

United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL
Advice Memorandum

DATE: December 12, 2016

TO: Dennis P. Walsh, Regional Director
Region 4

FROM: Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: PrimeFlight Aviation Services 524-0100
Case 04-CA-176296 524-0133-9000
524-3350-3100
524-5029-4300
524-6715-1300

The Region submitted this case for advice as to whether the Employer violated Section 8(a)(3) and (1) of the Act by charging employees paid time-off for their participation in two one-day strikes without obtaining the employees' consent. We conclude that the Employer violated Section 8(a)(3) and (1) under a *Wright Line* analysis because it deducted employees' paid time-off without their consent based on their protected strike activity, and the Employer has not established that it would have taken similar actions if its employees had not engaged in the one-day strikes. Alternatively, we conclude that the Employer's deduction of paid time-off from strikers without obtaining their consent was unlawful because this operated as a restraint on employees' willingness to engage in future strike activity.

FACTS

PrimeFlight Aviation Services ("Employer") operates ground handling and terminal services for several airlines at the Philadelphia International Airport in Philadelphia, Pennsylvania. For the past two years, Service Employees International Union Local 32BJ ("Union") has been engaged in an ongoing organizing drive aimed at the Employer's employees.

On May 13, 2015, the Employer implemented a new Paid Time Off ("PTO") Policy in response to a new city ordinance requiring employers to grant sick time to employees. Under the new PTO Policy, employees with less than six years of

seniority accrue 0.025 hours of PTO per hour of work.¹ These employees may only accrue up to forty hours of PTO at any given time, and employees are permitted to carry that amount forward from year to year.² The policy also states that employees who “use[] all of their available PTO, regardless of the reason, [will receive] no additional paid time off.” The PTO Policy enumerates the following reasons for requesting PTO:

- Vacation, as scheduled and approved in advance by the Manager (if two or more employees request vacation during the same time period, the employee with the longest continuous service will be given preference).
- An employee’s mental or physical illness, injury or health conditions; an employee’s need for medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; an employee’s need to preventative medical care.
- Care of a family member with a mental or physical illness, injury or health condition; care of a family member who needs medical diagnosis, care or treatment of a mental or physical illness, injury or health condition; care of a family member who needs preventive medical care. **NOTE:** The definition of “family member” under the Philadelphia Paid Sick Leave Ordinance includes a child, parent, spouse, Life Partner, grandparent, grandchild, sibling or sibling’s spouse.
- Absence necessary due to obtain [sic] medical attention, legal or other services, counseling or relocation due to domestic abuse, sexual assault or stalking, provided the leave is for the employee or the employee’s family member.

While the PTO Policy requires that “employee[s] **MUST** use PTO when absent for a qualifying reason,” the policy does not enumerate or define “qualifying reason.”³ However, the list of reasons that the Employer does provide (above) does not include

¹ Thus, forty hours of work are required for these employees to earn one hour of PTO. Employees with six years or more seniority accrue PTO at a rate of .038462 per hour of work, which requires about 26 hours of work to earn one hour of PTO.

² Employees with six years or more seniority, however, may accrue and carry over eighty hours at a time.

³ Emphasis in original.

unscheduled, non-medical absences and the policy is silent on whether employees must use available PTO for such absences.⁴ Additionally, the PTO Policy requires that employees utilizing PTO for “rest, relation and personal pursuits (i.e. vacation)” must schedule their leave two weeks in advance and have their leave approved by a supervisor. The Employer’s form for employees to request the use of PTO allows employees to indicate whether they wish to use PTO or leave without pay.

In April 2015, employees participated in a one-day strike organized by the Union. At least [REDACTED] employee who participated in that strike did not request, and was not charged, PTO for missing work on the day of the strike. On November 19, 2015, and March 31, 2016, the Union organized additional one-day strikes. Approximately forty employees participated in the November 19 and March 31 strikes. Some employees, prior to the one-day strikes on November 19 and March 31, requested and were approved to use PTO for that day. However, in their next pay check after each one-day strike, all striking employees noticed that they were charged seven hours PTO for the day of the strike and were paid for the strike day whether they had requested PTO or not.

The Employer asserts that it has been its policy to charge employees PTO for unscheduled absences in the past because they are “qualifying reasons” under the PTO Policy. The Employer also states that it did not want to unlawfully interrogate employees about their participation in the strikes and, instead, opted to charge PTO to all employees who missed work on November 19 and March 31 without discussing it with them first.

The Union provided evidence that [REDACTED] employee was denied leave without pay in [REDACTED] 2016 because [REDACTED] had no remaining PTO as a result of the Employer deducting PTO for the one-day strikes.

ACTION

We conclude that the Employer violated Section 8(a)(3) and (1) under a *Wright Line* analysis because it deducted employees’ PTO without their consent based on their protected strike activity, and the Employer has not established that it would have taken similar actions if its employees had not engaged in the one-day strikes. Alternatively, we conclude that the Employer’s deduction of PTO from strikers without obtaining their consent was unlawful because this was a restraint on employees’ willingness to engage in future strike activity.

⁴ It is possible that by “qualifying reasons,” the Employer is referring to this list.

The Board applies a *Wright Line*⁵ analysis to determine whether an employer's adverse employment action was unlawfully motivated by an employee's protected concerted activity, as opposed to a reason unrelated to protected concerted activity.⁶ To establish a violation, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, the employer had knowledge of such activity, the employer exhibited animus or hostility toward that activity, and the employee's protected activity was a "motivating factor" in the employer's decision to take adverse action against the employee.⁷ An employer's discriminatory motive may be established by, among other things: (1) the timing of the adverse action in relation to the employee's protected activity; (2) other unfair labor practices, statements, and actions showing the employer's discriminatory motivation; and (3) evidence demonstrating that the employer's proffered explanation for the adverse action is pretextual.⁸ Once the General Counsel makes that showing, the burden of persuasion shifts to the employer to show that it would have taken the same adverse action even in the absence of the protected activity.⁹

Initially, we conclude that the Employer's unilateral deduction of employees' PTO for participating in the one-day strikes constitutes an adverse employment action under the Act. In order to establish that an adverse employment action has occurred, there must be evidence that the employer changed some legally cognizable term or condition of employment for the worse.¹⁰ Here, by deducting paid leave without employees' consent, the Employer is preventing employees from using that leave in

⁵ 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

⁶ *Exelon Generation Co.*, 347 NLRB 815, 815 n.1 (2006).

⁷ 251 NLRB at 1089.

⁸ *See id.* at 1090 (finding timing of discharge, employer's anti-union animus, and pretextual explanations offered for discharge supported finding discriminatory motivation).

⁹ *Id.* at 1089.

¹⁰ *See, e.g., Postal Service*, 360 NLRB No. 79, slip op. at 1 n.3, 10 (Apr. 22, 2014) (finding no Section 8(a)(3) or (4) violation where evidence failed to show employer had denied employee's leave request); *Naples Community Hospital*, 355 NLRB 964, 965 (2010) (finding no Section 8(a)(3) violation where evidence failed to show employer had reduced employee's charge nurse assignments).

the future at a time when paid leave would be more valuable to them.¹¹ Indeed, there is evidence that at least one employee was denied leave without pay in [REDACTED] 2016 because [REDACTED] had no PTO available after the Employer charged [REDACTED] PTO for [REDACTED] participation in the strikes, which demonstrates how the Employer's conduct negatively impacted a term or condition of employment.

We also find that the General Counsel can meet its burden under *Wright Line*. It is beyond question that employees who engaged in one-day strikes on both November 19 and March 31 in furtherance of a representational drive with their Employer were engaged in protected Section 7 activity.¹² And the knowledge requirement is also easily met, as the Employer admitted that it knew that its employees were participating in the strikes.

The Employer's unlawful motivation in requiring employees to use PTO, without their permission, for participating in the one-day strikes on November 19 and March 31 is demonstrated by the pretextual nature of its proffered reasons for this action. The Employer argues that its decision to deduct PTO from employees with unscheduled absences on the days of those strikes was supported by the PTO Policy, the Employer's past practice under the PTO Policy, and its desire to avoid unlawfully interrogating its employees. The Employer's proffered explanations are not supported by the evidence.

Initially, the Employer's decision to unilaterally deduct PTO for unscheduled absences is not supported by its PTO Policy. Under the PTO Policy, employees are required to use PTO for "qualifying reasons." However, the PTO Policy does not enumerate what constitutes "qualifying reasons." Furthermore, of the reasons enumerated within the PTO Policy that employees may use to request PTO, neither strikes nor unscheduled absences are listed.

The Employer's further assertion that it has an established past practice of charging employees PTO whenever employees have an unscheduled absence is similarly unsupported. The Employer did not provide any evidence that it ever deducted PTO from employees unilaterally without first discussing the nature of their

¹¹ See *Exelon Generation Co.*, 347 NLRB at 815 n.3 (finding that employer's requirement that union-subpoenaed employees use paid leave or floating holidays to attend Board hearings violated Section 8(a)(3) and (4); *a fortiori*, employer's requirement constituted adverse employment action).

¹² See *National Management Consultants*, 313 NLRB 405, 405, 409 (1993) (employees engaged in lawful strike were engaged in protected activity for the purposes of *Wright Line*).

absence. Furthermore, the Employer did not offer any explanation as to why employees were not charged PTO for their participation in the April 2015 one-day strike—which occurred before the adoption of the new PTO Policy—but were deducted PTO for the later one-day strikes. While the Employer has provided evidence that it routinely allows employees to use PTO to cover unscheduled absences, the Employer has provided no evidence that it deducted PTO from these employees (under its current PTO policy or its prior policies) without first obtaining their consent. Indeed, the Employer’s contention is inconsistent with the PTO Policy, which explicitly states that employees must obtain approval from their supervisor for personal, non-medical leave at least two weeks before taking such leave.

Finally, the Employer contends that it did not ask employees about their unscheduled absences on the days of the one-day strikes to avoid unlawfully interrogating its employees about their union activities. However, this explanation is implausible; the Employer could have asked employees whether they wanted to use PTO for their unscheduled absences during the one-day strikes without asking employees whether or not they participated in the strike. Thus, the only reason employees were charged PTO without their consent for unscheduled absences on November 19 and March 31 is due to employee involvement in the one-day strikes on those dates.¹³

The Employer will not be able to meet its burden under *Wright Line* to demonstrate that it would have taken same action—unilaterally deducting PTO for employees’ involvement in the one-day strikes—absent their protected strike activity. The evidence showing that the Employer’s proffered non-discriminatory reasons for charging striking employees PTO for their participation in the one-day strikes were pretext also “provides strong support for the General Counsel’s required initial showing under *Wright Line* . . . as well as precluding any *Wright Line* defense.”¹⁴

¹³ See *Ferguson Enterprises*, 355 NLRB 1121, 1121 n.2, 1126–27, 1130–32 (2010) (finding of violation supported by employee’s testimony that supervisor stated that suspensions had nothing to do with safety violation but rather resulted from employees’ concerted filing of a prevailing wage claim).

¹⁴ See *Relco Locomotives, Inc.*, 358 NLRB 229, 229 (2012), *enforced*, 734 F.3d 764 (8th Cir. 2013). *Relco Locomotives, Inc.* was issued by a panel that under *NLRB v. Noel Canning*, 134 S. Ct. 2550, 2578 (2014), was not properly constituted. It is the General Counsel’s position that *Relco Locomotives, Inc.* was soundly reasoned. See *Austal USA, LLC*, 356 NLRB 363, 363–64 (2010) (holding that employer failed to establish its *Wright Line* defense because its proffered reason for discharge was pretextual); *Approved Electric Corp.*, 356 NLRB 238, 239–40 (2010) (evidence of pretext may be used to demonstrate discriminatory motive for adverse employment action).

Where a stated motive is found to be pretext, the trier of fact may infer that the respondent is seeking to conceal its true, unlawful motive.¹⁵ Here, the Employer's asserted reasons for charging employees participating in the one-day strikes PTO do not withstand scrutiny. Because the Employer's proffered justification is pretextual, it will not be able to sustain its burden of proving a nondiscriminatory motive. For the foregoing reasons, the General Counsel will meet its burden under *Wright Line* to demonstrate that the Employer's unilateral deduction of PTO was motivated by its union animus.

We also conclude, as an independent basis for finding a violation of Section 8(a)(3) and (1), that the Employer's unilateral decision to charge employees PTO for engaging in the one-day strikes amounts to a restraint on future Section 7 activity. In *Western Clinical Laboratory*, the Board held that an employer violated Section 8(a)(3) and (4) by forcing an employee who testified at a Board proceeding during working time to utilize paid leave, rather than unpaid leave, in order to testify.¹⁶ The Board concluded that this operated as "a restraint [against employee participation in the Board's processes] regardless of the motive behind such action."¹⁷ Like the right to participate in Board processes, the right to strike is central to the administration of the Act. The right to strike is protected not only by Section 7, but also by Section 13, which expressly protects and reaffirms that right.¹⁸ Indeed, the Supreme Court has long recognized that Congress's "concern for the integrity of the [right to strike under the Act] has remained constant."¹⁹ Thus, in the instant case, requiring employees to

¹⁵ See, e.g., *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

¹⁶ 225 NLRB 725, 726 (1976). In *Exelon Generation Co.*, 347 NLRB at 815 n.3, the Board, on similar facts to those present in *Western Clinical Laboratory*, found that the employer violated Sections 8(a)(1), (3), and (4) for charging an employee paid leave to participate in Board proceedings. In finding the employer's actions unlawful, the Board relied solely on *Wright Line* and "d[id] not pass on the judge's reliance on *Western Clinical Laboratory, Inc.*" *Exelon Generation*, 347 NLRB at 815 n.3. Thus, the holding in *Western Clinical Laboratory* remains Board precedent.

¹⁷ 225 NLRB at 726.

¹⁸ 29 U.S.C. § 163 ("Nothing in this Act, except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right.").

¹⁹ *NLRB v. Erie Resistor Corp.*, 373 U.S. 221, 233 (1963). See also *Special Touch Home Care Services*, 357 NLRB 4, 6 (2011) ("[I]t is beyond dispute that the right to strike is central to the Act, a core right protected by Section 7, and separately and

use their PTO to engage in Section 7-protected strike activity without obtaining their consent operates as an improper restraint on employees' future participation in such activity.

Accordingly, the Region should issue a Section 8(a)(3) and (1) complaint, absent settlement.

/s/
B.J.K

ADV.04-CA-176296.Response.PrimeFlightAviation (b)(6), (b)

expressly preserved in Section 13”), *enforcement denied*, 708 F.3d 447 (2d Cir. 2013).