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Papa's Penn Inc. d/b/a Papa John's and Fast Food Workers Committee. Case 29-CA-169864

December 14, 2017

DECISION AND ORDER+

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE
AND MCFERRAN

On August 18, 2016, Administrative Law Judge Raymond P. Green issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Charging Party filed exceptions.

The Board has considered the decision and the record in light of the exceptions and brief and has decided to adopt the judge's rulings, findings,¹ and conclusions as modified below and to adopt his recommended Order.

In dismissing the allegation that the Respondent discharged employee Jesse Scott because of his union activities and/or protected concerted activities in violation of Section 8(a)(3) and (1) of the Act, the judge failed to apply the burden-shifting framework articulated in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Instead, the judge simply found that "the only reason for Scott's discharge was the argument that he had with [store manager Juan] Otero when his paycheck was missing on February 12, 2016," conduct that is not alleged to be protected by the Act. The judge found "totally implausible" the possibility that the Respondent had retaliated against Scott because of his earlier involvement with the Fast Food Workers Committee, which had addressed employees' complaint that the Respondent had paid its employees less than minimum wage.

On exception, the General Counsel argues that the judge erred in failing to apply the *Wright Line* framework. Under *Wright Line*, the General Counsel has the initial burden of establishing that an employee's union or protected concerted activity was a motivating factor in an employer's decision to take adverse action against the

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

The General Counsel excepted to the judge's failure to find that the Charging Party, the Fast Food Workers Committee, is a labor organization under Sec. 2(5) of the Act. We assume that it is a labor organization.

employee. 251 NLRB at 1089. The General Counsel meets this burden by showing that the employee engaged in union and/or protected concerted activity, that the employer had knowledge of that activity, and that the employer harbored animus against union or protected concerted activity. See, e.g., *Mesker Door, Inc.*, 357 NLRB 591, 592 (2011).² If the General Counsel makes this initial showing, the burden then shifts to the employer to prove that it would have taken the same action even if the employee had not engaged in protected activity. *Wright Line*, 251 NLRB at 1089.

We assume, without deciding, that the General Counsel met his initial burden under *Wright Line* to prove that Scott's union and/or protected concerted activity was a motivating factor in his discharge. We find, however, that evidence presented by the Respondent, described below, proves that it would have discharged Scott even if he had not engaged in union and/or protected concerted activity.³

As more fully described in the judge's decision, during the afternoon of February 12, 2016, the Respondent's payroll company delivered the employees' paychecks to the store, and Scott discovered that his check was missing. At around 1 a.m., when the shift ended, Scott insisted that Store Manager Juan Otero pay him in cash, and Scott refused to leave or turn in the day's receipts until

² "[P]roving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), *enfd.* 801 F.3d 767 (7th Cir. 2015).

In Chairman Miscimarra's view, the General Counsel must make a particularized showing that links an employee's protected activity to the adverse employment action taken against that employee. In *Wright Line*, the Board stated that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. In other words, the General Counsel must establish a link or nexus between the employee's protected activity and the particular decision alleged to be unlawful. See *T-Mobile USA, Inc.*, 365 NLRB No. 15, slip op. at 1 fn. 1 (2017); *Libertyville Toyota*, 360 NLRB at 1306 fn. 5 (Member Miscimarra, concurring in part and dissenting in part).

³ Chairman Miscimarra would adopt the judge's finding that the sole motivation for Scott's discharge was his misconduct on February 12, 2016. Accordingly, in adopting the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(3) and (1) when it discharged Scott, Chairman Miscimarra finds it unnecessary to apply *Wright Line*, *supra*, which applies in dual-motive cases. See *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 14 (2015) (Member Miscimarra, dissenting), *enfd.* denied 857 F.3d 877 (D.C. Cir. 2017). The judge's findings establish that there was only one, lawful motive for Scott's discharge, and that the General Counsel failed to satisfy his burden of proving that Scott's discharge occurred because of unlawful considerations.

he was paid. Otero said he could not do that without the permission of Jean Morace, the Respondent's owner. Scott again insisted on being paid, and Scott and Otero got into a loud argument in the presence of a trainee. Otero then contacted the police and they arrived. After some discussion, in which Scott still refused to leave or turn in the receipts, Otero contacted Morace at home, who told him to pay Scott in cash and tell Scott not to return to work. Otero paid Scott in cash. Scott then turned over the receipts, and Otero discharged him.

Otero testified that he discharged Scott for refusing to turn over his receipts on February 12. He further testified that Scott's conduct—which included yelling, cursing, and banging on a table—made him and a trainee uncomfortable. Otero's explanation is supported by the testimony of Morace, whom Otero telephoned that evening. Morace testified that, during their telephone conversation, he told Otero to pay Scott in cash and that he agreed with Otero's decision to discharge Scott for his conduct that evening.

The judge's finding that Scott's failure to turn over the receipts was the sole reason for his discharge makes clear that he credited Morace's and Otero's version of what happened on the evening of February 12. Accordingly, we conclude that the Respondent has proved, based on this credited evidence, that it would have discharged Scott on February 12, even in the absence of his union and/or protected concerted activity.

For the same reasons, we also affirm the judge's dismissal of the complaint allegation that the Respondent violated Section 8(a)(3) and (1) by refusing to rehire Scott when he sought reinstatement approximately 1 week after his discharge. We reject the General Counsel's reliance on Scott's testimony that Otero told Scott that he would not rehire him because he had brought Lisa Delancey, an organizer for the Charging Party, into the store. Otero denied Scott's version of this conversation. Rather, Otero testified that he told Scott that he would not rehire him because what happened on February 12 was not Scott's first incident of inappropriate conduct, and that Otero did not want Scott in the store for "the safety of [his] employees." The judge credited Otero's testimony on this point, and we have affirmed the judge's credibility determinations.⁴ Accordingly, we conclude

⁴ Contrary to the General Counsel's argument, the judge's decision to credit Otero's testimony over Scott's testimony on this point is neither "inadequate" nor "contradictory." The judge acknowledged the witnesses' conflicting testimony and found that "Otero credibly denied Scott's version of this conversation." That credibility finding is not undermined by the judge's subsequent finding that "[e]ven if" Otero had made the statement attributed to him by Scott, Otero would have been referring to a demonstration Delancey led at the store *after* Scott was discharged, which would have had nothing to do with the discharge

that the Respondent has proved, based on this credited evidence, that the Respondent would not have rehired Scott even in the absence of his union and/or protected concerted activity.

ORDER

The recommended Order of the administrative law judge is adopted and the complaint is dismissed.

Dated, Washington, D.C. December 14, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

Kimberly A. Walters, Esq., for the General Counsel.
Jean Morace, president of the Respondent.
Ceildih B. Gao, Esq., counsel for the Charging Party.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Brooklyn, New York, on July 7, 8, and 11, 2016. The charge was filed on February 17, 2016, and the complaint was issued on May 20, 2016. In substance, the complaint alleged that on or about February 12, 2016, the Respondent discharged Jesse Scott because he supported the Union and engaged in concerted activities.

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

FINDINGS AND CONCLUSIONS

I. JURISDICTION

It is admitted and I find that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Charging Party is a community organization that is involved in a variety of social issues. It is not clear to me that it actually exists for the purpose, in whole or in

itself. We neither adopt nor reject the latter finding, and we express no view on the appropriate disposition of this case had the judge not credited Otero over Scott regarding their postdischarge conversation.

part, of representing employees in collective bargaining. Nevertheless, its status as a labor organization is not really critical to this case.

II. THE ALLEGED UNFAIR LABOR PRACTICE

The Respondent's owner is Jean Morace. He is a franchisee of Papa John's Pizza and he operates one store in Brooklyn, New York. His store manager is Juan Otero and as he has the power to hire and fire, I find that he is a supervisor within the meaning of Section 2(11) of the Act. The store employs about eight or nine drivers and two individuals who make the pizzas.

Jesse Scott was employed at this store on two occasions. On the first occasion he was discharged in 2013. He was rehired in November 2014 as a driver. In this capacity he worked Fridays, Saturdays, and Sundays, either from 6 p.m. to midnight or to 1 a.m. Basically, his job was to deliver takeout orders, collect the money, and then turn it in at the end of his shift. Morace's opinion was that Scott was a reliable employee, but one who had a temper and who had difficulty getting along with others. Scott acknowledged that he was not very popular.

Lisa Delancey is an organizer, who is employed by the New York Committee for Change (NYCC). This is a not for profit community organization. She testified that the Charging Party, the Fast Food Workers Committee is an organization that is allied with the NYCC and that it is engaged in a variety of actions to promote fair pay for fast food workers. She described her role as going to different fast food stores in order to speak to workers and inquire about any issues that they might have. She also testified that in 2015, she became involved in a "wage war" designed to get all fast food workers in New York, \$15 per hour. She testified that this involved holding demonstrations at various restaurants throughout New York State. Jesse Scott testified that he and two other employees of the Respondent attended a number of these demonstrations. But none of those demonstrations were at the Respondent.

There is no evidence that either the NYCC or the Fast Food Workers Committee has ever actually represented employees for the purpose of collective bargaining as that phrase is used in the Act.¹

Scott testified that in the summer of 2015, Delancey visited the store, usually around 5 p.m. on Fridays and spoke to employees about various issues. Whatever discussions were had, they apparently did not involve soliciting employees to authorize the Fast Food Workers Committee to represent them in collective bargaining.

On December 31, 2015, an increase in New York's minimum wage law became effective. But on January 8, the first Friday after the law went into effect, the Respondent hadn't yet changed its payroll to reflect the increase. So on that day, which is the normal payday for the employees, Delancey visited the store and started arguing with the store manager about the employees' pay being incorrect. Morace was notified of this by phone and he came down to the store and spoke with Delancey.

¹ To the extent that this organization purports to act on behalf of employees, if it is not a labor organization then it would not be subject to the 8(b) provisions of the Act. On the other hand, it would also not be afforded the protections given to labor organizations under the Norris-LaGuardia Act or the exemptions in the antitrust laws.

Her testimony was that Morace claimed that he was in compliance with the law and that she was wrong. Delancey testified that she insisted that Morace was incorrect and that he said he would check it out later. His testimony was that she insisted that he was not paying the correct amount and that she threatened to shut down the store. Morace testified that this batch of checks did not reflect the change because his payroll company hadn't made the change yet. He testified that he told Delancey that on Monday, the employees would be made whole for any difference in pay, but that Delancey still kept arguing. In fact, the employees were paid the difference.

Although there are minor differences in this account, the two versions are essentially the same. By the way, Delancey admits that she threatened to shut down the store. In either version, Jesse Scott played no role other than being one of the people who got paychecks with the wrong amounts and observed the altercation between Delaney and Morace.

At the end of January 2016, Scott was accused by Store Manager Otero of stealing a soda. After contacting Delancey, they visited the store on the following day and confronted Otero about the accusation. After some discussion, Morace came in and Delancey asked why Scott had been taken off the schedule. Morace essentially refused to respond and asked her to leave the premises. She refused. After some more give and take, Morace called the police and after getting both sides of the story, they told Delancey that she had to leave. Delancey agrees that the police mentioned the word trespass.

After this transaction, Scott resumed working on his normal schedule. Morace testified that he didn't do anything about the "stolen soda" as he felt the whole matter was too trivial to warrant any kind of discipline.

On Friday, February 12, 2016, the paychecks were brought to the store and Scott discovered that his check was missing. This apparently was not the only time that this had happened to other employees. And in this respect, the payroll company had notified Morace that when this does happen, he should first contact them before paying cash so that they can investigate and if necessary, stop payment on the missing check.

In any event, when the shift ended at around 1 a.m., Scott insisted that Otero pay him in cash and he refused to leave or turn in the day's receipts until he was paid. Otero said he could not do that without Morace's permission and Scott still insisted on being paid. By both accounts, Scott and Otero got into a loud argument. Otero then contacted the police and they arrived. After some discussion, in which Scott still refused to leave or turn in his receipts, Otero contacted Morace at home and was told to pay Scott in cash and to tell him not to return to work. At this point, Otero gave Scott his wages in cash. Scott then turned over the receipts and Otero told him that he was fired.

During the following week, Delancey led a silent demonstration that took place on the premises of the store. This lasted for a short time.

About a week later, Scott visited the store and spoke to Otero. He asked for his job back and states that Otero told him that he had been given several chances in the past and that he would not rehire Scott because he had brought Delancey into the store.

III. ANALYSIS

The complaint alleges that the Respondent discharged Scott on February 12, 2016, because of his union and concerted activities.

Firstly, I doubt that the Charging Party can be defined as a labor organization. And even if it could be, there is no evidence that it sought to organize the Respondent's employees for the purpose of collective bargaining. Neither Scott, nor any other employees, were ever asked to sign any kind of form authorizing the Charging Party to represent them or to bargain on their behalf. I simply do not think that Scott was involved in union activity; albeit it might be argued that he was engaged in concerted activity as defined by Section 7 of the Act.

In my opinion, the only plausible concerted activity, vis-a-vis, this employer was the time that Scott and other employees were present when Delancey got into an argument with Morace about the increase in the minimum wage law. And in this regard, I don't see Scott as being particularly involved beyond being present. Moreover, this was basically much ado about nothing inasmuch as the Company promptly complied with the minimum wage law and almost immediately paid its employees the difference.

The incident involving the alleged stolen soda was not concerted activity because Scott's protest, with the assistance of Delancey, was only about himself. Moreover, the employer essentially disregarded this incident and from what I can see, it had nothing to do with Scott's discharge.

To the extent that Scott may have participated in demonstrations at other companies in New York State, this had nothing to

do with the Respondent and I can't imagine that this could have been a reason for his discharge.

In my opinion, the only reason for Scott's discharge was the argument that he had with Otero when his paycheck was missing on February 12, 2016. As noted above, when his paycheck wasn't there, Scott understandably was annoyed. Scott then refused to turn over the receipts he received that evening and he refused to leave the premises until he was paid in cash. The testimony of both Otero and Scott shows that this was a heated argument that took place at one in the morning and that the police were called to calm things down. After Otero called Morace, the latter told Otero to pay him in cash. At this point, Otero paid Scott and told him that he couldn't return to work.

The General Counsel and the Charging Party argue that the true reason for Scott's discharge was revealed about a week later when he asked Otero to rehire him. Nevertheless, Otero credibly denied Scott's version of this conversation.² And in my opinion, it is totally implausible, given the events on February 12, that the Company would have decided to discharge Scott because of his involvement with the Charging Party or because he happened to witness an argument about minimum wages back in December of 2015.

I therefore shall recommend that the complaint be dismissed.

Dated at Washington, D.C. August 18, 2016

² 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. It therefore cannot be asserted that this event had anything to do with Scott's discharge.