

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

EYM KING OF KANSAS, LLC	§	
D/B/A BURGER KING®,	§	
	§	Nos.: 14-CA-148915
AND	§	14-CA-150321
	§	14-CA-150794
WORKER’S ORGANIZING COMMITTEE—	§	
KANSAS CITY,	§	

**EYM KING OF KANSAS, LLC’S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

Pursuant to NLRB Rules & Regulations § 102.46, EYM King of Kansas, LLC d/b/a Burger King® (“EYM”), respectfully files the following exceptions to the decision of the Administrative Law Judge, the Hon. Christine E. Dibble, issued February 12, 2016.¹

No.	ALJD PAGE/LINE ²	EXCEPTIONS
1.	p. 3/19	“Respondent employed approximately <u>45</u> employees . . .”
2.	p. 4 footnote 9	“I cannot find a reference in the record noting the days of the week Wise worked prior to March 26. However, Hayes testified that when Wise applied to work for the Respondent, he noted his unavailability to work on Sundays and could only work from 9:00 a.m. to 5:00 p.m. on Saturdays. She appeared to imply that up until that point Wise was available to work any day of the week.”

¹ Pursuant to § 102.46(b)(1), the grounds and authorities on which the exceptions are based are set forth in EYM’s separate, concurrently filed brief.

² Unless otherwise noted, page number references are to the ALJD and numbers following the “/” mark indicate line numbers. References to “Tr.” are to the hearing transcript.

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3.	p. 5, footnote 11	“[T]he lack of written documentation of the discipline leads me to credit Wise’s testimony on this point.”
4.	p. 5/15-17	Although the ALJ correctly found Wise was disciplined on April 21 and May 5, 2014, for tardiness, Respondent excepts to the ALJ’s failure to affirmatively find that Wise was also disciplined for tardiness on July 30, 2013, and May 6, 2014.
5.	p. 5, footnote 13	“There is no documentation of the disciplinary action being taken against him for sending employees on break without permission from Management.”
6.	p. 5/24 to p. 6/3	“During his Sunday shifts . . . Cline took the hamburgers and told him to have a good day.”
7.	p. 6/5-8	“Wise acknowledged that Cline took hamburgers from his coat pockets . . . so Cline was unaware that he had received prior authorization to take the hamburgers.”
8.	p. 6 footnote 15	“Either party could have called Sharrell as a witness to corroborate their version of the hamburger incident but chose not to exercise that right. Moreover, at the time of the incident, Wise and/or Hayes could have spoken to Sharrell to clarify whether she had given Wise permission to take the hamburgers. There was no testimony or evidence that this occurred. Consequently, I reject the Respondent’s and General Counsel’s arguments on this point. Even if Sharrell had testified, I still would not have found credible Hayes’ testimony that the hamburger incident was a reason for her decision not to hire Wise. My reasons for this finding are discussed above and later in the decision.”
9.	p. 7/1-3	“Based on the totality of the circumstances and the evidence, I find that there was not a directive from Strategic or the Respondent curtailing local management’s ability to discipline Wise or any

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		other employee.”
10.	p. 7/3	“I also find that the hamburger incident occurred in February 2014.”
11.	p. 7/4-9	“However, I cannot credit Hayes’ or Cline’s testimony that Strategic precluded them from issuing discipline to Wise or employees on the “strike committee” without prior approval from Strategic’s human resources. Neither Hayes nor Cline provided a copy of the directive restricting managers’ authority to discipline certain employees without prior approval from Strategic’s human resources.”
12.	p. 7/10-11	“Also, it is undisputed that the Respondent allowed local management to issue discipline to employees without restrictions.”
13.	p. 7 footnote 16	“Hayes denied receiving the notice[.]”
14.	p. 7 footnote 16	“Although Hayes denied making the notation at the top of the strike notice indicating it was received at 2:30 p.m. . . .”
15.	p. 7 footnote 16	EYM excepts to the import of the footnote as a whole, which assails Hayes’ credibility. The credibility assessment is based on demonstrably false premises that (1) Hayes denied receiving the notice and (2) denied annotating the notice with “2:30.”
16.	p. 7/35-36	“However, there is no <i>conclusive</i> evidence that this notice was delivered to Hayes.”
17.	p.8/3-7	“On April 16, management at the 47th Street BK was given a return to work notice listing the names of the strikers who agreed to return to work unconditionally. On April 16, Hayes prepared written warnings for Humbert, Camilo, Coney, Frazier, and Ortiz for failing to appear for their scheduled shifts on April 15.” Specifically, EYM excepts to the failure of the ALJ to find/note the uncontradicted evidence that Hayes prepared

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		the disciplinary notices on the morning of April 16th <i>before</i> any of the employees showed up at the restaurant and provide the return to work notice.”
18.	p. 12/26-28	“I find, for the reasons discussed below, that the General Counsel has established that the Respondent’s refusal to hire Wise was because of his union and protected concerted activities in violation of Sections 8(a)(1) and (3) of the Act.”
19.	p. 13/39-45	“I do not find Hayes’ articulated reason credible. The evidence shows that, except for Humbert and Frazier, Wise was no more limited in his availability than some other employees who applied and were hired. Moreover, Hayes testified that Cline could only work certain hours because she had another job, and Williams was limited in her availability because she went to school during the day. Nevertheless, there is no evidence that Hayes refused to rehire them because of their restricted availability.”
20.	p. 14/4-5	“[T]he General Counsel argues Hayes’ actions do not support her assertion that Wise’s actions justified her refusal to hire him. I agree.”
21.	p. 14/10-12	“However, I previously found that Hayes and Cline were not credible on this point. Again, I do not find it credible or plausible that Strategic required its managers to get pre-approval before issuing Wise discipline.”
22.	p. 14/13-16	“Moreover, I find that Hayes’ scant record of disciplining Wise for the infractions she alleged were serious is evidence of discriminatory pretext. She only acknowledged issuing him three disciplinary actions since he started working for her in 2012. The evidence reveals that she issued him two written counselings and a warning.”
23.	p. 14/17-20	“Despite the seriousness of the offense, she claimed that she could not remember the details or produce documentation that he was disciplined

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		for allegedly usurping her authority by sending employees on work breaks. I find it highly unlikely that she would not be able to remember the specifics of events that she later used to support a decision not to re-hire Wise.”
24.	p. 14/36-37	“I do not find Hayes credible. Hayes admits that in 2014, she only gave Wise two write-ups for attendance.”
25.	p. 14/37-38	“Nevertheless, she claims Wise’s cumulative tardiness was so serious that it warranted termination.”
26.	p. 14/43-47	“While Hayes alleged that the Respondent [sic] limited her ability to discipline Wise, she admits there were no such restrictions on her ability to discipline him under the Respondent’s [sic] ownership. Further, I have already found not credible her assertion that she received an email limiting her authority to discipline.”
27.	p. 15/4-11	“Hayes insisted there were no other employees who had the combination of infractions as Wise and that was the basis for her decision not to re-hire him. However, I do not find her reasons credible because of her shifting and inconsistent stories. For example, Hayes testified that Wise’s instances of tardiness were factors in her decision not to rehire him. Wise admitted he was late to work on at least two occasions and/or did not call in at least 3 hours before his shift on one occasion. Likewise, Hayes could only specifically recall the three incidents cited. These incidents of tardiness or no show/no call all occurred in 2014. There is no other evidence of Wise being tardy or disciplined for tardiness for the years Hayes was his manager.”
28.	p. 15/27-31	“I do not find the Respondent’s defense believable. Even if Hayes is to be believed, then why did she not also tell Wise it would be futile for him to apply because she was not going to hire him because of his multitudes of alleged infractions? It

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		casts doubt on her credibility; and also makes me discount, without corroborating evidence, her testimony on why McCoy, Jackson, and Comeaux were not hired to work for the Respondent.
29.	p. 13/36 to 15/35	EYM excepts to this section as a whole on grounds that the ALJ improperly substituted her judgment for the business judgment of the employer and, in several instances, did so based on demonstrably false factual premises.
30.	p. 17/32-34	“The Respondent argues that even assuming that participation in the strike was protected concerted activity, management had no knowledge of the employees’ protected concerted activity when adverse action was taken against them.”
31.	p. 18/33-36	“Even assuming the employees engaged in concerted protected activity, the Respondent argues it had no knowledge of the employees’ reasons for not reporting to work and denies the disciplines were issued because of discriminatory animus.”
32.	p. 18/38 to 19/18	Entire paragraph—the ALJ’s erroneous finding the April 15th strike was protected activity and not an intermittent strike.
33.	Tr. p. 97/19 to p. 99/15	ALJ’s erroneously sustained objection to questioning regarding plans for future strikes.
34.	Tr. p. 99/16-24	ALJ’s denial of the opportunity to make an offer of proof regarding plans for future strikes.
35.	Tr. to p. 103/14	ALJ’s erroneous rejection of Respondent’s Exhibit 24
36.	p. 19/20 to p. 20/6	Entire paragraph—the ALJ’s erroneous finding the April 15th strike was protected activity and not an intermittent strike.
37.	p. 20/8-27	Entire paragraph—the ALJ’s erroneous finding the April 15th strike was protected activity and not an intermittent strike.

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38.	p. 20/29 to p. 21/3	Entire section—the ALJ’s erroneous finding the April 15th strike was protected activity and not an intermittent strike.
39.	p. 21/5-31	Entire section—the ALJ’s erroneous finding the April 15th strike was protected activity and not an intermittent strike.
40.	p. 21/33-45	Entire section—the ALJ’s erroneous finding that Wright Line analysis applied because the April 15th strike was protected activity and not an intermittent strike.
41.	p. 22/1-8	Entire paragraph—the ALJ’s erroneous finding that Wright Line analysis applied because the April 15th strike was protected activity and not an intermittent strike.
42.	p. 22/17-30	“Notwithstanding, Hayes admitted that on April 16, she prepared and began to issue the six employees discipline and did not care that their names were on the strike notice because “[t]hey just didn’t show up for their shift.” (Tr. 390) Her admission and the evidence are clear indications that she was aware prior to preparing the disciplines that the employees had participated in the strike. By 2:30 p.m. on April 15, Hayes should reasonably have been aware from surrounding circumstances that the absent employees were on strike. There was an announcement of the upcoming strike. (GC Exh. 3). Hayes admitted that she knew Ortiz, Humbert, and Camillo had been active in WOCC events and the other employees had also been featured in various local media. The fact that the six employees, all of whom are active in WOCC, were absent on the day of the strike would not appear as coincidental to a reasonable person. Moreover, there is no evidence that Hayes did not receive the return to work notices provided for all six employees. CGLM, Inc., at 980. Consequently, I find that by April 15 at about 2:30 p.m. Hayes was aware that all six of the employees were not at work because they were on

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		strike.”
43.	Tr. pp. 302-304	ALJ’s erroneous rejection of Respondent’s Exhibits 36, ³ 38, ⁴ 40, ⁵ 42, 50, 51, 54, 56, and 58, ⁶ and 60-61-63. ⁷
44.	p. 22/32 to p. 23/7	Entire section—ALJ’s erroneous determinations EYM bore any burden of proof or, if it did, that EYM did not sustain it.
45.	p. 23/17-18	“3. By failing and refusing to hire Terrence Wise on March 26, because he engaged in protected concerted activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.”
46.	p. 23/20-22	“4. By issuing written discipline to its employees Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz and Myresha Vaughn on April 16, the Respondent has violated Section 8(a)(1) of the Act.”
47.	p. 23/24-25	“5. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.”
48.	p. 23/29 to p. 24/17	Entire Remedy section
49.	p. 24/19 to p. 25/31	Entire Order section

³ The reporter erroneously lists Exhibit 36 as “skipped.” As reflected on Tr. p. 304, the exhibit was, in fact, offered and rejected.

⁴ The reporter erroneously lists Exhibit 38 as “skipped.” As reflected on Tr. p. 304, the exhibit was, in fact, offered and rejected.

⁵ The reporter erroneously lists Exhibit 40 as “skipped.” As reflected on Tr. p. 304, the exhibit was, in fact, offered and rejected.

⁶ The reporter erroneously lists Exhibit 58 as “skipped.” As reflected on Tr. p. 304, the exhibit was, in fact, offered and rejected.

⁷ The reporter erroneously lists Exhibit 60 and 61 as “skipped.” As reflected on Tr. p. 304, the exhibits were, in fact, offered and rejected.

No.	ALJD PAGE/LINE ²	EXCEPTIONS
50.		EYM excepts to the ALJ's failure to rule on EYM's motion to correct the hearing transcript
51.		EYM excepts to the ALJ's failure to find that Ortiz did not miss work on April 15th because she was engaged in concerted activity; but, because she simply went home after the strike and didn't thereafter report for her shift.

REQUEST FOR ORAL ARGUMENT

Pursuant to NLRB Rules & Regulations § 102.46(i), EYM respectfully requests oral argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 8th day of March, 2016, a copy of the foregoing document was served by email and by certified mail, return receipt requested, on:

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