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BY E-FILE

Hon. Raymond Green
Administrative Law Judge
National Labor Relations Board - Region 12
Jacob K. Javits Federal Building
National Labor Relations Board Division of Judges
26 Federal Plaza - Suite 1703
New York, NY 10278-0214

**Re: Fast Food Workers Committee and Papa's Penn
Inc. d/b/a Papa John's
(NLRB Case No. 29-CA-169864)**

Dear Judge Green:

The Fast Food Workers Committee ("Union" or "Charging Party") submits this post-hearing letter brief in support of the General Counsel's allegation that Papa's Penn Inc. ("Employer") violated Sections 8(a)(1) and (3) of the National Labor Relations Act ("the Act") by terminating employee Jesse Scott.

Factual Summary

Throughout 2015, representatives from the Union communicated with workers at the Employer's 529 Stanley Avenue, Brooklyn NY, facility regarding their working conditions. About the summer of 2015, the Union began organizing regular "shift meetings" at the store to discuss work issues, in which Jesse Scott ("Scott") regularly participated. Tr. 20. On January 1, 2016, the minimum wage for fast food workers rose to \$10.50, and the Employer had failed to raise workers' pay rates accordingly. Tr. 24. On or about January 8, 2016, Organizer Lisa Delancey ("Delancey") and workers at the store, including Scott, met to discuss the pay rate. Tr. 24. General Manager Juan Otero ("Otero") observed the meeting and subsequent events that day. Tr. 25. Delancey and the workers confronted Owner Jean Morace ("Morace") regarding his failure to pay the correct rate. Tr. 24. Morace alleged that the correct rate was \$8.50 and produced documentation stating the same. Tr.

26, 59, 79. Delancey pointed out that Morace's documentation was from 2014, causing the employees to laugh at Morace. Tr. 59-60. Delancey reiterated that the correct rate was \$10.50 and produced documentation of the same. Tr. 59, 79. Morace became upset, the parties argued over the issue, and Delancey left the store. Tr. 27, 60. Later that day, workers' pay rates were adjusted to the \$10.50 minimum wage, and workers were paid the difference in cash. Tr. 26-27, 62, 80.

February 12, 2016 was a payday at the store. Tr. 37. When Scott went to retrieve his check, he found that his check was missing. No one else's check was missing. Tr. 37. During his shift, Scott called Morace, who stated that he had "personally made sure" Scott's check was there. Tr. 39. Scott requested that if his check was still missing at the end of his shift, that he be paid in cash. Tr. 39. Morace replied that Scott would be paid in cash at the end of the night if the check was missing. Tr. 39. At the end of Scott's shift, Scott requested from General Manager Juan Otero that Scott receive his paycheck in cash, per Morace's statement. Tr. 39-40. Otero stated he did not have authorization to pay Scott cash. Otero stated that Scott was to turn over the cash he had collected from deliveries and leave the store. Tr. 40. Scott stated that he would not leave the store until he received his paycheck in cash, and Otero called the police. Tr. 40-41. After the police arrived, Scott paid Otero the delivery money. Otero then called Morace, and then paid Scott in cash. Tr. 43. Otero then stated that Scott was terminated and Scott left the store. Tr. 44.

On about February 19, 2016, Scott visited the store again, spoke to Otero, and requested he be reinstated. Tr. 44. Otero proceeded to state that he would not hire Scott back to the store as there were "all the different incidents." Tr. 44. Otero stated that Scott had "brung that woman into the store," referring to Organizer Lisa Delancey, and "she's having conversations with my employees." Tr. 45. Otero stated that "[i]t bothers me and it bothers Morace." Tr. 45. Otero stated that Scott was the "reason why she's here," and that was another reason he was not reinstating Scott. Tr. 45. Otero has also stated to other employees that Delancey "can't save [your] jobs," that employees would be terminated for participating in Union activities, and that Delancey could not protect them from getting fired. Tr. 89.

Argument

The General Counsel has established a straightforward *prima facie* case under *Wright Line*. 251 NLRB 1083 (1980). The Employer's awareness of Scott's Union activity and concerted protected activity (collectively, "protected activity") is not disputed. The Employer is unable to meet its burden of proving that it would have terminated Scott had he not been engaged in and perceived as a leader of workers' protected activity. Firstly, the Employer essentially alleges that it was the events on or about February 12, 2016, following a missing paycheck, that caused the General Manager Juan Otero to terminate Scott. The Employer witnesses' testimonies of this night, however, is internally inconsistent and highly implausible. Secondly, there is ample evidence of repeated incidents of similar behavior which the Employer tolerated, and the Employer has provided no evidence as to why this alleged incident merited discharge compared to other apparently more serious incidents that were tolerated.

A. The testimonies of Employer witnesses Jean Morace and Juan Otero were incredible and internally inconsistent.

In the face of a clear cut *prima facie* case under *Wright Line*, the Employer has demonstrated that its witnesses are completely incredible. Firstly, Morace's testimony regarding the January 2016

incident regarding minimum wage rates directly and implausibly conflicts with three witnesses' consistent testimony. General Counsel witnesses Jesse Scott, Lisa Delancey, and John Mason consistently testified that when Morace was confronted by Delancey's demand that he pay the proper wage, Morace promptly denied that he was paying the incorrect wage and produced documentation he alleged substantiated his claim. Tr. 26 (Scott testifying that Morace stated, "you're wrong, the minimum age is 8.50. I have a paper"); Tr. 59 (Delancey testifying that Morace stated, "I have a document that says... they're not supposed to get the 10.50"); Tr. 79 (Mason testifying, "Lisa was trying to explain to Morace that the paper that he gave was wrong"). The witnesses also consistently testified that Delancey pointed out that this documentation was from 2014, in the presence of the multiple employees. Tr. 26, 59-60, 79.

In contrast, Morace implausibly testified that he never denied that \$10.50 was the correct wage, never produced documentation substantiating a proper wage of \$8.50, and even offered to show Delancey that the system already demonstrated a wage of \$10.50. Tr. 110 (Morace stating Delancey and Morace "had a nice conversation and she explain to me that the minimum was \$10, so I say, I know"). In addition to being plainly incredible, Morace's testimony is also illogical in light of the uncontested testimony that later that evening, mere hours following the workers' demand for the proper wage, the Employer updated the system with the proper rate and paid workers in cash for the back wages owed. Tr. 27, 62, 80.

Secondly, Juan Otero's and Jean Morace's testimonies were inconsistent with each other. Otero testified that after Scott requested he be paid for his missing paycheck in cash, Otero promptly received permission to do so from Morace, and stated to Scott he would be paid in cash. Tr. 132. Otero testified that it was only after he paid Scott that Otero called the police. Tr. 133, 135-136. Morace, in contrast, testified that when he first spoke to Otero, he did not instruct Otero to pay Scott in cash, and instead stated that Otero should call the police. Tr. 114-115. Morace testified that only after the police had come to the store did he speak to Otero a second time and instruct him to pay Scott in cash that night. Tr. 115. Otero's testimony not only conflicts with the testimony of both Morace and Scott, but also Otero's sequence of events is intuitively illogical. He testified repeatedly that he paid Scott but Scott nonetheless refused to turn over the delivery cash or leave the store. It is uncontested that any conflict that night stemmed from Scott requesting payment in cash. Otero's allegation that Scott received his money and continued to stay in the store is implausible.

B. By the Employer's own account, prior to Scott's protected activity, the Employer had repeatedly tolerated similar incidents.

The Employer's argument is essentially that Scott's actions on or about February 12, 2016 were the "last straw" for General Manager Juan Otero. However, Morace's testimony also made clear that apparently the Employer did not think any of Scott's previous actions – allegedly, credit card tip fraud (Tr. 107), aggressive behavior towards managers (Tr. 107), breaking a glass door (Tr. 109), punching a table (Tr. 108), "kicking stuff" (Tr. 108), theft of soda (Tr. 113) – merited discharge or even discipline.¹ The Employer failed to provide any evidence as to why this alleged incident was any more serious than the other alleged incidents, or why it merited discharge any more than the other alleged incidents. Board law is clear that this type of uneven enforcement supports a

¹ Although Morace testified that former General Manager Antoine White had discharged Scott based on allegations of credit card tip fraud in 2013, Morace also testified that in 2014 despite this allegation, Morace nonetheless rehired Scott and/or did not view the allegation as meriting termination of Scott. Tr. 107-108.

finding of pretext. *See, e.g., Nichols Aluminum, LLC*, 361 NLRB No. 22, slip op. at 12 (2014) (where employer did not consistently discharge employees for even relatively severe misconduct like threats of physical harm and employee harassment, employer failed to meet its burden under *Wright Line*); *Made in France, Inc.*, 336 NLRB No. 86 slip. Op at 946 – 947 (2001) (where employer regularly tolerated employee’s “absenteeism, tardiness, and other work-related deficiencies,” employer failed to meet its burden under *Wright Line*). The Employer cannot credibly argue that Scott was terminated for his actions on or about February 12, 2016 when it had repeatedly and consistently tolerated similar actions without consequence.

Conclusion

For all the reasons set forth herein, it is clear that the Employer terminated employee Jesse Scott in violation of Sections 8(a)(1) and (3) of the Act. Accordingly, the Union respectfully requests that the Employer be ordered to reinstate Scott and make Scott whole for his unlawful termination. The Union concurs in the General Counsel’s request for search-for-work expenses, work-related expenses, and consequential damages. The Union further requests that the ALJ grant any other relief that is warranted under these circumstances to effectuate the purposes of the Act.

Very truly yours,



Ceilidh B. Gao

cc: Kimberly Walters, National Labor Relations Board - Region 29
Jean Morace, Papa’s Penn Inc.

CERTIFICATE OF SERVICE

I, Ceilidh B. Gao, affirm under penalty of perjury that on July 29, 2016, I caused a true and correct copy of the foregoing Charging Party Fast Food Worker Committee's Post Hearing Letter Brief to be served upon the parties by email and facsimile respectively as follows:

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