

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

DATE: July 28, 2017

TO: Charles Posner, Regional Director
Region 5

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: Market 450, LLC d/b/a The Food Market
Case 05-CA-180158

506-0100
506-20001-5000-0000
506-4033-3800-0000
506-4033-5100-0000
506-4067
506-4067-3000-0000
506-6090-3400-0000
512-5072-8600-0000
512-7550-5000-0000
512-7550-7000-0000

The Region submitted this case for advice as to whether the Charging Party's intercession on behalf of a coworker regarding a tip constituted protected concerted activity such that [REDACTED] subsequent discharge violated the Act. We conclude that the Charging Party's conduct was both concerted and protected and thus that Market 450 ("the Employer") violated Section 8(a)(1) by discharging the Charging Party for that activity. The Region should therefore issue complaint, absent settlement.

FACTS

Background

The Employer operates a restaurant in Baltimore, Maryland where it employs roughly 55 employees, including bartenders, servers, hostesses, busboys, and cooks. [REDACTED] is the [REDACTED] and [REDACTED] of the restaurant and [REDACTED], works as a [REDACTED]. Although there is no indication that [REDACTED] has any supervisory authority, several employees perceive that [REDACTED] has a privileged status as compared to the other [REDACTED]. In particular, [REDACTED] is routinely assigned to one of the more lucrative sections of the restaurant where tips tend to be higher and is automatically the first [REDACTED] permitted to leave at the end of a shift.

The Charging Party worked as a [REDACTED] at the time of [REDACTED] discharge. Approximately two months prior to [REDACTED] discharge, the Charging Party and [REDACTED] had

been involved in a disagreement over the Employer's tip policy with regards to private dining parties. The Employer's policy was that (b) (6), (b) (7)(C) who worked private parties were guaranteed at least \$150 in tips. If the customer tipped less than \$150, the Employer would make up the difference. If the customer tipped more than \$150, the (b) (6), (b) (7)(C) would be entitled to keep the entire tip. The Charging Party worked a private party sometime in early March 2016¹ where (b) (6) received \$200, but less than the customary 20% of the total bill. The Charging Party argued to the manager on duty that (b) (6) was entitled to 20% of the total bill and convinced (b) (6), (b) (7)(C) to pay (b) (6), (b) (7)(C) the roughly \$87 difference. (b) (6), (b) (7)(C), confronted the Charging Party about the extra money the following day and the two had a disagreement over the policy and the proper amount owed to the Charging Party. Although (b) (6), (b) (7)(C) disagreed with the Charging Party, (b) (6) did not require the Charging Party to return the disputed money.

The Employer was open for both a brunch and dinner shift. Workers on the brunch shift were scheduled for roughly 8:45 a.m. until 4 p.m. and the dinner shift workers were scheduled to report at around 3 p.m. to prepare for the reopening of the restaurant at 5 p.m. Between 3 p.m. and 5 p.m. the restaurant would typically be closed to allow for the shift change.

Events leading up to the Charging Party's discharge

On (b) (6), (b) (7)(C), (b) (6), (b) (7)(C), a (b) (6), (b) (7)(C) was working the brunch shift. At around 3 p.m., when the restaurant was set to close, a (b) (6), (b) (7)(C) asked (b) (6), (b) (7)(C) to call a taxi for a customer who had been at the restaurant's bar for several hours. (b) (6), (b) (7)(C) called the taxi company several times, but a cab never arrived. After one of the attempts, (b) (6), (b) (7)(C) invited the customer to sit in the restaurant instead of waiting outside on the street and sat with (b) (6), (b) (7)(C) while he waited. At some point, the customer gave (b) (6), (b) (7)(C) a \$10 tip.

During this time, the Charging Party, (b) (6), (b) (7)(C), and other staff began arriving to work the dinner shift. (b) (6), (b) (7)(C) noticed that the customer had been in the restaurant for a long time and found out that (b) (6), (b) (7)(C) was waiting for a ride. (b) (6), (b) (7)(C) approached (b) (6), (b) (7)(C) and the customer and asked (b) (6), (b) (7)(C) if (b) (6), (b) (7)(C) would like for (b) (6), (b) (7)(C) to arrange for an Uber to take (b) (6), (b) (7)(C) home. (b) (6), (b) (7)(C) agreed and (b) (6), (b) (7)(C) booked an Uber, which arrived and took the customer home.

(b) (6), (b) (7)(C) mentioned that the customer had given (b) (6), (b) (7)(C) \$10 and offered to help (b) (6), (b) (7)(C) pay for the Uber ride. (b) (6), (b) (7)(C) accepted the offer of the tip money, but said that (b) (6), (b) (7)(C) would use it to buy candy for other workers on the dinner shift.²

¹ All subsequent dates are in 2016 unless otherwise specified.

² (b) (6), (b) (7)(C) was not working the dinner shift and told (b) (6), (b) (7)(C) that fact.

Shortly thereafter, [REDACTED] and the Charging Party got into a discussion about the tip. [REDACTED] stated that [REDACTED] offered the money to [REDACTED] to be polite and did not expect [REDACTED] to accept it. The Charging Party did not approve of [REDACTED] taking the tip and objected to [REDACTED] directly.

The Charging Party and [REDACTED] got into a somewhat heated discussion over the tip on the floor of the restaurant. While no customers were present, other workers and [REDACTED] witnessed the exchange. During this discussion, [REDACTED] left the \$10 on the bar and went home while [REDACTED] and the Charging Party continued to argue about the money. After [REDACTED] left, the Charging Party picked the \$10 off of the bar and walked towards the [REDACTED] office, intending to put the money in an envelope for [REDACTED] to pick up when [REDACTED] returned to work. [REDACTED] asked where [REDACTED] was going with [REDACTED] money, and the Charging Party responded that it was not [REDACTED] money because [REDACTED] did not work for it. [REDACTED] demanded that [REDACTED] return the money, explaining that the Uber fare came out of [REDACTED] bank account. At this point, the Charging Party handed over the \$10, but complained that [REDACTED] was stealing from the other employees, mentioned that [REDACTED] already made much more money than everyone else, and accused [REDACTED] of being selfish. [REDACTED] said something to the effect of, “Let’s see how [REDACTED] feels about this,” and called [REDACTED].

[REDACTED] arrived at the restaurant a few minutes later and told the Charging Party to meet [REDACTED] in [REDACTED] office immediately. Once in the office, the Employer stated that Maryland was an at-will state and that [REDACTED] was discharging the Charging Party for sticking [REDACTED] nose in other people’s business and acting like [REDACTED] ran the restaurant. [REDACTED] ordered the Charging Party to gather [REDACTED] belongings and leave immediately.

ACTION

We conclude that the Charging Party’s intercession on behalf of a coworker regarding a tip was protected concerted activity for the purpose of mutual aid or protection and was therefore protected by Section 7 of the Act. Accordingly, we conclude that the Employer violated Section 8(a)(1) by discharging [REDACTED] for this conduct.

In order for conduct to be protected, it must be both “concerted” and for purposes of “mutual aid or protection”, elements that are related but analytically distinct.³ We agree with the Region that the Charging Party’s conduct was concerted. The Charging Party was acting on behalf of another worker in response to a dispute over a

³ See *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

tip, after (b) (6) and (b) (6), (b) co-worker discussed their concerns about the issue.⁴ The Board has made clear that discussions between employees about their concerns regarding terms and conditions of employment can be concerted even if the employees decide to take no action regarding the issue discussed.⁵ *A fortiori*, the fact that the Charging Party took some action but did not present a complaint directly to management does not lessen the concertedness of the employees' conduct.

The more complex, and crucial, question in this case is whether the Charging Party's action was for "mutual aid or protection." Determining whether an employee action was conducted for "mutual aid or protection" requires focusing on the goal of concerted activity and whether the employee(s) involved were seeking to "improve terms and conditions of employment or otherwise improve their lot as employees."⁶ Further, in order to find that conduct was for "mutual aid or protection," the subject of the conduct must generally be related to terms and conditions of employment.⁷ Wages are indisputably a central term and condition of employment and the Board has been unequivocal about their significance.⁸ The Board has long held that tips are effectively wages and that employee action relating to tips constitutes action regarding wages.⁹

⁴ See *Meyers Industries, Inc. (Meyers II)*, 281 NLRB 882, 885 (1986) (Board's test for finding concerted activity is whether activity was "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.").

⁵ See *Fresh & Easy*, 361 NLRB No. 12, slip op. at 3 (citing *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964) ("inasmuch as almost any concerted activity for mutual aid and protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition.")).

⁶ *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

⁷ See *Meyers II*, 281 NLRB at 887 (citing *Eastex*, 437 U.S. at 565).

⁸ See, e.g., *Northfield Urgent Care, LLC*, 358 NLRB 70, 80 (2012) ("there is no more vital term and condition of employment than one's wages."). See also *Parexel Int'l*, 356 NLRB 516, 518 (2011) ("wage discussions among employees are considered to be at the core of Section 7 rights..."); *Triana Industries*, 245 NLRB 1258, 1258 (1979) ("wages are a vital term and condition of employment.").

⁹ See e.g., *Double Eagle Hotel & Casino*, 341 NLRB 112 (2004), enforced, *Double Eagle Hotel & Casino v. NLRB*, 414 F.3d 1249 (10th Cir. 2005) (finding that rule prohibiting employees from discussing tip policy prohibits employees from discussing a policy that

The Board has also found that the “mutual aid and protection” requirement can be met even where only one employee would directly benefit from employees' concerted conduct. In *Fresh & Easy Neighborhood Market, Inc.*, the Board analyzed the “mutual aid or protection” requirement in the context of an individual employee petitioning her coworkers to sign statements related to the individual employee’s sexual harassment complaint.¹⁰ In finding that the individual was acting for mutual aid or protection, despite the fact that she alone would be immediately impacted by the outcome of the sexual harassment claim, the Board cited to the “solidarity principle” grounded in Section 7. The Board stated that, “[b]y soliciting from coworkers to raise his issues to management, an employee is requesting that his coworkers exercise vigilance against the employer’s unjust practices,” and that the “solicited employees have an interest in helping the aggrieved individual—even if the individual alone has an immediate stake in the outcome—because ‘next time it could be one of them that is the victim.’”¹¹

If an employee engages in activity for mutual aid or protection by seeking assistance or support during a dispute where only the acting employee has an immediate stake in the outcome, then an employee who acts in support of a *coworker* and who has no immediate interest in the outcome is also acting for “mutual aid or protection.” Here, the Charging Party took it upon [REDACTED] to protest the taking of [REDACTED] tip by [REDACTED]. The Charging Party had no direct, immediate stake in the outcome of the dispute, in that nothing indicates that [REDACTED] would be given a share of the \$10 or otherwise directly benefit from the tip being returned to [REDACTED]. And, the Employer’s actions here did not implicate any broader policy that would clearly and directly impact the Charging Party. However, the Charging Party was standing up for a coworker with the implicit understanding that if [REDACTED] could get away with taking a

directly affects their income); *Le Madri Restaurant*, 331 NLRB 269, 276 (2000) (finding that the voicing of employee complaints regarding the alleged improper deduction of money from tips constituted protected activity); *Skyline Lodge, Inc.*, 305 NLRB 1097, 1098 (1992) (finding that employees’ complaints about alleged cheating over amount of tips received concerned “matters directly affect[ing] their earnings” and were thus protected), *enforced*, 983 F.2d 1068 (6th Cir. 1992); *Fairmont Hotel Company*, 230 NLRB 874, 878 (1977) (finding that complaints to management about tip arrangements “were topics of common interest and concern to all rank-and-file employees . . . because they directly related to the amount of their pay, procedures for settling the amount, and the time of payment.”).

¹⁰ *Fresh & Easy*, 361 NLRB No. 12, slip op. at 6.

¹¹ *Id.*, slip op. at 8 (quoting *El Gran Combo de Puerto Rico v. NLRB*, 853 F.2d 996, 1005 n.4 (1st Cir. 1988)).

tip from (b) (6), (b) (7)(C), (b) (6), (b) (7)(C) could conceivably get away with taking a tip from (b) (6), (b) (7)(C) or other workers.

Further, the fact that the Charging Party and the Employer have a history of disagreeing over tipping policy strengthens the argument that the Charging Party was acting not only in (b) (6), (b) (7)(C) interest, but in the interests of (b) (6), (b) (7)(C) and (b) (6), (b) (7)(C) coworkers. In this instance, the Charging Party was arguably being altruistic in coming to the defense of (b) (6), (b) (7)(C), but another reasonable interpretation of (b) (6), (b) (7)(C) actions is that the disagreement over (b) (6), (b) (7)(C) tip is part of a larger issue with the Employer over tipping practices at the restaurant.

Moreover, in determining whether the Charging Party was engaged in conduct for “mutual aid and protection,” it is irrelevant that (b) (6), (b) (7)(C) did not bring the dispute over (b) (6), (b) (7)(C) tip to the attention of management. Discussions amongst employees regarding their terms and conditions of employment can be for mutual aid and protection even absent any further action.¹² The Charging Party clearly was disciplined for engaging in such discussions, as evidenced by the timing of (b) (6), (b) (7)(C) discharge and the Employer’s contemporaneous statement that the Charging Party was being discharged for “sticking (b) (6), (b) (7)(C) nose in other peoples’ business.”

Accordingly, we conclude that the Region should issue complaint alleging a violation of Section 8(a)(1), absent settlement, because the Charging Party was

¹² See, e.g., *Cadbury Beverages*, 324 NLRB 1213, 1213 n.3, 1220 (1997) (employer violated Section 8(a)(1) by discharging an employee for warning his coworker not to seek assistance from a union officer whom he overheard advising the employer to fire the coworker while she was on maternity leave); *Express Messenger Systems*, 301 NLRB 651, 653, 656 (1991) (employer violated Section 8(a)(1) by discharging employee because a supervisor overheard him tell a coworker that the supervisor had lied to her and did not have her best interests in mind when the supervisor advised her to take a leave of absence before she completed her probationary period, as the coworker would be entitled to benefits and protections under a collective bargaining agreement if she completed the probationary period); *U.S. Furniture Industries*, 293 NLRB 159, 160–61 (1989) (violation for discharging employee because he talked to new full-time hires about the discrepancy between their wages and those of temporary workers); *Jhirmack Enterprises*, 283 NLRB 609, 609 n.2, 613–15 (1987) (employer violated Section 8(a)(1) when it discharged an employee for warning a coworker that other employees were complaining about his work performance).

disciplined for engaging in concerted activity for mutual aid or protection.

/s/
J.L.S.

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