

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 29**

**PAPA'S PENN INC. D/B/A PAPA JOHN'S  
Respondent**

**and**

**Case No. 29-CA-169864**

**FAST FOOD WORKERS COMMITTEE  
Charging Party**

**COUNSEL FOR THE GENERAL COUNSEL'S BRIEF  
IN SUPPORT OF EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## **PROCEDURAL HISTORY**

On February 17, 2016, the Fast Food Workers Committee (FFWC and/or the Union) filed an unfair labor practice charge against Papa's Penn d/b/a Papa John's (Respondent) in Case No. 29-CA-169864, alleging that Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act) by terminating employee Jesse Scott (Scott) in retaliation for his Union and other protected concerted activities. [GC Exh. 1(A).]<sup>1</sup>

On May 20, 2016, following a merit determination on the allegations raised in the charge, the Regional Director for Region 29 of the National Labor Relations Board (the Board) issued a Complaint and Notice of Hearing in Case No. 29-CA-169864 (the Complaint). [GC Exh. 1(C).] The Complaint alleges, *inter alia*, that Respondent violated Sections 8(a)(1) and (3) by discharging and refusing to reinstate Scott because of his support for the Union and for engaging in concerted activities.

The case was heard before Administrative Law Judge Raymond Green (the ALJ) on June 7, 8, and 11, 2016. [Tr. 1.] The ALJ issued a Decision in this matter on August 18, 2016, recommending dismissal of the Complaint in its entirety.

## **STATEMENT OF FACTS**

Respondent is a fast food franchise located at 529 Stanley Avenue, Brooklyn, New York. Jean Morace (Morace) owns Respondent's franchise, which employs approximately twelve people. [Tr. 102-03.] Most of Respondent's employees work as drivers. [Tr. 102.] Drivers are responsible for delivering pizza, answering the telephone, and cleaning the store. [Tr. 15.] Respondent also employs a general manger, Juan Otero (Otero), who is responsible for making

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<sup>1</sup> References to the official record of the hearing are abbreviated as follows: "GC Exh." denotes General Counsel's exhibits. Citations to the Transcript will appear "Tr. \_," with numbers specifying the particular page(s) cited in the transcript. References to the ALJ's Decision are denoted as "ALJD \_:", with numbers specifying the page(s) and line(s) cited.

employees' schedules, hiring and firing employees, organizing the store, and ordering supplies. [Tr. 103.]

Scott worked as a driver at Respondent's store until February 2016. [Tr. 15.] Scott also actively participated with the FFWC, an organization that seeks to unionize the fast food industry and fight for a fifteen dollar minimum wage for fast food workers. [Tr. 16-17, 54.] Scott attended several FFWC actions, which primarily involved rallying outside various fast food restaurants to advocate for the rights of workers. [Tr. 17.] Through his participation with FFWC, Scott met Lisa Delancey (Delancey), who works as a union organizer on behalf of FFWC. [Tr. 17, 54.]

Delancey began visiting Respondent's store during the summer of 2015. [Tr. 22, 55.] From that point on, she visited the store approximately twice a month to discuss working conditions, breaks, and pay with the employees of the store. [*Id.*] The ALJ mischaracterizes these interactions by stating that Delancey spoke with employees about "various issues" but did not officially solicit employees to authorize the FFWC to represent them in collective bargaining. [ALJD 2:22-24.] Delancey's testimony, which was not discredited, was that she discussed terms and conditions of employment with the employees as well as how the FFWC was fighting for higher wages. [Tr. 54-55.] In early January 2016<sup>2</sup>, Respondent's drivers discussed amongst themselves not getting paid the new minimum wage for fast food workers that went into effect in December 2015. One of the drivers at the store reached out to Delancey specifically because of this issue. [Tr. 55.] Consequently, Scott and other employees met with Delancey at the store on January 8 to discuss the wage discrepancy. [Tr. 55.] The employees addressed the issues with their wages, including having tips deducted, and Delancey took pictures of their paystubs. [Tr. 57.] After all of the employees had gathered (about 8 drivers, two customer service representatives and two pie makers), employee John Mason suggested the group move to the

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<sup>2</sup> All dates appearing hereinafter occurred in 2016, unless otherwise noted.

back of the store. [*Id.*] When Delancey moved to the rear of the store with the group of employees, General Manager Otero noticed her and told her she could only meet with employees in the front of the store. [Tr. 58.] Delancey moved to the front of the store, and Otero watched her exchange with the assembled employees through the glass window that divided the customer area in the front and the back of the store. [Tr. 25.]

While Delancey was speaking with employees, Owner Morace walked into the store. [Tr. 25.] Delancey introduced herself to Morace as a representative of the Fight for \$15 campaign. [Tr. 59.] She showed Morace a document indicating that the minimum wage in New York City for fast food workers was \$10.50 and he needed to pay employees the correct amount. [Tr. 60.] Morace argued with Delancey, and showed her a document stating that the minimum wage was \$8.75. [Tr. 59.] Delancey pointed out that the document was from 2014 and some employees started laughing at Morace. [Tr. 59-60.] Morace, who was becoming very upset, yelled at Delancey and made her leave the store. [Tr. 26, 61 (Delancey testified that Morace told her to “get out of my motherfucking store.”)]

After Delancey left, Morace authorized Otero to pay the employees the difference between the old rate and the new rate in cash that night. [Tr. 27.] Employees signed a sheet indicating that they had received the payment in cash, which was the common practice whenever employees received payments in cash as a substitute for their paychecks. [Tr. 28.] It is undisputed that the Employer would regularly pay employees in cash on payday if there was an issue with the checks or a specific check was missing. [Tr. 28, 80-81.]

About three weeks later, on about January 31, Scott received a text from Otero asking if he had seen another closing driver, John Mason, take a soda from inventory. [Tr. 31.] Scott replied that did not see Mason take the soda and asked Otero if he checked the refrigerators. [Tr.

31-32.] Otero replied that the soda was still missing and that he would take Scott off of the schedule until management could determine who took the soda. [Tr. 32.] Scott did not receive a write up or a formal notice of suspension from Otero regarding this incident. [Tr. 47.]

The next day, Scott called Delancey and told her about the allegation and they agreed to go to the store to speak with Otero about what had happened and the fact Scott had been removed from the schedule. [Tr. 32.] When they arrived, Delancey asked Otero to see surveillance video footage from that evening to determine who took the soda. [Tr. 65.] Otero refused, and told Delancey that Scott had stolen sodas in the past. [Tr. 33.] Delancey asked Otero why Scott had never been disciplined and did not have write-ups if he had allegedly stolen soda previously and Otero told Delancey that he did not want to speak with her anymore. [Tr. 33.]

As Delancey and Scott were leaving the store, Morace walked in and Delancey confronted him by asking why they took Scott off of the schedule. [Tr. 65.] Morace told Delancey that he did not have to speak with her and that he was going to call the police. [Tr. 65-66.] Morace testified that he told Delancey to “get the F out of my store.” [Tr. 112.] The police arrived, and after Delancey spoke with them, she and Scott left the store. [Tr. 67.] Respondent claims that it attempted to investigate, but discovered that they did not save video footage from the store that night and had no other evidence regarding the incident. [Tr. 116.] As a result, Respondent asserts that it rescinded Scott’s suspension, without Scott missing any shifts. [Tr. 36, 116-17.]

Less than two weeks later, on February 12, Scott went to work and discovered that his paycheck was missing. [Tr. 37.] Unlike all the other employees, Scott’s paycheck was the only one missing. [*Id.*] Scott reported his missing paycheck to Otero, who said that he would try to figure out what happened. [Tr. 38.] On his deliveries that evening, Scott called Morace to follow

up about the missing check. [Tr. 38.] Morace told Scott that he could get paid in cash at the end of the night if his check could not be found. [Tr. 39.] As noted above, it is undisputed that this was consistent with a prior practice of paying employees in cash if their paycheck was missing on payday. [Tr. 28.] Yet that is not what initially occurred on this day with Scott.

When Scott's shift ended, he asked Otero to be paid in cash for the week as Morace had told him he would be. [Tr. 40.] Contrary to the established past practice of doing so and Morace's express assurances that such would happen, Otero inexplicably told Scott that he was not authorized to pay Scott in cash and asked Scott to hand in the money from his deliveries that day and leave. [*Id.*] Like the Union a few short weeks before, Scott demanded that he be properly paid. Accordingly he refused to leave, stating that he would not leave until he received his pay for the week [*Id.*] Otero and Scott continued to argue about the paycheck, and Scott continued to refuse to leave the store until Otero paid his salary for the week. [*Id.*] Otero then called the police. When the police arrived, they asked Scott to hand over the cash from the deliveries, which he did. [Tr. 43.] The police then had Otero call Morace, who told Otero to pay Scott in cash. [Tr. at 43.] Otero handed Scott the cash and told him not to return to the store. [Tr. 44.] This incident was never documented and Scott did not receive a formal termination letter. [Tr. 33.] Even Morace concluded that the incident was not serious enough to save the surveillance footage from that night. [Tr. 117.]

Delancey returned to the store on Wednesday or Thursday after Scott was terminated. [Tr. 75.] She led a silent action protesting Scott's discharge at the store with about 20 people, including representatives from the FFWC and employees of other fast food stores such as Wendy's and McDonald's. [Tr. 74.] The workers silently carried signs with Fight for \$15 logos around the store for about fifteen minutes. [*Id.*]

Approximately one week after he was terminated, Scott went to the store to pick up his final check and asked Otero for his job back. [Tr. 44.] Otero refused to give Scott his job back, arguing that Scott had incidents in the past and he had given Scott several chances already. [*Id.*] Otero also said that he did not want to take Scott back because Scott had brought Delancey into the store and Delancey talked to his employees and it bothered him and it bothered Morace. [Tr. 45.] Revealing his motive for the adverse actions taken against Scott, Otero further stated that because Scott brought Delancey into the store, he was a danger to their team and could not be reinstated. [*Id.*] Critically, the ALJ did not render an adequate credibility determination as to the above testimony. To the contrary, in footnote 2 of his Decision, the ALJ found that if such statements were made linking Scott to Delancey's appearance on the scene, it refers to her silent protest post-dating Scott's discharge. Such a finding is clear evidence that Respondent's failure to rehire Scott is linked to his Union activity, an allegation that goes entirely unaddressed by the ALJ.

### **THE ADMINISTRATIVE LAW JUDGE'S DECISION**

In the Decision, the ALJ made substantial errors in both fact and in law resulting in his recommendation that the Complaint be dismissed. Without applying the appropriate standard, the ALJ improperly found that the FFWC was not a labor organization. Compounding his error, and necessarily flowing from that erroneous finding, the ALJ next found that Scott was not engaged in any union activity. [ALJD 3:38, 42.] Further doubling down on his error, the ALJ failed to conduct any burden shifting analysis, instead summarily finding that Scott's termination was lawful. In this regard, the ALJ opined that Scott was solely terminated for arguing with Otero on February 12. [ALJD 4:10-11, 21-24.] Finally, the ALJ completely failed to address the

Complaint allegation that Respondent unlawfully refused to reinstate Scott, even while recognizing and advancing an unlawful motive for that refusal to reinstate.

Contrary to the findings and omissions of the ALJ, Counsel for the General Counsel urges the Board to find the following:

- I. The FFWC is a labor organization within the meaning of the Act;
- II. Scott was engaged in Union and other protected concerted activities;
- III. Respondent had an unlawful motivation for terminating Scott, as evidenced by the ALJ's conceding that it harbors animus against the activities of the FFWC;
- IV. The ALJ conducted an inadequate and conflicting credibility determination;
- V. Counsel for the General Counsel having established a prima facie case, the ALJ erred by failing to conduct a proper *Wright Line* burden-shifting and *Atlantic Steel* analysis;
- VI. The ALJ erred by failing to address the Complaint allegation concerning Respondent's unlawful refusal to rehire Scott, or finds that it was unlawful;
- VII. The ALJ erred by failing to grant the remedial relief sought;
- VIII. In the alternative, the case is appropriate for remand considering the ALJ's failure to apply or misapply proper legal standards and address Complaint allegations.

As discussed below, these findings are well-established in the record evidence and supported by the Board's precedent and policies. The ALJ should be reversed.

### **ARGUMENT**

I. **The ALJ Incorrectly Determined that the FFWC is Not a Labor Organization Under the Act and Applied an Improper Standard**

**A. The Board's Standard for Labor Organizations is Very Broad**

Seemingly out of thin air and without resort to any legal authority, the ALJ states that the FFWC is not a labor organization because it does not represent employees for the purposes of collective bargaining, as solely evidenced by its not securing authorization from Respondent's

employees to be their representative. [Tr. 2:17-19, 3:38-41.] This *ad hoc* standard is not, and has never been, that which the Board or Courts apply in determining labor organization status.

Rather, Section 2(5) of the Act defines a labor organization as “any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.” Congress intended this definition to be expansive. See e.g. *Electromation, Inc.*, 309 NLRB 990, 993-4 (1992), *enfd.* 35 F.3d 1148 (7<sup>th</sup> Cir. 1994) (discussing the legislative history of this definition). Further, the Supreme Court in interpreting this Section has unequivocally found that this definition is intended to be broad and that “dealing with” does not mean bargaining collectively within this section of the Act. *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211-13 (1959).

Nor does a labor organization need to meet a certain formality threshold to fit within the definition. The Board has said that any group “may meet the statutory definition of ‘labor organization’ even if it lacks a formal structure, has no elected officers, constitution or bylaws, does not meet regularly, and does not require the payment of initiation fees or dues.”

*Electromation*, 309 NLRB at 994. See also *Yale New Haven Hospital*, 309 NLRB 363, 363-64 (1992) (noting that lack of formal papers does not preclude Section 2(5) labor organization status); *Fire Alert Co.*, 182 NLRB 910, 912 fn. 12 (1970) (not yet engaging in collective bargaining and not meeting regularly or having dues or initiation fees does not prevent the finding of labor organization status if the other elements of Section 2(5) are present).

The ALJ erred by failing to apply and give deference to the Board and the Court’s broad standard for labor organization status under Section 2(5) of the Act.

## **B. The FFWC is a Labor Organization Under the Act**

The FFWC meets the statutory definition of a labor organization according to Section 2(5) of the Act. In the closest thing to analysis of the statutory definition of labor organization in the Decision, the ALJ notes that there is no evidence that the FFWC has ever “represented employees for the purpose of collective bargaining.” [ALJD 2:18.] The ALJ again focuses on bargaining collectively when he says “there is no evidence that [the FFWC] sought to organize the Respondent’s employees for the purpose of collective bargaining.” [ALJD 3:38-41.] However, this factor is irrelevant to the analysis of whether the FFWC is a labor organization under the Act. See *NLRB v. Cabot Carbon Co.*, 360 U.S. 203, 211-13 (1959) (holding that “dealing with” does not mean “bargaining collectively” within Section 2(5) of the Act). The ALJ’s insistence on focusing solely on collective bargaining aside, the evidence establishes that the FFWC is a statutory labor organization.

The Board has found that an organization remarkably similar to the FFWC, the Mid-South Organizing Committee, is a labor organization under the definition in the Act in *Chipotle Services, LLC*, 363 NLRB No. 37 (2015). In that case, the union is “an association of workers employed in the retail fast food and related industries” and its aims “are to unite fast food workers in an effort to improve wages and working conditions.” *Id.* That union also “meets with employers on behalf of employees in an effort to resolve grievances and conducts large scale demonstrations seeking higher wages for fast food workers.” *Id.*

The first prong of the definition requires that “employees participate.” The record establishes that employees do in fact participate in the FFWC. Scott testified to participating in actions and strikes with the FFWC to fight for the rights of fast food workers. [Tr. 16-17.] Many employees from Respondent’s store participated in meetings with Organizer Delancey to discuss

workplace issues such as their rate of pay, including the meeting at which Delancey approached Respondent about increasing the minimum wage in accordance with the new law. [Tr. 20, 55.] Scott went to Delancey when he was suspended and she represented him in discussions with Respondent about him returning to work. [Tr. 32-33.] Employees from other fast food restaurants also participated with FFWC at the silent action held after Scott's termination. [Tr. 74.]

The second prong of the definition involves the organization's purpose of "dealing with employers" with respect to wages, rates of pay and labor disputes, among other things. Based on the record evidence, the FFWC clearly meets the requirements of this prong as well. As in *Chipotle Services, LLC, supra*, Delancey testified that the FFWC is working to increase wages for fast food workers to \$15 (the "Fight for \$15") and the right for an eventual Union. [Tr. 53-54.] She said that as an Organizer working on behalf of the FFWC, her job is to make sure working conditions are being respected in the workplace and that the fast food workers are receiving fair pay. [Tr. 54.] Organizers meet with fast food workers at numerous stores and discuss various working conditions about which to fight for improvements. The goals of the rallies and actions that the FFWC holds also fit within the definition under the Act. For example, the silent action held after Scott's termination was both about Scott's termination and an attempt to get a wage increase to \$15 an hour for fast food workers, as demonstrated by the signs that the workers were carrying. [Tr. 74.]

The FFWC, through Delancey, also actually engaged in "dealings" with Respondent over wages and conditions of work. Delancey was the one who brought to Morace's attention on January 8 that he was not paying his employees according to the recent wage increase for fast food workers and then convinced him to raise the wages for his employees. [Tr. 59-60.] While the ALJ dismisses this interaction as "much ado about nothing" since Respondent "promptly

complied with the minimum wage law and almost immediately paid its employees the difference,” that in no way diminishes from the fact that Delancey, acting on behalf of the FFWC, *dealt with* Respondent to increase the employees’ wages. [ALJD 3:48-50.] Delancey then *dealt with* Respondent again when she accompanied Scott to seek redress concerning the soda incident with Otero and Morace and ask for Scott to be returned to the schedule. [Tr. 32-33, 65.]

The record evidence clearly establishes that the FFWC is an entity in which employees participate and which exists for dealing with employers concerning terms and conditions of employment. The ALJ erred by not applying this standard to the evidence and by finding the FFWC not to be a labor organization under the Act. The ALJ should be overturned on this issue.

II. The ALJ Incorrectly Found Scott was Not Engaged in Union Activity and Therefore Ignored Evidence Concerning His Involvement with the FFWC

Flowing directly from his erroneous finding that the FFWC is not a statutory labor organization, the ALJ found that Scott was not involved in any union activity. [ALJD 3:42.] He made this determination without evaluating any of the testimonial evidence pertaining to Scott’s activities in support of the FFWC. Having established that the evidence shows that the FFWC is a labor organization, the evidence also plainly shows that Scott was involved in Union activity in support of the FFWC and other protected activities.

**A. Scott Participated in Protected Activity on January 8**

The meeting on January 8 was another meeting in a series of earlier meetings that Organizer Delancey held with employees at Respondent’s store. [Tr. 20, 55.] The ALJ incorrectly casts the event as solely an argument between Delancey and Morace that happened to occur in front of some employees, including Scott. [ALJD 2:42-43, 3:46-48.] That description

dismissively glosses over the key element: The reason that the argument happened at all was the employees' protected union activity that brought Delancey to the store to advocate on their behalf by confronting Morace. Scott testified that when he looked at his paystub on January 8 and it did not reflect the new wage rate, he started discussing the issue of wages with his coworkers. [Tr. 23-24.] The employees decided the next step in getting the proper \$10.50 wage rate was to contact Delancey. As a result, one of Scott's coworkers called her and asked her to come to the store. [Tr. 24, 78.] Employees discussing their wages together and then taking action to improve those wages is classic protected activity. See e.g., *Medical and Surgical Clinic*, 241 NLRB 1160, 1163 (1979) (holding that employees discussing amongst themselves a new minimum wage law and the effects on them clearly falls within the scope of protected concerted activity); *Chipotle Services, LLC*, 363 NLRB No. 37 (2015) ("it is axiomatic that discussing terms and conditions of employment with coworkers lies at the very heart of protected Section 7 activity" referring to discussions about rates of pay between coworkers). It is undisputed that Respondent knew about this protected union activity because Otero watched the employees' meeting with Delancey through the glass and Morace had a direct confrontation over the employees' wages with Delancey in the meeting. [Tr. 25, 26.]

While it is true, as noted by the ALJ, that Scott was not the only employee who engaged in protected activity on January 8, it remains incumbent upon the ALJ to address and analyze the question of whether Respondent retaliated against Scott because of his established activity. The ALJ erred by summarily dismissing Scott's clearly protected union activity.

#### **B. Scott Participated in Union Activity By Requesting Delancey to Represent Him**

Another clear instance of Scott engaging in Union activity with the FFWC is when he asked Delancey to represent him in dealing with Respondent after he was suspended. The ALJ

describes the incident as Scott protesting an issue that applied solely to himself. [ALJD 4:1-2.] Had the ALJ applied the correct standard in assessing the FFWC labor organization status, such a conclusion would be of little consequence as Scott clearly sought out and obtained the assistance of union representation in resolving a workplace grievance. The ALJ's erroneous finding aside, the incident was more than that. Not only was Scott asking the FFWC to help him with his workplace issue, but he was also asking another statutory employee (Delancey) to help him address Respondent's disciplinary practices and procedures (i.e., whether there was sufficient grounds to remove Scott from the schedule).

At the time Delancey intervened to assist with Scott's suspension, Respondent already knew that she was associated with the FFWC because of the incident on January 8 concerning the employees' wage rates. [Tr. 59.] The premise of the meeting concerning the soda is that Scott had been removed from the schedule indefinitely and wanted to return to work. In seeking to challenge the suspension, Delancey asked the standard questions when investigating a discipline regarding what evidence Respondent was basing its action on and whether she and Scott could see the surveillance footage. After being confronted by Delancey and discovering that there was no evidence to establish that Scott took a soda as accused, Respondent put Scott back on the schedule. [Tr. 116.]

The ALJ fixation on whether or not Morace said the word "trespass" during this interaction ignores the fact that Scott secured representation from the FFWC with respect to his discipline, which constitutes clear protected union activity, as Scott was an employee entitled to be on Respondent's premises. See *Automotive Plastic Technologies, Inc.*, 313 NLRB 462, 463 (1993) (recognizing off-duty employees' rights to be on the employer's premises on the basis of the "continuing employment relationship" and holding that off-duty employees have a

presumptive right to be at the work site to engage in protected activities, absent a legitimate business justification). Scott was then subsequently blamed for bringing Delancey into the store. [ALJD 3:4-5; Tr. 67 (the ALJ questioning the witness about the use of the word “trespass.”)] If anything, Scott’s actively seeking out and securing FFWC representation to deal with his individual disciplinary matter distinguished him and elevates his support for the FFWC as compared to his other coworkers that attended the meeting on January 8. The ALJ erred in not finding it Union activity for an employee to request representation by a labor organization representative concerning a disciplinary issue.

III. The ALJ Erred By Failing to Evaluate Respondent’s Motivation for Terminating Scott and Apply the Appropriate Analytical Framework

The ALJ failed to do any legal analysis of Respondent’s motivation for terminating Scott and instead just stated a conclusory opinion, unsupported by the record evidence, for the entire rationale behind Scott’s discharge. [ALJD 4:10-11.] As discussed above, the ALJ erred in not finding the FFWC to be a labor organization under the Act and in not finding Scott’s activities to be protected Union activities. After establishing these two elements, coupled with the timing of Scott’s discharge less than two weeks after he distinguished his level of support for the FFWC, the ALJ should have analyzed the 8(a)(3) allegation that Respondent’s decision to terminate Scott was unlawful according to long-followed Board law.

Under Section 8(a)(3) of the Act, it is an unfair labor practice for an employer to discriminate against an employee in regard to the tenure of employment to discourage membership in a labor organization. An employer violates Section 8(a)(3) of the Act when it terminates an employee after the employee engages in a protected activity, the employer had knowledge of that activity, and 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. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. on other grounds 662 F.2d 899 (1<sup>st</sup> Cir. 1981), cert. denied 455 U.S. 989 (1982).

As set forth above, the record establishes that Scott participated in protected union and other concerted activity under the Act, including the meeting on January 8 about the new wage rate and his utilization of Delancey in his attempt to be reinstated after the soda incident. The record also clearly establishes that Respondent knew about Scott's protected activities and his association with Delancey and the FFWC. Delancey made clear her association with the FFWC and her purpose for meeting with Respondent's employees when she approached Otero and Morace on January 8 about the employees' wage rate. [Tr. 59 ("My name is Lisa Delancey, I'm with the fight for 15 and I told [Respondent] the reason why I was there").] Both Otero and Morace would have remembered her and the FFWC about three weeks later when Delancey came back to the store to represent Scott with respect to his suspension for the soda incident. [Tr. 63, 65.] The first two elements of the *Wright Line* analysis are, therefore, established.

Respondent's interactions with Delancey demonstrate clear animus against the FFWC and its organizing campaign. The evidence establishes that when Delancey visited the store on several occasions, neither Otero nor Morace were willing to speak with her. When Delancey visited the store to speak with employees about their wage rate and the new minimum wage law, Morace told her to leave the store after the employees laughed at Morace. [Tr. 59-60.] Similarly, when Delancey accompanied Scott to speak about his suspension, Morace refused to speak with her and ultimately called the police. [Tr. 65-66 ("[Morace] said he didn't have to talk to me. He

said get the fuck out of the store”].] This evidence speaks to Respondent’s hostility towards the FFWC and its campaign.

Further, even though Respondent alleges that Scott had disciplinary issues at the store prior to his termination, Respondent did not discipline him in any manner until after he brought Delancey into the store. An employer’s departure from past practice when taking an adverse employment action can be evidence of animus. *JAMCO*, 294 NLRB 896, 905 (1989) (changing criteria for layoffs from past practice is evidence of discrimination in violation of 8(a)(3)). Respondent presented no evidence whatsoever accounting for why Scott was not terminated or disciplined for his alleged past aggressive behavior and why his conduct was suddenly seen as terminable only after bringing Delancey into the store. Respondent’s sudden change in its evaluation of Scott’s behavior is evidence of animus.

Finally, Respondent made statements when Scott went to pick up his last paycheck that indicated animus against the FFWC. Otero told Scott that he was responsible for bringing Delancey into his store and, as a result, Scott was a danger to the team and could not be rehired. [Tr. 45.]<sup>3</sup> This demonstrates Respondent’s animus against the FFWC and Scott’s involvement with it and therefore shows that Scott’s association with Delancey contributed to his termination from the store. Based on the above, it must be found that the General Counsel has demonstrated a prima facie violation of Section 8(a)(3) of the Act.

Under the *Wright Line* test, once General Counsel has established a prima facie showing

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<sup>3</sup> The ALJ provided an inadequate and contradictory finding as to what was said by Otero during this interaction as indicated by Footnote 2 in the Decision, where the ALJ expressly referenced Otero referring to Delancey as a reason he was refusing to rehire Scott. [ALJD 4:20-21 n.2.] Scott’s testimony was that Otero said, “you brung that woman into the store and she’s having conversations with my employees. You know, why is she talking to my workers? She’s holding meetings almost every Friday. It bothers me and it bothers Morace... you got a reason why she’s here, why did you bring her here. I don’t even know why she was here in the first place and that’s another reason why I’m not hiring you back because you’re a danger to me and my team.” [Tr. 45.] The ALJ never expressly discredited Scott’s testimony in this regard. As argued below, the ALJ’s failure to make adequate and non-contradictory credibility determinations concerning this conversation is reversible error.

that protected conduct was a motivating factor in an employer's adverse employment action, the burden shifts to the employer to prove that it would have taken the same adverse employment action even in the absence of the protected conduct. *Wright Line, Inc.*, 251 NLRB 1083 (1980). If the employer's asserted rationale for the adverse employment action is pretextual, then the employer by definition fails to make out a defense. *Advoserv of New Jersey Inc.*, 363 NLRB No. 143 (2016).

Respondent argues that Scott was terminated for safety reasons, and pointed to prior, unestablished disciplinary issues that supposedly led to Scott's termination. [Tr. 115.] This defense fails for several reasons. To start, Respondent never issued any written warnings or disciplines to Scott while he worked at the store that would support any prior history of misconduct. [Tr. 47, 117.] Respondent presented no evidence at all of Scott's alleged prior incidents other than hearsay allegations by Morace. Without more, these prior incidents amount to nothing more than empty allegations similar to Scott's suspension for stealing soda, where he was suspended before Respondent determined if there was merit to the allegation. Thus, given Respondent's history of disciplining employees before investigating the issue, Respondent's reliance upon these unsubstantiated transgressions does not withstand scrutiny.

Further, Respondent's statements at trial cut against its defense that the reason for Scott's termination was safety concerns. Morace testified that he can choose to save surveillance footage if he thinks an incident requires it. [Tr. 116.] When posed with the question of why Respondent did not choose to save video footage from the night that Scott was terminated, Morace responded, "there was no fight, there was a conversation, argument." [Tr. 117.] In characterizing the exchange between Scott and Otero in this manner, Respondent evidently did not think that Scott's behavior was dangerous enough to warrant saving the surveillance footage. Thus, despite

Respondent's contention that Otero terminated Scott for safety reasons, Morace did not characterize the interaction in a way that reflected poorly on Scott's ability to work safely and he did not find it important to save any of the video footage from that evening. The following week, when Scott talked with Otero about getting his job back, Otero felt comfortable enough with Scott to talk with him alone in the office with the door shut. [Tr. 45.] This is not consistent with the actions of a person actually scared for their safety.

Further, it appears that Otero and Morace confront disciplinary issues with the staff regularly and therefore singled out Scott because of his association with Delancey. When Respondent was asked about why he did not retain video footage from the soda incident, Respondent stated that the soda issue "wasn't a big case." [Tr. 116.] Additionally, when asked why Respondent did not keep any paper records of disciplinary issues, Morace stated that if he had to document every disciplinary issue at the store, there would be too many to handle. [Tr. 118.] In fact, Respondent presented no evidence that it had ever disciplined, let alone fired, any other employee for misconduct similar to Scott's alleged misconduct. If other employees have disciplinary issues in the store frequently as Respondent asserts, and none of them were issued disciplines or terminated, Respondent has no historical record of showing the types of conduct that it treats as discharge worthy and has failed to establish that it would have taken the same adverse actions against Scott even in the absence of his union activity.

The ALJ did not consider any of these facts or the elements of the proper legal analysis of Respondent's decision to terminate Scott. The ALJ just suggests that the "heated argument" was a sufficient rationale for discharging Scott. [ALJD 4:10-11, 14-15.] However, in making this conclusion, the ALJ also failed to properly analyze whether this argument should have lost Scott the protection of the Act under established Board guidelines.

When an employer argues that an employee's behavior is so egregious that it not only justifies an employee's termination but also causes the employee to lose the protection of the Act, the Board uses a balancing test that weighs (1) the place of discussion, (2) the subject matter of the discussion, (3) the nature of the employee's outburst, and (4) whether the outburst was, in any way, provoked by the Employer's unfair labor practice. *See Felix Industries, Inc.* 339 NLRB No. 32 (2003), quoting *Atlantic Steel Co.*, 245 NLRB 814, 816-17 (1979). For the first factor, the Board looks to see if other employees or supervisors are present and whether the incident disrupts the work process. *See Advoserv of New Jersey Inc.*, 363 NLRB No. 143 (2016). For the second factor, if the outburst relates to terms and conditions of employment at issue, it weighs in favor or protection. *See Alcoa, Inc.* 352 NLRB 141 (2008).

Here, the dispute between Otero and Scott took place in the back of the store away from potential customers and occurred after the store closed for the evening. [Tr. 39.] The subject matter of the discussion pertained to Scott's wages, which weighs heavily in favor of protection of the Act. Regarding the nature of the employee's outburst, Morace himself characterized the incident between Otero and Scott about the missing paycheck as a "conversation, argument," which downplays the nature of the disagreement between them. [Tr. 117.] The argument was also provoked by Respondent singling Scott out to not receive his weekly salary or following the standard alternative pay practice of paying him in cash after historically paying all of the other employees in this manner. As a result, Scott's actions that evening did not lose the protection of the Act.

The ALJ erred in not considering these facts and analyzing Scott's termination in accordance with longstanding Board law. The ALJ's conclusion that Scott was lawfully

terminated for the argument on the night of February 12 should be overturned and Respondent should be found to have violated Section 8(a)(3) in terminating Scott.

IV. The ALJ Erred By Failing to Find or Address the Allegation that Respondent Violated the Act by Refusing to Rehire Scott

The ALJ completely failed to address in his Decision the Complaint allegation that Respondent unlawfully refused to reinstate Scott. The evidence showed that Respondent had rehired Scott in the past, so it was reasonable for Scott to request reinstatement when he talked with Otero about a week after his termination. [Tr. 99.] The ALJ found that “even if Otero did say that he was refusing to rehire Scott because Scott brought Delancey into the store, this would have referred to the demonstration that she led in the store’s premises during the week after Scott had been discharged.” [Tr. 4:fn. 2.] By the ALJ’s own interpretation of these events, Respondent’s refusal to rehire Scott is a violation of the Act. If Otero was refusing to rehire Scott because of the demonstration that Delancey and the FFWC held at the store, that would be unlawful retaliation against Scott because of Union activity in an attempt by Respondent to discourage membership in FFWC, a labor organization, in violation of Sections 8(a)(3) and (1) of the Act. However, the ALJ just states that this comment had nothing to do with Scott’s termination and fails to make any finding of fact or law as to whether Respondent violated the Act when it refused to rehire Scott.

Even setting aside the ALJ’s assertion of a possible intention in Otero’s mind for his making the statement, the evidence shows that Respondent acted unlawfully when it refused to rehire Scott. The same unlawful motivation underlying Respondent’s decision to terminate Scott was still present a week later when Scott sought to be reinstated. Respondent still blamed Scott for bringing Delancey into the picture, and by then, she had been back and led an additional

demonstration with the FFWC in the store. Respondent could not risk Scott returning and instigating more involvement with the FFWC at the store.

Counsel for the General Counsel requests that the Board find that Respondent refused to reinstate Scott to discourage activities in support of the labor organization FFWC in violation of Section 8(a)(3) and (1) based, in part, on the ALJ's footnote 2 in his Decision.

V. The ALJ Erred by Failing to Make a Proper and Non-Contradictory Credibility Determination

As noted in footnote 4 above, the ALJ expressly proffered an unlawful motivation for Respondent's failure to rehire Scott that is entirely irreconcilable with his summary finding that Otero "credibly denied" Scott's version of the conversation had at the time he sought rehire. That is to say that the ALJ must have credited parts of Scott's testimony about this conversation (at least the part that Otero stated that he was refusing to rehire Scott because he brought Delancey into the store), or his finding that such a statement related to the post-discharge silent demonstration makes no sense. The ALJ's abrupt and cursory handling of this testimony resulted in a woefully inadequate explication of the credibility resolution process that presents undue prejudice to the General Counsel in advancing the allegation regarding Scott's discharge and failure to be rehired.

The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of the evidence convinces the Board that they are incorrect. *See Standard Dry Wall Products*, 91 NLRB 544 (1950) enfd. 188 F. 2d 362 (3<sup>rd</sup> Cir. 1951). The Board has also consistently held that "where credibility resolutions are not based primarily upon demeanor... the Board itself may proceed to an independent evaluation of credibility." *Stevens Creek Chrysler Jeep Dodge, Inc.*, 357 NLRB 633, 635 (2011), *quoting J.N.*

*Ceazan Co.*, 246 NLRB 637, 638 fn. 6 (1979). Even when a credibility determination is based on demeanor, it is not dispositive if it is “inconsistent with the weight of the evidence, established or admitted facts, inherent probabilities, and reasonable inferences drawn from the record as a whole.” *E.S. Sutton Realty Co.*, 336 NLRB 405, 407 fn. 9 (2001).

In the instant case, a clear preponderance of the evidence shows that the ALJ never expressly discredited Scott and, in fact, must have credited at least the portion of his testimony concerning Otero’s statement that he was not being rehired because he brought Delancey into the store. However, the Decision is silent as to which parts of whose testimony was credited or discredited and the factors used to make any such determination. See *Stevens Creek Chrysler Jeep Dodge, supra*, at 635-36 (reversing the judge’s credibility determination because the judge gave no indication it was based on demeanor and instead used conclusory terms in citing merely the “testimony of [the witness]”); *El Rancho Market*, 235 NLRB 468, 470 (1978) (considering the record de novo with respect to credibility determinations because the judge only referred generally to demeanor and did not make specific credibility determinations regarding conflicting testimony based on witnesses’ demeanor). The ALJ gave no indication that he was relying on demeanor when making his implicit, yet contradictory, determinations. Accordingly, the ALJ’s seeming credibility determination should be overturned.

VI. In the Absence of Finding that Respondent Violated the Act as Alleged in the Complaint, This Matter Should be Remanded for Proper Legal Analysis and Factual Findings

Based on the ALJ’s failure to appropriately apply the law pertaining to labor organization status, whether Scott engaged in union activity, a burden-shifting analysis with respect to Respondent’s defenses for the discharge, the failure to address the failure to rehire allegation in its entirety, or to properly extrapolate the basis for an essential credibility determination, Counsel

for the General Counsel urges the Board to remand the case, absent finding that Respondent violated the Act as alleged in the Complaint.

VII. The ALJ Erred in Failing to Make Scott Whole for the Reasonable Consequential Damages Incurred as a Result of Respondent's Unlawful Conduct

The language of Section 10(c) of the Act is broad enough to conclude that the Board may order a remedy for the economic consequences directly resulting from an employer's unfair labor practice. Section 10(c) states that upon a finding by the Board that an unfair labor practice has been committed, the Board shall issue "an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without backpay, as will effectuate the policies of the Act."

Congress granted the Board broad power under Section 10(c) of the Act to determine the proper scope of its remedial orders, particularly with respect to affirmative relief. See, e.g., *Sure-Tan, Inc. v. NLRB*, 467 U.S. 883, 898-99 (1984) (Congress vested in Board "the primary responsibility and broad discretion to devise remedies that effectuate the policies of the Act, subject only to limited judicial review"). The Board is not limited to an order of reinstatement and/or backpay as a remedy simply because they are the only forms of affirmative action expressly provided for in the Act. Thus, in reference to Section 10(c) the Supreme Court has noted:

A statute expressive of such large public policy as that on which the National Labor Relations Board is based must be broadly phrased and necessarily carries with it the task of administrative application. There is an area plainly covered by the language of the Act and an area no less plainly without it. But in the nature of things Congress could not catalogue all the devices and stratagems for circumventing the policies of the Act. Nor could it define the whole gamut of remedies to effectuate these policies in an infinite variety of specific situations. Congress met these difficulties by leaving the adaptation of means to end to the empiric process of administration. *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 194 (1941).

As the Court has explained, “[t]he Act does not create rights for individuals which must be vindicated according to a rigid scheme of remedies.” *Id.* Rather, remedies “must be functions of the purposes to be accomplished” and must “heed ‘the importance of taking fair account, in a civilized legal system, of every socially desirable factor in the final judgment.’” *NLRB v. Seven-Up Bottling Co. of Miami*, 344 U.S. 344, 346 (1953) (quoting *Phelps Dodge Corp.*, *supra* at 198). Each remedy should “be tailored to the unfair labor practice it is intended to redress.” *Sure-Tan*, 467 U.S. at 900. Thus, by its plain meaning, Section 10(c) is a grant of authority to the Board to devise remedies for various unfair labor practices, so long as such remedies “effectuate the policies of the Act.” *Frontier Hotel & Casino*, 318 NLRB 857, 863 (1995), *enfd in part*. *sub nom. Unbelievable, Inc. v. NLRB*, 118 F.3d 795 (D.C. Cir. 1997). Accordingly, the language of both Section 10(c) is broad enough to conclude that in order to restore the *status quo*, the Board may order a remedy for the economic consequences directly resulting from an employee's unlawful discharge.

Indeed, the Board has ordered an employer to compensate an employee for the economic consequences resulting from the employer's unlawful discharge of a union supporter. In *Freeman Decorating Co.*, 288 NLRB 1235 (1988), the employer violated Section 8(a)(1) and (3) of the Act by forcibly removing from the workplace, and causing injury, to its employee when it discharged him because of his union activities. The ALJ ordered the employer to offer the employee reinstatement and backpay. In addition, the ALJ noted that if the employee showed that he suffered loss because of his injuries, the employer should offer him backpay for periods of his disability and “costs for medical and rehabilitation treatment.” *Id.* at 1241. The Board affirmed the remedy ordered by the ALJ, but stated that the employer is only required to reimburse the discriminatee for medical and rehabilitative expenses “that were incurred due to

lack of insurance coverage resulting from the employees unlawful discharge.” *Id.* at 1235 n. 2. The Board noted that the reimbursement for medical expenses is not compensation for the physical injuries, but is reimbursement only for those expenses incurred due to a lack of insurance coverage resulting from the employee’s unlawful discharge.

Thus, once the ALJ is overturned and Respondent has been found to have violated Sections 8(a)(3) and (1) of the Act, Scott should be awarded consequential damages in addition to the standard make-whole remedy.

### CONCLUSION

Based on the entire record, the evidence clearly supports the conclusion that Respondent discharged and refused to rehire Scott because of his protected Union activities, in violation of Sections 8(a)(1) and (3) of the Act as alleged in the Complaint. Counsel for the General Counsel therefore urges that the Board sustain the General Counsel’s Exceptions in their entirety, reverse the ALJ’s recommendation to dismiss the Complaint, and issue an Order requiring that Respondent reinstate Scott, awarding backpay, post a Notice to employees, and any further remedy as the Board deems appropriate. In the alternative, Counsel for the General Counsel requests that the case be remanded for an ALJ to conduct the appropriate and required legal and factual analysis.

Respectfully submitted,

/s/ Kimberly Walters  
Kimberly Walters  
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DATED AT Brooklyn, New York, this 13<sup>th</sup> day of October, 2016.