present and former employees. Therefore, if Arsovski was discharged because the employer believed or suspected that he was engaged in concerted activity that would be sufficient to find a violation of the Act. Thus, when a discharge is motivated by the employer's belief or suspicion that the employee is engaged in conduct that is protected by the Act, the discharge would be deemed unlawful, even if that belief was mistaken. *NLRB v. Scrivener*, 415 U.S. 117 (1972); *Trayco of S.C.*, 297 NLRB 630 (1990).

[Recommended Order omitted from publication.]