

No. 16-3415

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

NATIONAL LABOR RELATIONS BOARD

Petitioner

v.

EYM KING OF MISSOURI, LLC d/b/a BURGER KING

Respondent

**ON APPLICATION FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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SUMMARY OF THE CASE

The National Labor Relations Board seeks enforcement of its Order finding that EYM King of Missouri, LLC, d/b/a Burger King (“EYM King”) violated Section 8(a)(3) and (1) of the Act by refusing to hire union organizer Terrance Wise because of his union and protected concerted activity. The Board’s conclusion is based on well-supported credibility findings and involves the straightforward application of well-settled law to the credited facts.

EYM King was hiring at the time Wise applied, he was thoroughly qualified for the position, and EYM King’s union animus contributed to its refusal to hire him. EYM King’s union animus is amply demonstrated by the shifting, inconsistent, and pretextual reasons General Manager LaReda Hayes offered for her refusal to hire Wise. Specifically, the Board discredited Hayes’ claim that she would refuse to hire Wise, an employee with eleven years’ experience at Burger King, based on his slight change in availability and his twice overcooking hamburgers. Hayes’ pretextual reasons doom EYM King’s affirmative defense that it would have refused to hire Wise even in the absence of his union and protected concerted activity.

Although the Board believes oral argument is not necessary, if the Court grants EYM King’s request for argument, the Board requests the opportunity to participate and believes that 10 minutes per side for oral argument is appropriate.

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER
AND APPELLATE JURISDICTION**

This case is before the Court on the application of the National Labor Relations Board (“the Board”) to enforce the Board’s Decision and Order issued against EYM King of Missouri, LLC, d/b/a Burger King (“EYM King”) on June

23, 2016, and reported at 364 NLRB No. 33. (A 85-100.)¹ The Board had jurisdiction over the unfair-labor-practice proceeding below under Section 10(a) of the National Labor Relations Act, as amended (29 U.S.C. §§ 151, 160(a)) (“the Act”). The Board’s Order is final with respect to all parties.

The Board filed its application for enforcement on August 15, 2016. This filing is timely because the Act imposes no time limit on the initiation of enforcement proceedings. The Court has jurisdiction pursuant to Section 10(e) of the Act (29 U.S.C. § 160(e)), and venue is proper because the unfair labor practice occurred in Kansas City, Missouri

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board’s finding that EYM King violated Section 8(a)(3) and (1) of the Act by refusing to hire Terrence Wise because he engaged in union and protected concerted activity.

NLRB v. Wolfe Elec. Co., 314 F.3d 325 (8th Cir. 2002)

Town & Country Elec., Inc. v. NLRB, 106 F.3d 816 (8th Cir. 1997)

FES (A Division of Thermo Power), 331 NLRB 9 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002)

¹ “A” refers to the Joint Appendix; “SA” refers to the Supplemental Appendix; “Br.” refers to EYM King’s Opening Brief; and “Tr.” refers to specific transcript pages, where more than one transcript page appears on an Appendix cite. Where applicable, references preceding a semicolon are to the Board’s decision; those following it are to the supporting evidence.

29 U.S.C. § 158(a)(1), (3)

STATEMENT OF THE CASE

This case involves EYM King’s refusal to hire union activist and long-time employee Terrence Wise when it took over the franchise. After investigating unfair-labor-practice charges filed by the Workers’ Organizing Committee – Kansas City (“WOCKC”), the Board’s General Counsel issued a complaint against EYM King, consolidating multiple unfair-labor-practice charges alleging violations of Section 8(a)(3) and (1) of the Act (29 U.S.C. § 158(a)(3), (1)). (A 87; A 23-30.) Following a hearing, an administrative law judge issued a decision on February 9, 2016, finding that EYM King violated the Act by refusing to hire Wise because he engaged in union and protected concerted activity, and by unlawfully disciplining six strikers. (A 87-100.) On June 23, 2016, the Board issued a Decision and Order, adopting, with two clarifications, the administrative law judge’s finding that EYM King unlawfully refused to hire Wise, severing the issue of striker discipline for further consideration, and modifying the judge’s recommended remedy to remove a notice-reading requirement. (A 85 & n.2 & n.3.) Thus, the only issue before the Court for review is EYM King’s refusal to hire Wise.

I. THE BOARD'S FINDINGS OF FACT

A. EYM King's Operations and Wise's Employment with Other Burger King Franchisees

EYM King is a franchisee of several Burger King restaurants in Kansas City and other cities in Missouri. (A 87; A 151-52 (Tr. 249-50), SA 345 ¶ 2(a).) It purchased several Burger King restaurants from another franchisee, Strategic Restaurants ("Strategic") and began operations on March 26, 2015. (A 87; A 113 (Tr. 61), 150 (Tr. 242), SA 345 ¶ 2(a).) Among those restaurants was one at 1102 E. 47th Street in Kansas City ("47th Street Restaurant"). (A 87; A 105 (Tr. 29), 164 (Tr. 327), SA 345 ¶ 2(a).)

Wise was a long-time employee who had worked for various Burger King restaurants for eleven years. (A 88; A 105 (Tr. 29).) He worked as a "general crew member" for Strategic at the 47th Street Restaurant for three years from 2012 through March 25, 2015. (A 88 & n.8; A 106 (Tr. 30), 340.) As a general crew member, Wise performed various non-supervisory tasks at Burger King, including kitchen work, such as cooking food; customer service; and maintenance. (A 88; A 106 (Tr. 30).) On occasion, management trusted him with additional tasks, such as arranging breaks for his coworkers in the kitchen. (A 89 & n.13; A 185-86 (Tr. 429-30).)

In early 2015, Wise worked from 9:00 a.m. to 5:00 p.m. (A 88; A 106 (Tr. 30).) Just before the change in ownership, however, he was mostly working

the overnight shift from 10:00 p.m. to 6:00 a.m. and was available to work on weekends. (A 88 & n.9; A 106 (Tr. 30), 127 (Tr. 120), 172 (Tr. 372).)

LaReda Hayes worked as the general manager of the 47th Street Restaurant under Strategic. (A 88; A 164 (Tr. 327-28).) As general manager, she supervised Wise throughout his employment at the 47th Street Restaurant. (A 88 & n.8; A 113 (Tr. 61), 117-18 (Tr. 77-78).) EYM King hired Hayes to continue on as its general manager, and she has worked for EYM King since it took over operations. (A 88; A 117-18 (Tr. 77-78), 164 (Tr. 327-28), SA 345-46 ¶ 4.)

B. Beginning in Spring 2013, Wise Actively Participates In Union and Protected Concerted Activity, and Hayes Is Aware of That Activity

WOCKC is the Kansas City chapter of the national Workers Organizing Committee (“WOC”), also known as the “Fight for \$15.” (A 87, 88 & n.10; A 106 (Tr. 30).) WOCKC – with assistance from WOC, other unions, and community groups – conducts local campaigns for higher wages, better working conditions, and unionization, primarily in the fast food and other low-wage industries. (A 88; A 106 (Tr. 30-33), 121 (Tr. 91-92), 139 (Tr. 176), 144 (Tr. 202), 153 (Tr. 269).)

In spring 2013, Wise became active in WOCKC. (A 88, 93; A 106 (Tr. 33).) Over time, Wise assumed a leadership role with the organization. (A 88; A 106 (Tr. 32), 118 (Tr. 80-81), 139 (Tr. 177), 144 (Tr. 202), 154 (Tr. 270-71).) At the local and national level, Wise participated in strikes, rallies, protests, health and

safety campaigns, and marches and sometimes spoke at or assisted in organizing those events. (A 88; A 106-07 (Tr. 31-34).) Prominent local and national media (print, television, and radio), such as the New York Times; the Washington Post; the Wall Street Journal; USA Today; ABC News; Fox News; and MSNBC, have featured and/or quoted Wise regarding his participation in WOCCK and the Fight for \$15. (A 88; A 107 (Tr. 34), 108 (Tr. 40-41), 154 (Tr. 271-72), 194-202.)

Wise's picture, along with that of another 47th Street Restaurant employee, also appeared on the side of city buses in a promotion for WOCCK's campaign. (A 88; A 129 (Tr. 126-27), 145 (Tr. 210).)

Wise was responsible for bringing the WOCCK organizing campaign to the 47th Street Restaurant. (A 88; A 144 (Tr. 202), 154 (Tr. 270-73).) Because the campaign largely depends on "worker to worker organizing," Wise regularly encouraged his coworkers to participate in strikes and rallies and to sign petitions. (A 88, 93; A 122 (Tr. 97), 154 (Tr. 270-73).) During his tenure at the 47th Street Restaurant, Wise participated in six union-sanctioned strikes between July 2013 and December 2014, most of which were part of nationwide strikes coordinated by WOC. (A 88; A 106 (Tr. 31), 118 (Tr. 81), 119-21 (Tr. 83-91).)

In July 2013, while Hayes was conducting a routine random search to prevent theft, Hayes learned of Wise's activity when she discovered a flyer in his backpack advertising a rally coordinated by the Fight for \$15. (A 88; A 109

(Tr. 43-44), *see also* 172 (Tr. 371).) Thereafter, Hayes saw Wise's union activity in the media (A 93; A 172 (Tr. 371)) and told Wise she saw his picture on WOCKC's bus advertisements (A 88; A 129 (Tr. 126-27)).

In addition to his union activities, in July 2013 and May 2014, Wise filed, or was named a discriminatee in charges before the Board against Strategic. (A 88; A 110-11 (Tr. 47-52), 204, 205, 341.) Some of those charges alleged that Hayes unlawfully disciplined Wise and other employees. (A 110-11 (Tr. 47-52), 171 (Tr. 367), 204, 205, 341.) In March 2015, shortly before EYM King took over, Wise and his coworkers presented a health-and-safety petition to Hayes requesting that management repair kitchen equipment, fully stock the restaurant's first aid kits, and provide its employees protective equipment for hazardous tasks. (A 88; A 109-10 (Tr. 45-47), 127 (Tr. 121), 143 (Tr. 199-201).)

C. Strategic Management Disciplines Wise a Handful of Times During His Employment

Strategic had several rules that employees had to follow, including practices regarding the appropriate amount of food to cook and attendance policies. (A 88-89; A 183 (Tr. 420-21), 184 (Tr. 422-24), 186-87 (Tr. 433-34), 328.) Despite those rules, Strategic's management only disciplined Wise a handful of times during his three-year tenure at the 47th Street Restaurant. (A 88.)

Regarding cooking the appropriate amount of food, Strategic's practice was for a "kitchen minder" to tell the cooks how much food to cook and when to cook

it. (A 88-89; A 186 (Tr. 433).) If employees cooked more food than customers purchased, and the food sat too long in the warmer, management had to count, record, and discard the excess food. (A 89; A 184 (Tr. 423), 186-87 (Tr. 433-34).) Once the discarded food was counted and recorded, Hayes sometimes permitted employees to eat the food or give it away. (A 89 & n.11; A 184 (Tr. 423-24).) During the three years that he worked for Strategic, Wise twice cooked too much food to meet customer demand. (A 88-89; A 174 (Tr. 380-81), 184 (Tr. 422-23).) Hayes verbally counseled Wise for those two infractions, but she did not document them in writing. (A 89 & n.11; A 174 (Tr. 380), 184 (Tr. 422-23).)

Strategic's attendance policy required employees to notify management at least three hours before the start of their shift if they were going to be late or absent. (A 89 n.12; A 183 (Tr. 420-21), 328.) During his time at Strategic, Wise received two write-ups for tardiness: one for arriving at work 55 minutes late on April 21, 2014, and one for switching shifts and arriving 15 minutes late on May 5, 2014. (A 89; A 125-26 (Tr. 112-14), 183 (Tr. 419), 326-27.) Hayes also issued him a written warning for calling in less than three hours before his scheduled shift to tell management that he was going to be five to ten minutes late on May 6, 2014. (A 94; A 126 (Tr. 115-16), 183 (Tr. 420-21), 328.)

D. Hayes Asks 47th Street Restaurant Employees To Apply for Employment with EYM King; Hayes Refuses to Hire Wise

Shortly before EYM King took over operations at the 47th Street Restaurant, Hayes met with her employees and told them that they must complete job applications and other personnel documents if they wanted to continue working at the restaurant under the new owners. (A 91; A 114 (Tr. 62-64), 136 (Tr. 151), 142 (Tr. 190).) A few days before the changeover, Hayes, or another manager, distributed the applications. (A 91; A 136 (Tr. 151), 142 (Tr. 190), 164 (Tr. 328.) Hayes had sole hiring authority for the restaurant. (A 91; A 164 (Tr. 329).)

For most employees, the application process was a mere formality. Some employees took several days to complete their applications and some continued to work at the restaurant under new ownership for almost a week before submitting their applications. (A 91; A 115 (Tr. 66), 136 (Tr. 151-52), 142 (Tr.191-92), 281-322.) Wise completed and submitted his job application on March 25, the day he received it. (A 91; A 114-15 (Tr. 64-66), 323-24.)

On his application, Wise listed his availability as 7:30 a.m. to 5:00 p.m. (or overnight) on Mondays through Fridays; 9:00 a.m. to 5:00 p.m. on Saturdays; and unavailable on Sundays. (A 93; A 323.) Although some applicants imposed no availability limitations on their applications (A 93; A 253, 281, 310), others listed availability restrictions, like Wise did (A 93; A 210, 232).

On the morning of March 26, Hayes met with Wise in the lobby of the restaurant at the beginning of his shift. (A 91-92; A 169 (Tr. 346).) She informed him that she was not going to hire him to work for EYM King because of changes in his availability and “some insubordination.” (A 91-92; A 169 (Tr. 346).) Hayes hired most of the former Strategic employees who applied to work for EYM King. (A 91; A 137-38 (Tr. 161-62), 142 (Tr. 192-93), 164-67 (Tr. 329-38).)

II. THE BOARD’S CONCLUSIONS AND ORDER

On June 23, 2016, the Board (Chairman Pearce and Members Hirozawa and McFerran) issued its Decision and Order finding, in agreement with the administrative law judge, that EYM King violated Section 8(a)(3) and (1) of the Act by refusing to hire Wise because he engaged in union and protected concerted activity.² (A 85 & n.2.) The Board’s Order directs EYM King to cease and desist from its unlawful conduct, and in any like or related manner, interfering with its employees’ Section 7 rights. (A 85.) Affirmatively, the Order requires EYM King to instate Wise to the position for which he applied or to a substantially equivalent position. (A 85.) The Order further requires EYM King to make Wise whole for

² Two additional cases (14-CA-150794 and 14-CA-150321) were consolidated for administrative purposes with this refusal-to-hire case. As noted, the Board severed for its further consideration Case 14-CA-150321, in which the administrative law judge found that EYM King unlawfully disciplined six employees for engaging in a one-day WOC strike on April 15, 2015. (A 85 n.3, 87, 95-98.) The Board dismissed the charges in Case 14-CA-150794. (A 85 n.1, 87, 94-95.) Accordingly, those cases are not before the Court.

the losses suffered as a result of the discrimination against him and to remove from its files any reference to the unlawful refusal to hire him. (A 85.) Finally, the Order directs EYM King to post a remedial notice. (A 86-87.)

SUMMARY OF THE ARGUMENT

When EYM King, a Burger King franchisee, took over operations of the 47th Street Restaurant from Strategic, another franchisee, it gave sole hiring authority to General Manager LaReda Hayes. Hayes, who had been Strategic's general manager, hired most of the former Strategic employees who applied to work at the 47th Street Restaurant, except for Terrence Wise, who was the most prominent WOCKC supporter and organizer and participated in numerous activities for the "Fight for \$15" campaign.

Substantial evidence supports the Board's finding that EYM King violated Section 8(a)(3) and (1) of the Act by refusing to hire Wise because of his union and protected concerted activity. In accordance with its decision in *FES (A Division of Thermo Power)*, 331 NLRB 9 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002), the Board found that EYM King was hiring at the time Wise applied and that he was thoroughly qualified for the position, having eleven years' experience at Burger King, including three of those years at the 47th Street Restaurant under Hayes' supervision. EYM King's union animus is amply demonstrated by the Board's finding discrediting Hayes' reasons for refusing to hire Wise – both those

told to Wise at the time and the additional reasons she proffered at the hearing – as shifting and inconsistent and therefore pretextual.

Not only do Hayes’ pretextual, and wholly discredited, reasons for her decision not to hire Wise support the Board’s finding of union animus, they also doom EYM King’s affirmative defense under *FES*. Before the Court, EYM King repeats Hayes’ discredited version of the facts. EYM King, however, has not met its heavy burden of demonstrating “exceptional circumstances” to overturn the Board’s well-supported credibility determinations. Thus EYM King failed to prove that it would not have hired Wise even in the absence of his protected activity.

STANDARD OF REVIEW

The Court will enforce the Board’s Order “if the Board correctly applied the law and if its findings of fact are supported by substantial evidence on the record as a whole, even if [the Court] might have reached a different decision had the matter been before [it] de novo.” *King Soopers, Inc. v. NLRB*, 254 F.3d 738, 742 (8th Cir. 2001) (citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 490-91 (1951), and other cases); accord *NLRB v. Wolfe Elec. Co.*, 314 F.3d 325, 328 (8th Cir. 2002). See also 29 U.S.C. § 160(e) (factual findings of the Board are “conclusive” if supported by substantial evidence). Substantial evidence is “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.”

Universal Camera Corp., 340 U.S. at 477 (citation omitted). An employer’s motive is a question of fact reviewed under the substantial evidence test, *see Wright Elec., Inc. v. NLRB*, 200 F.3d 1162, 1166, 1168 (8th Cir. 2000); however, “review of the Board’s conclusion as to discriminatory motive is even more deferential, because most evidence of motive is circumstantial,” *Ozburn–Hessey Logistics, LLC v. NLRB.*, 833 F.3d 210, 217 (D.C. Cir. 2016) (citation omitted).

The Court reviews determinations about witness credibility under the same deferential standard, but with the additional recognition that, “the question of credibility of witnesses and the weight to be given their testimony in labor cases is primarily one for determination by the trier of facts.” *Town & Country Elec., Inc. v. NLRB*, 106 F.3d 816, 819 (8th Cir. 1997) (internal quotation marks omitted) (citing cases); *accord NLRB v. La-Z-Boy Midwest*, 390 F.3d 1054, 1058 (8th Cir. 2004). Thus, the Court affords “great deference to the [administrative law judge’s] credibility determinations,” *JHP & Assocs., LLC v. NLRB*, 360 F.3d 904, 910-11 (8th Cir. 2004) (citations omitted), and “afford[s] great deference to the Board’s affirmation of the [judge’s] findings,” *NLRB v. RELCO Locomotives, Inc.*, 734 F.3d 764, 779 (8th Cir. 2013) (quoting *Town & Country Elec.*, 106 F.3d at 819). The Court will not reverse such findings “unless extraordinary circumstances come into play.” *Wilson Trophy Co. v. NLRB*, 989 F.2d 1502, 1509 (8th Cir. 1993) (citing cases).

ARGUMENT

SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD’S FINDING THAT EYM KING VIOLATED SECTION 8(a)(3) AND (1) OF THE ACT WHEN IT REFUSED TO HIRE WISE BECAUSE HE ENGAGED IN UNION AND PROTECTED CONCERTED ACTIVITY

A. An Employer’s Refusal To Hire a Job Applicant Because of the Applicant’s Protected Activities Is Unlawful

Section 8(a)(3) of the Act specifically prohibits employers from “discrimination in regard to hire . . . [in order to] discourage membership in any labor organization.” 29 U.S.C. § 158(a)(3). *See NLRB v. Town & Country Elec., Inc.*, 516 U.S. 85, 87-88 (1995) (citing *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 185-86 (1941)) (recognizing that the Act protects applicants for employment). Hence, an employer violates Section 8(a)(3) and (1)³ by refusing to hire job applicants because of their union sentiments, membership, or activities. *Wright Elec.*, 200 F.3d at 1167-68; *see Progressive Elec., Inc. v. NLRB*, 453 F.3d 538, 546 (D.C. Cir. 2006). As the Supreme Court explained long ago, “[d]iscrimination against union labor in the hiring of [employees] is a dam to self-organization at the source of supply . . . [that] inevitably operates against the whole idea of the legitimacy of organization.” *Phelps Dodge*, 313 U.S. at 185.

³ An employer who violates Section 8(a)(3) of the Act also commits a “derivative” violation of Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)). *See Metro. Edison Co. v. NLRB*, 460 U.S. 693, 698 n.4 (1983).

To establish a discriminatory refusal to hire job applicants in violation of the Act, the Board's General Counsel must demonstrate: (1) the employer was hiring, or had concrete plans to hire; (2) the applicant had experience or training relevant to the announced or generally known requirements of the open job positions; and (3) union animus contributed to the employer's decision not to hire the applicant. *FES (A Division of Thermo Power)*, 331 NLRB 9, 12 (2001), *enforced*, 301 F.3d 83 (3d Cir. 2002).⁴ Once the General Counsel has made that preliminary showing, the employer must prove that it would not have hired the applicants even in the absence of their union or protected concerted activity. *Id.*; *accord Casino Ready Mix, Inc. v. NLRB*, 321 F.3d 1190, 1194 (D.C. Cir. 2003); *Wolfe Elec. Co.*, 336 NLRB 684, 690-91 (2000), *enforced*, 314 F.3d at 327-28.

The Court has recognized that direct evidence of unlawful intent is rare. *NLRB v. Senftner Volkswagen Corp.*, 681 F.2d 557, 559 (8th Cir. 1982). Thus, the Board may rely on circumstantial evidence in determining an employer's motivation "and is 'permitted to draw reasonable inferences, and to choose between fairly conflicting views of the evidence.'" *Pace Indus., Inc. v. NLRB*, 118

⁴ In *FES*, the Board adapted its framework for analyzing refusal-to-hire violations from its longstanding general test for determining unlawful employer motivations for adverse employment actions, developed in *Wright Line*, 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 403 (1983). *FES*, 331 NLRB at 12, 15.

F.3d 585, 590 (8th Cir. 1997) (quoting *Concepts and Designs, Inc. v. NLRB*, 101 F.3d 1243, 1245 (8th Cir.1996)); *accord Power, Inc. v. NLRB*, 40 F.3d 409, 418 (D.C. Cir. 1994). In particular, a finding that the employer’s justification for its employment decision is pretextual supports a finding that its motivation for that decision was unlawful. *York Prod., Inc. v. NLRB*, 881 F.2d 542, 545 (8th Cir. 1989) (citing cases); *Commercial Erectors, Inc.*, 342 NLRB 940, 943 (2004). For when the employer’s stated motive is false, the trier of fact “can infer that the motive is one that the employer desires to conceal – an unlawful motive.” *Shattuck Denn Min. Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *see Suburban Elec. Engineers/Contractors, Inc., Local Union 577*, 351 NLRB 1, 5 (2007) (inferring animus solely based on employer’s pretextual justifications for failure to hire); *Leading Edge Aviation Servs., Inc.*, 345 NLRB 977, 977-78 (2005) (same), *enforced*, 212 F. App’x 193 (4th Cir. 2007).

Evidence of pretext may include: an employer’s new or shifting explanations for its employment decision; reasons that are proven false or that are based on discredited testimony; tolerance of behavior later cited as the reason for the employment decision; and the disparate treatment of union supporters or organizers compared to other employees. *See Lucky Cab Co.*, 360 NLRB No. 43, 2014 WL 670231, at *6 (Feb. 20, 2014), *enforced*, 621 F. App’x 9 (D.C. Cir. 2015); *see also RELCO*, 734 F.3d at 787.

A finding that the employer's proffered justification is pretextual not only supports the General Counsel's initial showing, but it precludes the employer's defense. *Pace Indus., Inc. v. NLRB*, 118 F.3d at 593 (successor employer's proffered reasons for hiring procedure were largely pretextual and "did not sustain [employer's] burden of showing that it would have taken the same action even absent the unlawful motivation"). For "[i]f the Board concludes . . . that the employer's purported justifications for adverse action against an employee are pretextual, then the employer fails as a matter of law to carry its burden." *Ozburn-Hessey Logistics*, 833 F.3d at 219; accord *Suburban Elec. Engineers/Contractors*, 351 NLRB at 5.

B. EYM King Refused to Hire Wise Because of His Union and Protected Concerted Activity

The Board's finding (A 94) that EYM King "refused to hire Wise for discriminatory reasons in violation of Sections 8(a)(1) and (3) of the Act" is amply supported by the credited record evidence. The General Counsel easily demonstrated all three *FES* elements: EYM King was hiring, Wise was well-qualified, and EYM King's union animus was amply demonstrated by the credited evidence showing that Hayes' reasons for refusing to hire Wise were pretextual. (A 93-94.) Under settled principles, as shown, those pretextual reasons both support a finding of illegal motivation and doom EYM King's affirmative defense.

1. It is undisputed that EYM King was hiring, and Wise was well-qualified for the open position

The Board reasonably found (A 93), and EYM King does not dispute, that the General Counsel easily met the first two *FES* elements. It is uncontested that EYM King was hiring at the time Wise applied. Likewise, Wise was thoroughly qualified for the position; he was employed at various Burger King restaurants for eleven years and spent three of those years working at the 47th Street Restaurant. (A 88 & n.8, 93; A 105 (Tr. 29), 340.) *See FES*, 331 NLRB at 12.

2. The reasons Hayes gave to long-time employee Wise for not hiring him demonstrate that her decision was unlawfully motivated

Substantial credited evidence supports the Board's finding (A 93-94) that Wise's protected activities, of which Hayes was well aware, motivated her decision not to hire Wise. Indeed, the Board discredited Hayes' reasons for not hiring Wise – both those told to Wise on March 26, as well as the additional reasons she proffered at the hearing – as “shifting and inconsistent” (A 94) and unsupported by corroborating evidence. The Board adopted the judge's finding that Hayes' reasons for refusing to hire Wise were not the real reasons at all, but were pretextual. (A 85 & n.2, 93-94.) *See, e.g., Hall v. NLRB*, 941 F.2d 684, 688 (8th Cir. 1991) (employer's contradictory and vague explanations for employee's lay-off evidenced unlawful motivation); *accord Suburban Elec. Engineers/Contractors, Inc.*, 351 NLRB at 5.

As an initial matter, it is uncontested that Wise engaged in actions that “were the epitome of protected union and concerted activity,” and that Hayes, EYM King’s hiring official, was well aware of those activities.⁵ (A 93.) As shown at pp. 5-7, Wise was an early supporter of, and ultimately a leader in, WOCKC. He regularly spoke on behalf of WOCKC and the “Fight for \$15” campaign on the local and national stage and participated in their rallies and strikes. He brought WOCKC’s campaign to the 47th Street Restaurant, encouraged coworkers to participate in the organization, and discussed the benefits of unionization. In addition, Wise engaged in concerted activities otherwise protected by the Act, including filing charges with the Board (some involving Hayes’ actions) and joining his coworkers in presenting a petition to Hayes about improving working conditions. *See Meyers Indus.*, 281 NLRB 882, 887 (1986) (concerted activity protected by Section 7 “encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action”), *enforced sub nom., Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

⁵ Courts and the Board have long recognized that communication with fellow employees and union representatives is core to an employee’s right under Section 7 of the Act, which guarantees that “[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations . . . and to engage in other concerted activities for the purpose of . . . mutual aid or protection.” 29 U.S.C. § 157. That is, “[t]he right of self-organization depends in some measure on the ability of employees to learn the advantages of self-organization from others.” *NLRB v. Babcock & Wilcox Co.*, 351 U.S. 105, 113 (1956).

Hayes – the sole person responsible for EYM King’s hiring decisions – admitted she was well aware of Wise’s involvement in WOCCK and his protected activity. She became aware of his activity in July 2013 when she found a flyer advertising a WOCCK rally. Thereafter, she saw Wise promoting WOCCK in the media and on city buses; she was a witness in the unfair-labor-practice proceeding that resulted from charges filed in May 2014, in which WOCCK alleged that Wise had been unlawfully disciplined; and she received the health-and-safety petition presented by Wise and his coworkers in March 2015, shortly before she made her hiring decision. *See* pp. 6-7.

In refusing to hire Wise, Hayes told Wise that “due to [his] change of availability and some insubordination and whatever going on [she] decided not to bring [him] on with EYM.” (A 91-92; A 169 (Tr. 346).) As discussed in detail below, the Board’s finding (A 93-94) that Hayes’ proffered reasons were pretextual rests on the judge’s well-supported credibility resolutions – in particular, discrediting the bulk of Hayes’ testimony and crediting key portions of Wise’s testimony. (A 89 & n.11 & n.13 & n.15, 90, 93-94.) In making her determinations, the judge properly considered the witnesses’ demeanor, the vagueness or detail of their testimony, and the extent to which their testimony was corroborated or inconsistent. (A 89 & n.11 & n.13 & n.15, 90, 93-94.) Based on those considerations, the judge expressly discredited Hayes, finding her not “to be

an overall credible witness” and finding that her reasons for refusing to hire Wise were not the real reasons at all. (A 93-94.) Now, before the Court, EYM King presents no reasons, much less “extraordinary circumstances,” warranting the Court’s setting aside those well-supported findings, which are to be afforded great deference. *See Wilson Trophy Co.*, 989 F.2d at 1509; *JHP & Assocs.*, 360 F.3d at 910-11.

a. Hayes’ claim that Wise’s change in availability warranted refusing to hire him was pretextual

Hayes cited Wise’s “change of availability” as one of the two reasons she did not hire him. (A 91-92; A 169 (Tr. 346).) The judge, affirmed by the Board, found (A 93) that Hayes’ claim was “not . . . credible” because “Wise was no more limited in his availability than some other employees who applied and were hired.” (A 91, 93.) *See Wright Elec.*, 200 F.3d at 1166, 1168 (employer’s justification for failure to hire union supporter based on experience was pretextual where employees contacted and hired had similar experience); *Tradesmen Int’l, Inc.*, 351 NLRB 579, 583 (2007) (employer’s argument that it delayed hiring union member because he was “high priced” evidenced disparate treatment because employer had not delayed hiring an equally “high priced” non-union employee).

On his employment application for EYM King, Wise listed his availability as: 7:30 a.m. to 5:00 p.m. or the overnight shift on Mondays through Fridays; 9:00 a.m. to 5:00 p.m. on Saturdays; and unavailable on Sundays. (A 93; A 323-24.)

This change in his availability was not substantial.⁶ At Strategic, Wise had worked both the day shift (9:00 a.m. to 5:00 p.m.) and, more recently, the overnight shift (10:00 p.m. to 6:00 a.m.), including some weekends. (A 93; A 106 (Tr. 30), 127 (Tr. 120), 172 (Tr. 372).) Thus, his availability changed only for the Saturday overnight shift and Sunday shifts.

Significantly, other employees who were hired placed similar restrictions on their availability. Indeed, one applicant was not available Sundays and Mondays, nor was she available for any overnight shifts. (A 210.) Another applicant was unavailable before 3:00 p.m. or after 10:00 p.m. during most weekdays. (A 232.) Despite greater restrictions on their availability, EYM King hired those employees (A 91, 93; Br. 4), but refused to hire Wise.

EYM King confusingly argues (Br. 13-15, 25-26) that the judge used improper comparators by examining the availability of Assistant Manager Ann Williams and Shift Manager Yon Nonnua Cline. But, as EYM King acknowledges (Br. 15, 26), the Board explicitly rejected (A 85 n.2) the judge's reliance on those managers as comparators. EYM King's additional argument (Br. 13 n.22, 26) that it is unaware which other employees the judge used as comparators is unsupported.

⁶ EYM King's assertion (Br. 8, 14) that Wise cut in half his availability is overblown. Wise testified that towards the end of his time with Strategic, he worked 35 hours per week and was available overnights and weekends. (A 106 (Tr. 30), 127 (Tr. 120).) On his employment application, he was still available six days a week during the day and overnights on weekdays. (A 323-24.)

At the hearing, the General Counsel introduced a number of employment applications, and the employees' availability limitations were plainly listed on those applications. (A 210, 232, 253, 281, 310, 323.)

b. Wise's alleged insubordination as a basis for refusing to hire him was plainly pretextual

Substantial credited evidence supports the Board's finding (A 93-94) that Hayes did not, in fact, rely on Wise's purported insubordination in refusing to hire him. According to Hayes, Wise's insubordination during the three years they worked together consisted of twice cooking too much food to meet customer demand. (A 89 & n.11, 94; A 174 (Tr. 380), 184 (Tr. 422-23).) Hayes elaborated on that claim at the hearing, asserting that Wise gave away excess food to homeless people without permission. (A 89 & n.11; A 175 (Tr. 382-84).)

According to the credited evidence, Strategic assigned the "kitchen minder" responsibility for telling the cooks how much food to cook and when to cook it. If the kitchen overestimated, management had to count, record, and discard any excess food, which it often permitted employees to keep or give away. Notably, although Hayes verbally counseled Wise the two times he overcooked food, she never wrote him up for this behavior, nor was he "reprimanded []or issued a warning" for any other purported insubordination during the three years they worked together. (A 89 & n.11; A 174-75 (Tr. 380-83), 184 (Tr. 422-24).) *See NLRB v. Melrose Processing Co.*, 351 F.2d 693, 699 (8th Cir. 1965) (finding that

tolerance of an employee's behavior prior to a hiring decision "indicates that [the employee] was not rehired for a rule infraction as the [employer] indicated"); *Adair Standish Corp. v. NLRB*, 912 F.2d 854, 862 (6th Cir. 1990) ("That the company chose to impose penalties upon [the employees] . . . for behavior that previously had been condoned through inaction strongly suggests improper motivation.").

The administrative law judge amply supported her decision to discredit (A 93-94) Hayes' testimony that she relied on Wise's purported insubordination in refusing to hire him. To start, Hayes exaggerated the severity of the issue. Indeed, despite claiming that Wise's insubordination was so severe that she chose not to hire him, the judge noted that Hayes, when asked for specific examples of insubordination, could only cite Wise's "cooking too much food and giving it to homeless people." (A 94; A 167 (Tr. 341).) Hayes also gave a vague and "shifting account[]" of when and how often Wise overcooked food. (A 94; A 167 (Tr. 341), 174-75 (Tr. 379-82).) She first testified that she "constantly" coached him for cooking too much food, that he did so "often" and "throughout his employment" with her, and that she counseled him every time she saw a violation. (A 94; A 174 (Tr. 379-80).) Later, however, she admitted to counseling him only twice for cooking too much food and conceded that his overcooking food was not a problem

throughout the three years they worked together. (A 94; A 174 (Tr. 380), A 175 (Tr. 382).)

Hayes' testimony regarding Wise's giving away food to the homeless was similarly infirm; she could not remember key details, such as when or how often he did so. (A 89 & n.11; A 168 (Tr. 342-43), 175 (Tr. 382-84).) Moreover, Wise directly contradicted her testimony, asserting that Hayes explicitly allowed him to give away discarded food, and did so herself on occasion. (A 89 & n.11; A 184 (Tr. 423-24).) As the judge explained, Hayes' "vague testimony combined with the witnesses' demeanor, and the lack of written documentation of the discipline," led her to credit Wise over Hayes. (A 89 n.11.)

As the Board reasonably found, the reasons Hayes provided to Wise when communicating her hiring decision – his "change of availability and some insubordination and whatever going on" – do not support EYM King's assertion that it would have refused to hire him even in the absence of his protected activity. (A 93-94; A 169 (Tr. 346).) Indeed, the judge found incredible Hayes' claim that she would refuse to hire a long-time Burger King employee, with eleven years' experience including three years' experience at the 47th Street Restaurant, based on his slight change in availability and his twice overcooking hamburgers. Having found Hayes' stated reasons for her refusal to hire Wise false, the Board reasonably inferred that her "true motive is an unlawful one." *Suburban Elec.*

YorkEngineers/Contractors, Inc., 351 NLRB at 5; *see Wright Elec., Inc.*, 327 NLRB 1194, 1207 (1999) (“If one can show that every other alternative except the fact sought to be proved is not true, you indirectly prove the fact is true.” (quoting *Melrose Processing Co.*, 351 F.2d at 698)), *enforced*, 200 F.3d 1162 (8th Cir. 2000).

EYM King argues (Br. 28-29) that the General Counsel failed to prove that Hayes’ decision was unlawfully motivated because the record contains no direct evidence of her union animus. But, as shown (pp. 15-16), and as EYM King concedes, “the General Counsel may rely on direct *or* circumstantial evidence” to meet its burden. (Br. 22 (emphasis added).) Here, the Board found (A 94) substantial evidence of animus in Hayes’ false reasons for refusing to hire Wise.

3. EYM King’s additional justifications for refusing to hire Wise, which it presented at the hearing, are pretextual and based entirely on discredited testimony

Substantial credited evidence supports the Board’s finding that EYM King’s additional justifications for its refusal to hire Wise are pretextual; that is, they “were ‘not the real reasons for the refusal to hire at all, they were arguments crafted for defense at hearing.’” (A 93 (citation omitted).) At the hearing, Hayes unconvincingly presented a litany of additional reasons for her decision, including: Wise’s alleged attitude that he could run the restaurant, a disputed incident regarding the purported theft of hamburgers at the end of his shift in February

2014, and a handful of attendance issues in spring 2014. (A 91-94; A 169 (Tr. 348-49) 175-76 (Tr. 384-86).) The Board reasonably affirmed the administrative law judge's finding discrediting Hayes' testimony and dismissing the reasons as pretextual.

Significantly, Hayes cited none of those reasons at the time she refused to hire Wise. (A 169 (Tr. 346).) *See Senftner Volkswagen Corp.*, 681 F.2d at 560 (noting employer's later justifications for its refusal to rehire employee were not provided to employee). And she had a "scant record" of actually disciplining Wise for infractions she alleged at the hearing were serious enough to warrant refusing to hire him. (A 93.) *See Melrose Processing Co.*, 351 F.2d at 699. For those reasons, and the ones discussed below, the judge reasonably discredited Hayes, finding her testimony vague, "self-serving," uncorroborated, and "shifting and inconsistent." (A 89 & n.11 & n.13, 90, 93-94.) *See Commercial Erectors, Inc.*, 342 NLRB at 943-44 (stating that "judge's fact and credibility findings . . . consistently indicate that the [employer's] real motive was unlawful").

To start, Hayes claimed that Wise's attitude, notably his "feeling like he [could] run the restaurant . . . without management supervision," justified her refusal to hire him. (A 94; A 169 (Tr. 348-49).) As an example, Hayes alleged that Wise twice sent employees on break without management's permission,

though she was unable to remember which employees or when it happened, and she did not write him up for the incidents. (A 89, 94; A 175 (Tr. 384-85).) Wise denied sending, or being disciplined for sending, employees on break without authorization, claiming that the only times he did so were when Hayes specifically asked him to coordinate his coworkers' breaks. (A 89 & n.13; A 185-86 (Tr. 429-30).) The judge reasonably discredited Hayes, finding her testimony regarding Wise's attitude to be "subjective, self-serving and without credible evidence to corroborate it." (A 94.) Regarding Wise's sending employees on breaks, the judge discredited (A 89 & n.13, 94) Hayes, and credited Wise, finding it "highly unlikely that [Hayes] would not be able to remember the specifics of events that she later used to support a decision not to re-hire Wise," and noting the lack of documented discipline for such purportedly serious offenses.

Hayes, with prompting from company counsel, also claimed that Wise's purported theft of hamburgers motivated her refusal to hire him. (A 89-90, 94; A 169 (Tr. 349).) In February 2014, shift manager Cline searched Wise at the end of his shift and found hamburgers in his coat pocket. (A 89-90.) Although Wise claimed that he had permission from another manager to take the hamburgers because he had no break that day (A 184-85 (Tr. 424-28)), Cline and Hayes claimed that he stole them (A 162 (Tr. 318-20), 168 (Tr. 344)). Wise received no discipline for the incident. (A 93-94; A 162 (Tr. 320), 168 (Tr. 344-45), 173

(Tr. 374-75), 185 (Tr. 427-28).) The judge credited neither account, finding each party's version of the hamburger incident "problematic." (A 89.) Significantly, however, the judge explicitly discredited (A 89-90, 94) Hayes' claim that she based her March 2015 hiring decision on the February 2014 incident because her testimony was shifting and inconsistent, and she was "woefully unsure" about whether the hamburger incident occurred in 2014 or 2015.⁷ Contrary to EYM King's assertion (Br. 27), Hayes also vacillated between a claim that she did not bother submitting the discipline to Strategic because she did not "think it would have done any good" (A 89; A 168 (Tr. 344-45)) and the later claim that she recommended Strategic terminate Wise for the incident (A 89; A 172-73 (Tr. 373-75)).

Hayes further suggested that she refused to hire Wise because of his "tardies" and "no shows" while at Strategic. (A 93-94; A 169 (Tr. 348).) In spring 2014, Strategic issued Wise written discipline for three attendance violations:

⁷ Initially, Hayes claimed that she was "not sure" about the timing of the hamburger incident because she "wasn't there" (A 172 (Tr. 373)); next she claimed the incident occurred in February 2014 (A 173 (Tr. 375)); then, just a few minutes later, she decided the incident happened at the end of 2014 (A 173 (Tr. 376)); and finally, after leading questions on redirect, she testified that it took place in February 2015 (A 178-79 (Tr. 401-04)). Cline similarly waffled on timing, first testifying that the hamburger incident occurred in 2014, before changing her mind and deciding it took place in 2015. (A 162 (Tr. 318).) The judge found (A 90) that "the hamburger incident occurred in February 2014."

arriving 55 minutes late on April 21; arriving 15 minutes late on May 5; and calling in late less than three hours before his scheduled shift on May 6.⁸ Wise received no further disciplinary write-ups, and Hayes awarded him a certificate for excellent work in December 2014.⁹ (A 94; A 113 (Tr. 60-61), 172 (Tr. 371), 183-84 (Tr. 421-22).)

Again, the judge reasonably discredited (A 93-94) Hayes' claimed reliance on Wise's attendance infractions for her hiring decision. As with Wise's insubordination, Hayes exaggerated the severity of Wise's attendance issues and belatedly cited those issues as so serious that they motivated her refusal to hire him almost a year later.¹⁰ (A 93-94.) See *Melrose Processing Co.*, 351 F.2d at 699; *Adair Standish Corp.*, 912 F.2d at 862. Moreover, record evidence supports the judge's finding (A 94) that, as with his availability limitations (see pp. 21-23 and

⁸ Although the judge, at one point in her decision, stated that Hayes admitted to issuing Wise only two attendance write-ups, at other points, the judge clearly acknowledged and discussed all three. (A 93-94.) Even if that statement is an error, as EYM King asserts (Br. 25-26), that error is harmless.

⁹ All three of Wise's 2014 attendance write-ups should have been expunged from Wise's employment record as part of Strategic's settlement of unfair-labor-practice charges. (A 171 (Tr. 368-69), 182 (Tr. 415-17), 337-39, 342.) Hayes acknowledged knowing that at least two of those disciplines should have been expunged. (A 171 (Tr. 368-69).)

¹⁰ EYM King mistakenly argues (Br. 26) that the judge found that Hayes claimed that Wise's tardiness *alone* justified her refusal to hire him. The judge made no such finding, duly examining each reason Hayes provided for the decision at the hearing. (A 93-94.)

cases cited), Wise was disparately treated for his three attendance infractions. Indeed, Hayes testified that some employees had multiple attendance write-ups, but were not terminated. (A 94; A 177 (Tr. 394-97).) In sum, Hayes' struggle at the hearing to justify her refusal to hire long-time Burger King employee Wise strongly supports the Board's finding (A 93-94) that her proffered justifications provided the "excuse rather than the reason" for her hiring decision. *York Prod.*, 881 F.2d at 545.

EYM King repeats the argument rejected by the Board and attributes (Br. 6, 24-25) Wise's "scant record" of discipline for the above offenses to Strategic's purported policy prohibiting the 47th Street Restaurant managers from disciplining Wise, or other WOCKC supporters, without Strategic's approval. (A 89-90, 93-94; A 162-64 (Tr. 320-26), 167-68 (Tr. 340-42).) Hayes claimed that she had to clear Wise's discipline through Strategic, and because Strategic never approved Hayes' "three or four" disciplinary recommendations, she purportedly stopped submitting them. (A 89-90, 93-94; A 167-68 (Tr. 340-45).) EYM King, however, provided no corroborating evidence to support Hayes' and Cline's claim that there was a Strategic policy requiring clearance of discipline, and no evidence corroborating Hayes' claim that she forwarded recommendations to discipline Wise, and even discharge him in February 2014 for the hamburger incident. Accordingly, the judge explicitly discredited (A 90, 93) Hayes' and Cline's testimony on this point,

finding it neither “credible [n]or plausible that Strategic required its managers to get pre-approval before issuing Wise discipline.”¹¹

EYM King’s claim (Br. 17-21, 24-25) that the judge improperly drew adverse inferences against it for failing to introduce corroborating evidence to support Hayes’ story is incorrect for several reasons. First, as described above, the judge discredited Hayes’ story about her reasons for not disciplining Wise, specifically finding that she did “not find Hayes to be an overall credible witness,” not only because of the lack of corroborating evidence, but also based on her inconsistent testimony and her demeanor. (A 89 & n.11 & n.13 & n.15, 90, 93-94.) Thus EYM King is merely inviting the Court to take the extraordinary step of overturning well-supported credibility findings. *See RELCO*, 734 F.3d at 779; *JHP & Assocs.*, 360 F.3d at 910-11.

Moreover, the judge did not, in fact, draw an adverse inference. The words “adverse inference” nowhere appear in the judge’s discussion of EYM King’s proffered reasons for failing to hire Wise. In stark contrast, in the portion of the

¹¹ EYM King takes great pains (Br. 12-13) to point out that the judge mistakenly confused Strategic and EYM King in stating that “the Respondent” did not restrict local management’s ability to discipline Wise (A 90, 94). But the judge expressly found, “[b]ased on the totality of the circumstances and the evidence . . . that there was not a directive from Strategic or the Respondent curtailing local management’s ability to discipline Wise or any other employee.” On review, the Board reviewed and upheld the judge’s finding that Strategic did not have a policy restricting discipline of Wise but refused to rely on the judge’s statements that Respondent EYM King imposed no restrictions on disciplining Wise. (A 85 n.2.)

case that the judge dismissed, the judge expressly discussed the concept when she declined to apply it. (A 95.) Rather than draw an adverse inference here, the judge simply found it significant (A 89 & n.11 & n.13, 90, 93-94) that despite company witnesses' vague, shifting, and inconsistent testimony, EYM King also failed to produce any documentation to corroborate their implausible version of events. *See Swearingen Aviation Corp. v. NLRB*, 568 F.2d 458, 462 & n.6 (5th Cir. 1978) (noting, with approval, Board's finding that employer did not meet its burden of proof where witness' testimony was "not particularly creditable" and "no documentary support was offered as was done to support [witnesses'] version of other events"); *cf. Queen of The Valley Hospital*, 316 NLRB 721, 721 n.1 (1995) (finding that "judge may properly consider the failure to call an identified potentially corroborating witness as a factor in determining whether the General Counsel has established" its burden even in circumstances where judge could not properly draw adverse inference).

Next, EYM King's suggestion (Br. 17-21) that it fully explained that existing relevant documents are not within its dominion or control is meritless. EYM King subpoenaed Wise's records of employment from Strategic, including relevant "correspondence or other record[s] of communications." (A 181 (Tr. 413), SA 349-57.) It then introduced into evidence documents it received

pursuant to that subpoena related to Wise's three expunged attendance write-ups.¹² (A 181 (Tr. 413), 326-28, SA 349-57.) EYM King did not introduce any evidence supporting Hayes' claim that she sought to discharge Wise over the hamburger incident. And even assuming the subpoena did not cover the alleged Strategic directive, EYM King could have specifically subpoenaed that document too in light of Cline's claim that it came through email. (A 162 (Tr. 320-21).)

In a further effort to explain the lack of corroborating evidence for Hayes' story, EYM King claims (Br. 19-21, 25) that relevant records are "missing" because Hayes directed Wise to throw Strategic files in the dumpster the night before EYM King took over the restaurant. This is yet another excuse for EYM King's actions that is belied by both testimonial evidence and common sense. EYM King's own witnesses testified that any potentially relevant documents would have been at Strategic headquarters or stored electronically, and not easily "dumped" by Wise. (*See* A 171-72 (Tr. 369-70) (Wise's personnel file sent to Strategic), 167-68 (Tr. 340-42) ("three or four" proposed disciplines sent to Strategic), 162 (Tr. 320-21) (Strategic directive sent via email).) Moreover, if

¹² EYM King's continually shifting arguments about the availability of supporting documents (Br. 21) is amply demonstrated by its suggestion that additional documented discipline existed, but was expunged by Strategic. But EYM King introduced Wise's three attendance write-ups, which Strategic agreed to expunge but nevertheless provided to EYM King pursuant to subpoena. (A 181 (Tr. 413), 326-28, 337-39.)

Hayes truly intended to rely on Wise's disciplinary file in making her hiring decision the next day, she could have excluded that file from her dumping orders.

C. EYM King's Remaining Arguments Are Without Merit

Finally, EYM King makes a number of unrelated arguments (Br. 28-31), claiming that the Board's decision is not supported by substantial evidence. Each claim is meritless.

To start, EYM King's suggestion (Br. 29) that the Board's decision is infirm because the record contains no evidence of employees who shared Wise's combination of availability limitations and disciplinary issues, and who EYM King treated more favorably, is wrong for several reasons. (A 180 (Tr. 408).) First, the credited record evidence contains evidence of disparate treatment established through appropriate comparators. As shown above, EYM King hired some employees with even more limited availability than Wise presented. The judge explicitly discredited evidence of any additional disciplinary issues (aside from Wise's twice cooking too many hamburgers). And there was no need for the judge to find a comparator for the false issues, such as the attendance issues, that Hayes brought up at the hearing. However, the judge noted that, even as to this issue – which Hayes failed to mention to Wise as a reason she refused to hire him – the record contains evidence of disparate treatment, as Hayes admitted EYM King retained employees with multiple attendance issues. Finally, a perfect comparator

is not a prerequisite for finding that an employment decision was unlawfully motivated. As the Court has explained, “[t]he ‘similarly situated co-worker inquiry is a search for a substantially similar employee, not for a clone.’” *RELCO*, 734 F.3d at 787 (citation omitted).

EYM King’s argument (Br. 29-30) that Hayes allegedly hired some WOCKC supporters does not undermine the Board’s finding (A 93-94) that EYM King’s failure to hire Wise was unlawfully motivated. It is well-settled that “a discriminatory motive, otherwise established, is not disproved by an employer’s proof that it did not weed out all union adherents.” *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964); *see also York Prod.*, 881 F.2d at 545. Here, Wise participated in WOCKC to a greater degree than his colleagues who also engaged in some union and protected concerted activity. (A 106-07 (Tr. 32-34), 108 (Tr. 40-41), 118 (Tr. 80-81), 144 (Tr. 202), 147 (Tr. 223), 154 (Tr. 270-73).) *See Hi-Tech Interiors, Inc.*, 348 NLRB 304, 304 & n.4 (2006) (citing *Zurn/N.E.P.C.O.*, 345 NLRB 12, 20 (2005), *pet. for review denied sub nom., N. Michigan Bldg. & Const. Trades Council v. NLRB*, 243 F. App’x 898 (6th Cir. 2007)). Indeed, Wise “began the organizing effort at Burger King” and was seen as “the anchor in the shop.” (A 154 (Tr. 272-73).) EYM King concedes that Wise was “a leading organizer and *spokesperson* for the Union, both in Kansas City and nationally.” (Br. 5 (emphasis added).)

On the other side of the coin, EYM King, without supporting argument or case law, suggests (Br. 30) that because Hayes refused to hire former Strategic employees who purportedly did not engage in protected activity, the Board's decision should be overturned. At the hearing, EYM King presented evidence that Hayes did not hire three former Strategic employees, in addition to Wise.¹³ (A 94; A 164-65 (Tr. 329-31), 173-74 (Tr. 376-79), 180 (Tr. 407-08).) Hayes, however, admitted that, at her direction, none of the three former Strategic employees applied to work for EYM King (A 173-74 (Tr. 376-378)). And the judge explicitly discredited Hayes' testimony as to why she told them not to bother applying. (A94; A 164-65 (Tr. 329-31), 180 (Tr. 407-08).) EYM King offers no further explanation as to why those individuals are significant here, and again presents no reasons for overturning the judge's well-supported credibility findings.

Finally, EYM King suggests (Br. 14, 30-31) that it was entitled to consider Wise's changed availability and purported disciplinary issues in refusing to hire him because scheduling and staffing needs are a matter of business judgment. The Board does not dispute that EYM King may *legitimately* rely on such considerations in making a hiring decision. But, as the Court has noted, "it is not

¹³ Although EYM King mentions (Br. 30) two former employees who Hayes did not hire, according to Hayes' testimony, she told these two employees, and a third employee, not to apply. (A 94; A 164-65 (Tr. 329-31), 173-74 (Tr. 376-79), 180 (Tr. 407-08).)

enough that an employer put forth *a* nondiscriminatory justification . . . , [i]t must be *the* justification.” *NLRB v. Rockline Indus., Inc.*, 412 F.3d 962, 970 (8th Cir. 2005) (applying principle to unlawful discipline).

CONCLUSION

The Board respectfully requests that the Court enter a judgment enforcing the Board's Order in full.

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National Labor Relations Board
December 2016

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

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)	No. 16-3415
v.)	
)	Board Case No.
EYM KING OF MISSOURI, LLC d/b/a)	14-CA-148915
BURGER KING)	
)	
Respondent)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(g)(1), the Board certifies that its final brief contains 9,148 words of proportionally-spaced, 14-point type, the word processing system used was Microsoft Word 2010, and the PDF file submitted to the Court has been scanned for viruses using Symantec Endpoint Protection version 12.1.6 and is virus-free according to that program.

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Dated at Washington, DC
this 19th day of December, 2016

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CERTIFICATE OF SERVICE

I hereby certify that on December 19, 2016, I electronically filed the foregoing document with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the appellate CM/ECF system.

I certify that the foregoing document was served on all those parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not by serving a true and correct copy at the addresses listed below:

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Dated at Washington, DC
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