

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

DATE: June 4, 2019

TO: John J. Walsh, Regional Director  
Region 2

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

SUBJECT: Nusret New York LLC d/b/a Nusr-Et 506-0170  
Steakhouse, Cases 02-CA-231984; 506-0180  
02-CA-233995; 02-CA-233997; and 506-2017-1700  
02-CA-234081 506-1200  
506-4000  
506-4033-3800  
506-6090-7700  
524-8387-6550

The Region submitted these cases for advice as to whether the Employer unlawfully terminated the four Charging Party restaurant employees because of their discussions and complaints about tip pooling. We conclude that the employees were engaged in protected concerted activity related to the Employer's tip pooling practices, and that the Employer discharged them for engaging in that activity. The Region should therefore issue complaint, absent settlement, alleging that those discharges violated Section 8(a)(1).<sup>1</sup>

**FACTS**

The Employer opened in New York City in January 2018<sup>2</sup> and is part of a global chain of Nusr-Et steakhouses. The Employer's part-owner ("Owner") is a prominent "celebrity chef" and regularly carves meat and greets patrons at the Manhattan iteration of [REDACTED] chain.

The Employer's tip pooling system has been a source of employee frustration since the New York restaurant opened. During various pre-shift and staff meetings, some employees, including each of the four Charging Parties, objected to the non-transparency and unfairness of the Employer's tip compensation system—whereby

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<sup>1</sup> The Region intends to issue complaint alleging that the Employer also committed numerous independent violations of Section 8(a)(1).

<sup>2</sup> All subsequent dates are 2018 unless otherwise specified.

management counts and divides tips among employees regardless of their shift—and proposed instead that the employees be apprised of the tip totals for each shift and that the tip pool be divided between the lunch and dinner shifts because dinner work was more stressful and busier than the lunch shift. The Employer repeatedly told employees, including the Charging Parties, to not complain or talk to each other about the tip issue, and that doing so could endanger their jobs.

In June and July Charging Party A, on behalf of (b) (6), (b) (7)(C) and others, approached the Owner and objected to the tip system. The Owner told A that (b) (6) knew A has sued other restaurants, is a “leader” among the employees, is “telling the waiters about the laws and all these conversations,” and had been seen speaking about the issue on the Employer’s cameras. The Owner said (b) (6) did not want A talking to other servers about the tip issue.

In August, after the Employer tried to partially address the situation by setting up a whiteboard that contained the total number of tips received for the lunch and dinner shifts each day, the Charging Parties continued to object to the Employer’s system, including that servers were required to share their tips with the lead server whom the Charging Parties assert is a manager and should not be part of the tip pool. At various times, the Employer told each of the Charging Parties that they should work elsewhere if they did not like the Employer’s tip system and/or that continuing to talk about the system would result in adverse consequences, including job loss. In late October or early November, the general manager told employees during a pre-shift meeting that the Employer did not want to hear about tip issues anymore. The general manager said employees who were talking about the tips were a “cancer” and that the Employer had cleared out some of those employees and would continue to do so. The general manager asked employees to identify which employees were talking about the tip issues and that the servers needed to tell those employees to “shut the ... up” and “that they are poisoning our brains.”

Between (b) (6), (b) (7)(C), the Employer discharged the Charging Parties pursuant to its progressive disciplinary policy.<sup>3</sup> Charging Party A had received two warnings in (b) (6), (b) (7)(C) for talking out of turn in meetings and mishandling salt before (b) (6) was discharged on (b) (6), (b) (7)(C) for alleged insubordination, failing to follow directions, and—despite producing a doctor’s note—insufficient medical clearance to work in a “pressure[d]” environment after experiencing (b) (6), (b) (7)(C). Charging Party B was terminated in (b) (6), (b) (7)(C) for swearing at another employee; the other employee,

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<sup>3</sup> The Employer maintains a 5-step progressive disciplinary policy but does not consistently adhere to it.

who swore back to B, was not discharged.<sup>4</sup> Charging Party C received three disciplinary warnings in (b) (6), (b) (7)(C)—for counting money while out of uniform, a common practice no other server had been disciplined for; for violating a “new rule” against taking photographs of celebrities frequenting the restaurant; and because one of (b) (6), (b) (7)(C) customers did not pay the full bill—before (b) (6) was discharged in (b) (6), (b) (7)(C) for allegedly endangering the health of a customer with an ostensible citrus allergy by bringing the customer a soda with lime (even though the customer had eaten a salad with citrus dressing). Charging Party D had received a final warning in (b) (6), (b) (7)(C) for having left (b) (6), (b) (7)(C) station twice during a shift without notifying a manager before (b) (6) was discharged in (b) (6), (b) (7)(C) for failing to deliver drinks to a table, even though that task is assigned to a different restaurant employee.

### ACTION

We conclude that the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(1) by discharging the Charging Parties for engaging in protected concerted activity concerning the Employer’s tip pooling system.

#### I. The Charging Parties Engaged in Protected Concerted Activity by Discussing and Bringing to the Employer their Concerns about the Employer’s Tip Pooling Practices

Employee discussions and complaints about employers’ tip policies are “undeniably” protected by Section 7.<sup>5</sup> This long-held principle is not contradicted by the Board’s recent decision in *Alstate Maintenance*, where the Board found that a skycap’s complaint to a supervisor about a *customer’s* tip practice was neither

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<sup>4</sup> It is not unusual for swearing to occur at the restaurant among both managers and staff.

<sup>5</sup> *The Loft*, 277 NLRB 1444, 1465-66 (1986) (complaints to employer about its tip pool system were “undeniably protected under Section 7 of the Act”). See also *Thalassa Restaurant*, 356 NLRB 1000, 1016 (2011) (employees were engaged in protected concerted activities when they discussed their dissatisfaction with the tip distribution system with managers, supervisors and employer agents and when they pressed their demands for a tip book); *Le Madri Restaurant*, 331 NLRB 269, 276 (2000) (employee complaints regarding the alleged improper deduction of money from tips constituted protected activity); *Skyline Lodge, Inc.*, 305 NLRB 1097, 1098 (1992) (employee complaints about alleged cheating over tip amounts 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) (same).

concerted nor for the purpose of mutual aid or protection.<sup>6</sup> There, the Board concluded that the skycap's statement that "[w]e did a similar job [for that customer] a year prior and we didn't receive a tip for it," while said in front of other employees, was not intended to induce group action about a workplace concern but instead amounted to "mere griping" about a customer's tip history.<sup>7</sup> The Board also found that the skycap's statement was not for the purpose of mutual aid or protection because the employer had no control over the customer's tip practice.<sup>8</sup> Notably, the Board distinguished cases in which employers exerted some control over tips through tip pooling and sharing arrangements.<sup>9</sup>

Unlike the skycap's isolated gripe in *Alstate*, the Charging Parties acted concertedly by repeatedly bringing employees' concerns about the Employer's tip pooling policy to management, including during group pre-shift meetings and one-on-one conversations.<sup>10</sup> Also unlike in *Alstate*, the Charging Parties' conduct concerning the tip pooling policy was protected as it related to working conditions over which the Employer exerted control. Thus, the Charging Parties' conduct concerning the Employer's tip practice constituted protected concerted activity.

## II. The Employer's Discharges of the Charging Parties Violated Section 8(a)(1)

To establish unlawful discrimination under Section 8(a)(1), the General Counsel must first demonstrate by a preponderance of the evidence that animus toward protected activity was a "motivating factor" for an adverse action against an employee.<sup>11</sup> To do that, the General Counsel must show that the employee was engaged in protected activity, that the employer had knowledge of that activity, and

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<sup>6</sup> See *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 1, 7-9 (January 11, 2019). Although the skycaps refused to provide service to the customer, the Board stressed that the General Counsel's theory of violation was limited to the skycap's statement. See *id.*, 367 NLRB No. 68, slip op. at 3.

<sup>7</sup> See *id.*, 367 NLRB No. 68, slip op. at 3, 7-8.

<sup>8</sup> See *id.*, slip op. at 8-9.

<sup>9</sup> See *id.*, slip op. at 8, nn. 47-48.

<sup>10</sup> *Id.*, slip op. at 3, citing *Meyers Industries ("Meyers II")*, 281 NLRB 882, 886 (1985) (Section 7 concerted activity "encompasses those circumstances where individual employees . . . bring[] truly group complaints to the attention of management.").

<sup>11</sup> *Austal USA, LLC*, 356 NLRB 363, 363-64 (2010).

that the employer's hostility to that activity "contributed to" its decision to take the adverse action.<sup>12</sup>

In *Kitsap Tenant Support Services, Inc.*, Chairman Ring explained his view that *Wright Line* is "inherently a causation test," and, therefore, the essential question is whether there is a nexus between an employee's protected activity and the challenged adverse action.<sup>13</sup> As Chairman Ring emphasized, "[n]ot just any evidence of animus against protected activity generally" will satisfy the *Wright Line* requirement; instead, the General Counsel must show evidence of animus that was a motivating factor for the specific adverse employment action at issue. *Id.* The General Counsel agrees with that articulation of the *Wright Line* standard.

The Region should argue that, under this correct articulation of the *Wright Line* standard, the record establishes that the Charging Parties' protected activity was a motivating factor in their discharges. There is abundant evidence of animus directed specifically toward the Charging Parties' protected concerns over the tip policy, including that the Employer targeted them for discussing the Employer's tip practices among themselves and during pre-shift meetings, and told employees that the individuals talking about tips were a "cancer" and the Employer had "cleared out" some of them and intended to "clear out" the rest.<sup>14</sup> Several months after the Charging Parties began complaining to the Employer about the tip policy, they were discharged for various pretextual reasons.<sup>15</sup> The General Counsel has therefore met

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<sup>12</sup> *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), clarifying *NLRB v. Transp. Mgt.*, 462 U.S. at 395, 403 n.7; *Wright Line*, 251 NLRB 1083, 1089 (1980).

<sup>13</sup> 366 NLRB No. 98, slip op. at 11 & n.25 (2018). See also *Advanced Masonry Assoc., LLC d/b/a Advanced Masonry Systems*, 366 NLRB No. 57, slip op. at 3-4 & n.8 (2018) (Chairman Kaplan, disagreeing with majority's formulation of *Wright Line*; noting that *Wright Line* requires a nexus between the employer's animus and the employee's protected activity); *St. Bernard Hospital & Health Care Center*, 360 NLRB 53, 53, n.2 (2013) (Member Johnson, clarifying his view on the correct formulation of *Wright Line* in the same manner).

<sup>14</sup> See *Thalassa Restaurant*, 356 NLRB at 1004 (violation supported in part by supervisor asserting that "problems [regarding employees' tip policy complaints] were solved by cutting out the cancer to avoid the spread").

<sup>15</sup> The Board has long found that the presumption of unlawful motive is raised when the reason for the adverse employment action is "baseless, unreasonable or contrived." See, e.g., *Montgomery Ward & Co.*, 316 NLRB 1253-55 (1995) (citing

his burden of establishing a nexus between the Charging Parties' protected activity and the Employer's discharge decisions and the Employer has failed to show that it would have made those same decisions absent the protected activity.<sup>16</sup>

Accordingly, for the foregoing reasons, the Region should issue complaint, absent settlement, alleging that the Employer's discharges of the Charging Parties violated Section 8(a)(1).

/s/  
J.L.S.

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cases) (employer's proffered reasons for employees' discharges were "incredible" and thus pretextual), *enforced*, 97 F.3d 1448 (4th Cir. 1996).

<sup>16</sup> See *Austal USA, LLC*, 365 NLRB 363, 364 (2010) (if employer's proffered reason for employee's discharge is pretextual, employer necessarily fails *Wright Line* defense); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (same) (citing *Limestone Apparel Corp.*, 255 NLRB 722 (1982), *enforced*, 705 F.2d 799 (6th Cir. 1982)).