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

DATE: September 8, 2017

TO: John D. Doyle, Jr., Regional Director
Region 10

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

SUBJECT: RoHoHo, Inc.
d/b/a Papa John's Pizza
Case 10-CA-192458

506-0128
506-2001-5000-0000
506-4033-5100-0000
506-6050-0117-0000
524-1717-7650-0000
524-8387-0350-0000

The Region submitted this case for advice on whether the Employer lawfully discharged an employee for failing to give sufficient notice of her absence in order to participate in a two-day "Fight for $15" convention. We conclude that the employee engaged in a protected solo strike to assist a labor union, and that the Employer violated Section 8(a)(1) and (3) by discharging [redacted] for this activity.

FACTS

RoHoHo, Inc. (the "Employer") is a franchisee of Papa John's Pizza fast food restaurants. It was founded in 1991 and operates a number of Papa John's restaurants in South Carolina. The Southern Workers Organizing Committee ("SWOC") is one of eight organizations that form the Fight for $15 movement, funded in large part by the Service Employees International Union ("SEIU").[1]

The Fight for $15 movement began in 2012 with striking fast food workers demanding $15 per hour and union rights. It has since grown to a global fast food worker movement that also includes low-wage workers in other industries, such as home health aides, airport workers, and adjunct professors.[2] One of the Fight for $15

[1] See https://www.theguardian.com/us-news/2016/aug/12/fight-15-organizers-demand-employee-status-seiu (last visited Sept. 8, 2017).

[2] *See* http://fightfor15.org/about-us/ (last visited Sept. 8, 2017).

campaign's main goals is union organizing.[3] An employee who has worked for Papa John's in New York is a Fight for $15 leader.[4]

An employee (the "Employee") worked for the Employer preparing pizzas and answering phones in the Employer's Mount Pleasant, South Carolina restaurant for approximately four months until [redacted] discharge on (b)(6), (b)(7)(C) 2016.[5] The Employee had previously worked as a paid organizer for the Fight for $15 campaign, and there are news reports reflecting that [redacted] has been and continues to be a worker-activist and leader for the movement, attending rallies and speaking to the press about the campaign. For instance, a newspaper reported that, in 2015, [redacted] led a march around a McDonald's parking lot and into the store with a megaphone, followed by other protesters, chanting in support of the Fight for $15 campaign.[6]

Because the Region has identified numerous credibility concerns about the Employee's statements in this case, some of which are supported by objective evidence (e.g., the Employer's scheduling software records and a SWOC-supplied tape-

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[3] *See, e.g.*, http://fightfor15.org/why-we-strike/ (last visited Sept. 8, 2017) (workers are striking "for $15/hr and union rights"); https://thinkprogress.org/fast-food-workers-are-starting-to-win-the-fight-for-15-what-about-the-battle-for-union-rights-ccdc12404cb4/ (last visited Sept. 8, 2017) (quoting the SEIU president and a member of the Fight for $15 National Organizing Committee, each describing the goal of the Fight for $15 campaign as trying to win union representation for fast food workers); https://www.theatlantic.com/business/archive/2015/08/fifteen-dollars-minimum-wage/401540/ (last visited Sept. 8, 2017) (quoting a McDonald's spokesperson and the president of the International Franchise Association, describing the Fight for $15 campaign's attempts to unionize McDonald's).

[4] *See* http://www.newsday.com/business/report-average-fast-food-worker-on-long-island-earns-16-000-1.10456581 (last visited Sept. 8, 2017) (describing the New York Papa John's employee as "one of the leaders of the fast food workers movement"); https://www.dailykos.com/stories/2014/9/5/1327344/-Fifteen-Years-in-the-same-Job-at-Papa-John-s-and-still-making-only-8-50-an-Hour (last visited Sept.8, 2017) (stating that the same Papa John's employee appeared on a cable news program on behalf of the Fight for $15 campaign).

[5] All dates are in 2016 unless otherwise indicated.

[6] *See* (b)(6), (b)(7)(C) [redacted]

recording, both of which undermine the Employee's version of events),[7] the summary of facts concerning events at the Employer's restaurant, below, is drawn mainly from the Employer's perspective.

On (b)(6), (b)(7)(C) the Employee approached (b)(6), (b)(7)(C) to request time off on (b)(6), (b)(7)(C) explained that needed the time because SWOC was offering to pay $150 to transport (b)(6), (b)(7)(C), who worked for a different fast food restaurant, to a Fight for $15 rally. made clear that was not protesting the Employer or pay. The Employee had never requested the time off through the Employer's scheduling software, as required. The (b)(6), (b)(7)(C) said that had no issues with the request, but it must be approved by the (b)(6), (b)(7)(C). The (b)(6), (b)(7)(C) denied the time-off request on grounds that the Employee had not given seven days' advance notice, as required by the Employer's written Attendance and Punctuality policy.

The Employer's Attendance and Punctuality policy provides, in relevant part, that "[s]even days notice must be given before an employee requested schedule change may be honored" but that "the Company understands that some times [sic] things happen that will prevent prior notice." The policy states that "[y]our manager has the authority to determine if an absence or tardy is excused."[8] The policy also states that disciplinary action may result from "excessive unexcused absences or unexcused tardies," and that employees with "three (3) or more unexcused absences or unexcused tardies in a rolling calendar year" are subject to termination. The policy further states that employees who are "absent two (2) consecutive workdays without notification to [their] supervisor" will be considered to have voluntarily resigned.

On (b)(6), (b)(7)(C), the (b)(6), (b)(7)(C) and (b)(6), (b)(7)(C) informed the Employee that request for time off was denied. Also on (b)(6), (b)(7)(C) the Employee discovered and photographed the (b)(6), (b)(7)(C) log entry on a clipboard in the office that stated: "I talked with [the Employee] at 3:00pm on . is well aware of consequences for to not work fri, sat, or sun in protest for 15 for a different company."

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[7] The Employee also has been convicted of felony credit card fraud. was released on April 1, 2007 after serving nine months in prison, with no additional parole requirement.

[8] The Employer's attendance records from January 1 through December 18 showed that, although most untimely requests for leave were denied, management approved eight time-off requests with fewer than seven days' notice and listed three as "pending approval."

On (b)(6), (b)(7)(C) the Employee informed the (b)(6), (b)(7)(C) that (b) would not work the following day as scheduled. Later that day, the (b)(6), (b)(7)(C) (6) called the Employee and told (b) that if (b)(6), failed to report to work, (b) would lose (b) job. Following that call, a SWOC organizer arrived at the restaurant and presented the (b)(6), (b)(7)(C) with a strike notice, and said that the Employer could not legally fire the r failing to report to work.

The strike notice stated that the Employee would be going on strike on (b)(6), (b) (7)(C) and unconditionally offered to return to work for (b)(6), (b)(next regularly-scheduled shift after (b)(6), (b)(7) The notice included reasons for the strike that SWOC admits have no bearing on the Employer—that the Employer "is forcing us to work on Homecoming weekend" and is "requir[ing] us to perform management duties without a promotion or a raise"—but were listed because the organizer had reused a strike notice concerning another employer. Importantly, however, the strike notice also stated that the Employee was "also striking to demand $15 an hour wage and the right to join a union without retaliation." The notice further explained that:

> This company is profitable because of our hard work, but we are paid poverty wages that are not enough to pay for the basics like food, rent, and utilities. We want to properly care for our families and work in a safe environment, so we are taking a stand to improve our future.

On August 12 and 13, the Fight for $15 campaign held its first national convention in Richmond, Virginia. There, the campaign adopted a resolution calling for, *inter alia*, "direct actions and demonstrations at presidential debate locations" and "the right to join unions without fear of retaliation."[9] The morning of the convention on August 13 began with a large protest at a Richmond McDonald's that included striking McDonald's workers.[10] At the close of the convention, the workers joined faith leaders and community activists as they marched through Richmond for

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[9] *See* http://www.workers.org/2016/08/22/fight-for-15-links-racism-low-wage-economy/ (last visited Sept. 8, 2017).

[10] *See* http://fightfor15.org/massive-strike-richmond/ (last visited Sept. 8, 2017) (stating that, on the morning of the convention, "hundreds" of workers protested at a Richmond McDonald's, including McDonald's strikers). SWOC submitted a copy of the strike notice it gave to management of that McDonald's, which listed twenty workers who intended to strike that morning.

"economic and racial justice."[11] The Employee states that [redacted] participated in the Fight for $15 events and led a group of employees at the McDonald's protest.

On [redacted] the Employee returned to work in [redacted] uniform, accompanied by the SWOC organizer and [redacted] son, who videotaped part of [redacted] arrival. The SWOC organizer asked the [redacted] if the Employee could return to work, and the [redacted] said no, explaining that the Employee had been told before [redacted] absence that [redacted] could either come to work as scheduled on [redacted] or [redacted] absence would be considered unauthorized. The Employee's termination notice specified that the Employee was terminated for "job abandonment" sinc [redacted] [w]as denied for 8-12 and 8-13 off . . . . [sic] not enough notice, [sic] [redacted] chose to take those days off after speaking with [unknown initials]." There is no evidence that the Employee had a prior unexcused absence or tardy.[12]

ACTION

We conclude that the Employer violated Section 8(a)(1) and (3) by discharging the Employee because [redacted] engaged in a protected solo strike to assist a labor union.

For employee conduct to be protected under Section 7, it must be both concerted and pursued either for collective-bargaining purposes or for other "mutual aid or protection."[13] The Board has defined "concerted activities" generally as those "engaged in with or on the authority of other employees, and not solely by and on

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[11] *See* https://thinkprogress.org/fight-for-15-richmond-convention-1dbc73e24183/ (last visited Sept. 8, 2017) (more than a thousand workers marched in Richmond, "determined to link modern economic exploitation to the system of free, forced labor that built the United States"); http://www.workers.org/2016/08/22/fight-for-15-links-racism-low-wage-economy/ (last visited Sept. 8, 2017) (thousands of workers participated in the convention, and "[t]housands more joined them at the close of the convention to march . . . in a protest against racism and poverty wages," which, according to the campaign, included, e.g., "exposing the connections between the slave economy and low-wage economy today").

[12] The Employer provided records for six employees who it says were fired for job abandonment. None is of an employee who gave prior notice before taking time off. One employee notified the Employer that [redacted] would not be working ten minutes after [redacted] shift began, four never notified the Employer, and one voluntarily quit.

[13] *See, e.g., Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (Aug. 11, 2014).

behalf of the employee himself."[14] However, Section 7 "defines both joining and assisting labor organizations—activities in which a single employee can engage—as concerted activities."[15] Accordingly, the Board finds a single employee's apparent solo strike to be protected, concerted activity where the employee strikes to assist a labor union in furtherance of the union's organizing efforts,[16] particularly when it is done with the union's knowledge and agreement.[17]

We conclude that the Employee's solo strike was concerted because it was done to assist SWOC, a labor union,[18] with its union organizing campaign. The Fight for $15 movement may be best known for its wage demands, but it also campaigns for union

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[14] *Meyers Industries, Inc.* (*Meyers I*), 268 NLRB 493, 497 (1984), *reaffirmed in Meyers Indus.* (*Meyers II*), 281 NLRB 882 (1986), *enforced sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

[15] *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984). *See also C.S. Telecom, Inc.*, 336 NLRB 1193, 1193-94 (2001) (finding that employee who gave employer's jobsite locations to union so it could target employer's customers was concerted activity even though employee was acting alone; assisting a union is, "by definition," acting concertedly).

[16] *See Manno Electric*, 321 NLRB 278, 281 (1996) (employee's solo strike concerted because it continued earlier union organizing activities and was in protest of what he understood to be unlawful anti-union discrimination), *enforced mem. per curiam*, 127 F.3d 34 (5th Cir. 1997); *Mauka, Inc.*, 327 NLRB 803, 804 & n.8 (1999) (because employee was striking to protest unfair labor practices committed in the course of a union organizing campaign, "it is irrelevant that no other employee joined him in striking").

[17] *See Mauka, Inc.*, 327 NLRB at 804-05 (solo strike protected where the employee discussed matters with a union representative before striking, the strike occurred in furtherance of a union organizing campaign, and the employee made clear that he was protesting the treatment of other employees as well as himself; distinguishing *DeMuth Electric*, 316 NLRB 935 (1995), in which Member Stephens, writing separately, noted that single employee's walkout was not concerted activity because, *inter alia*, he acted against union's wishes).

[18] *See EYM King of Missouri, LLC d/b/a Burger King*, 365 NLRB No. 16, slip op. at 1-2 (Jan. 24, 2017) (describing the Workers Organizing Committee—Kansas City, a sister organization of SWOC within the Fight for $15 campaign, as a labor union in the notice and order).

rights.[19] Before going on strike, the Employee met with the SWOC organizer, who accompanied [redacted] workplace, where they jointly presented the Employer with the strike notice clearly explaining that [redacted] was going on strike "to demand $15 an hour wage and the right to join a union without retaliation."[20] And, during the strike, the Employee assisted SWOC. Thus, [redacted] attended the Richmond convention, which adopted critical resolutions guiding the campaign going forward, including, *inter alia*, "the right to join unions without fear of retaliation." [redacted] also assisted SWOC by participating in the march for economic and racial justice and the McDonald's strike and protest, both of which also furthered the Fight for $15 campaign's union-organizing objectives. Therefore, like other solo strikes the Board has found to be concerted, the Employee's strike in this case was done in consultation with a labor union, in furtherance of its organizing campaign, and after providing notice to the Employer detailing the reasons for the strike. Accordingly, the strike was concerted.

The Employee's solo strike also satisfies the "mutual aid or protection" standard. The focus of the "mutual aid or protection" inquiry is on the goal of the concerted activity, primarily, "whether the employee or employees involved are seeking to 'improve terms and conditions of employment or otherwise improve their lot as employees.'"[21] In *Eastex, Inc. v. NLRB*, the Supreme Court held that the distribution of a newsletter which included a section in part criticizing the Presidential veto of a bill that would have increased the federal minimum wage was for the purpose of "mutual aid or protection" under Section 7.[22] The Court rejected the employer's argument that activity regarding the minimum wage cannot implicate mutual aid or protection because it does not relate to a specific dispute between employees and their employer.[23] Here, the Employee's strike notice made clear that [redacted] was striking to demand a $15 per hour wage and union rights for [redacted] and [redacted] co-workers. During [redacted] strike, [redacted] also joined thousands of other employees working in fast-food and

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[19] *See* pp. 1-2, *supra*.

[20] Because the strike notice clearly informed the Employer that the Employee was going on strike for a $15-per-hour wage and union rights, and explained why a raise was important to workers, it is irrelevant that the notice contained additional reasons for striking that were not applicable to the Employer.

[21] *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (quoting *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978)).

[22] 437 U.S. at 569-70.

[23] *Id.* at 563, 569-70.

other low-wage industries at the Richmond convention, the economic-and-racial-justice march, and the McDonald's strike and protest, to advocate for these common goals in their respective workplaces. Accordingly, as in *Eastex*, the Employee's strike activities to raise wages for (b)(6), (b)(7)(C) and other employees satisfy the mutual aid or protection prong.

We reject the Employer's argument that this case is analogous to cases in which we found that employees who left work to attend demonstrations to protest federal immigration policies were not engaged in valid strikes, even though the walkouts were concerted activity for mutual aid or protection, because the conduct was not "directed at an employer who has control over the subject matter of the dispute. . . ."[24] Here, by contrast, the Employer clearly has control over the subject matter of the dispute: the wage rates of its employees and its decision of whether to oppose a union organizing drive.[25]

We further conclude that a *Wright Line*[26] motive analysis is not appropriate here; therefore, we reject the Employer's defense that it terminated the Employee for nondiscriminatory business reasons, i.e., because (b)(6), (b)(7)(provided insufficient notice of (b)(6), (b)(7)(C absence under the Absentee and Punctuality policy. When the very conduct for which an employee is disciplined is itself alleged to be a protected concerted activity, such as a strike, the employer's motive is not at issue.[27] The only question is whether

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[24] *See, e.g., Reliable Maintenance*, Case 18-CA-18119, Advice Memorandum dated Oct. 31, 2006; *Benchmark Manufacturing, Inc.*, Case 16-CA-24962, Advice Memorandum dated Oct. 31, 2006; "Guideline Memorandum Concerning Unfair Labor Practice Charges Involving Political Advocacy," GC Memorandum 08-10, at p.10 (July 22, 2008).

[25] *See Forever 21*, Case 13-CA-116213, Advice Memorandum dated Apr. 4, 2014, at 5 (finding Chicago-area one-day strikes for improved wages, workplaces free of ULPs, and right to join union without interference or intimidation protected, as subject matter of strikes was clearly within employer's control; GC Memorandum 08-10 inapplicable).

[26] 251 NLRB 1083 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981).

[27] *See, e.g., Readyjet, Inc.*, 365 NLRB No.120, slip op. at 1 n.4 (Aug. 16, 2017) (refusing to apply *Wright Line* when holding that the employer unlawfully disciplined employees for striking without complying with the employer's attendance policy requirement of advanced notice for time off because the employer's motive was not at issue); *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2001) (where "employees are terminated for engaging in a protected work stoppage, *Wright Line* is not the

the conduct was protected, concerted activity. In *Burger King*, for example, the Board affirmed the ALJ's determination that the employer unlawfully disciplined six employees for striking to support the Fight for $15 campaign.[28] In so finding, the ALJ rejected the employer's defense that the strike left it predictably short-staffed for the shift because its procedures require at least three hours' notice before an employee may take time off, and there was not "conclusive evidence" that the manager ever received it.[29] As adopted by the Board, the ALJ explained that, "even if the employees did not notify [management] that they would not be at work [on the day of the strike], it is immaterial," since employees are not required to comply with the notice provisions of an employer's attendance policy before striking.[30] Because an employer's attendance policy cannot curb an employee's broad right to strike as protected by Sections 7 and 13,[31] the Employer's *Wright Line* defense is inapplicable.

Therefore, even crediting the Employer's version of events, we conclude that the Employee's discharge was unlawful. Although the Employee initially may have told

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appropriate analysis . . . ."); *Phoenix Transit Sys.*, 337 NLRB 510, 510 (2002) (refusing to apply *Wright Line* where it was undisputed that the employer discharged the employee because of articles he wrote in a union newsletter; because the Board found that he engaged in protected concerted activity, "the only issue is whether [the employee's] conduct lost the protection of the Act . . . ."), *enforced per curiam*, 63 F. App'x 524 (D.C. Cir. 2003).

[28] 365 NLRB No. 16, slip op. at 1 n.4.

[29] *Id.*, slip op. at 14.

[30] *Id.*, slip op. at 6, 14. *See also Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003) (the Act "protects the right of employees to engage in concerted activities, including the right to strike without prior notice"); *Readyjet, Inc.*, 365 NLRB No. 120, slip op. at 1 n.4 (holding that employer unlawfully disciplined employees for striking without complying with employer's attendance policy requirement of advanced notice for time off, as "employees lawfully may strike without providing notice, notwithstanding an employer's policy that requires advanced notice of employee absences"); *Anderson Cabinets*, 241 NLRB 513, 518-19 (1979) ("Calling a strike a voluntary quit or an absence from work justifying discharge is to write Section 13 out of the Act."), *enforced*, 611 F.2d 1225 (8th Cir. 1979).

[31] Section 13 states that "[n]othing 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 . . . ."

the Employer that [redacted] was getting paid $150 to drive [redacted] to the convention and that [redacted] was not protesting the Employer's policies, [redacted] ultimately delivered a strike notice that unambiguously listed the demand for $15 per hour and union rights from the Employer as among the reasons for [redacted] strike. Likewise, once the Employee submitted the strike notice, [redacted] truthfulness in asserting that [redacted] had requested time off seven days in advance using the Employer's scheduling software, and that the Employee's [redacted] had initially approved [redacted] time-off request until being overruled by another manager, became immaterial.[32]

Finally, although we have concluded that *Wright Line* cannot privilege the Employer's conduct, the Region should consider, as a potential alternative argument under *Wright Line*, whether the Employer discriminatorily applied its Attendance and Punctuality policy against the Employee. In this regard, while the Employer's stated reason for discharging the Employee was that [redacted] failed to give seven days' notice, the policy's seven-day notice provision does not state that failure to comply results in termination; it only states that a requested schedule change will not be honored. Moreover, the policy gives management discretion to approve untimely requests, and the Employer's records indicate that, from January 1 through December 18, the Employer approved eight requests for time off with fewer than seven days' notice, and three more were listed as "pending approval." And, although the Employer's policy states that employees will be considered to have voluntarily quit when absent for two consecutive workdays without giving "notification" to a

[32] [redacted]

supervisor, this provision does not specify a seven-day notice requirement. Finally, in this case, the Employee's strike notice clearly constituted prior notification of the Employee's (b)(6), (b)(7)(C) absences. Thus, it appears that the Employee would not be considered to have voluntarily quit (or abandoned (b)(6), (b)(job) under this consecutive-day rule. Furthermore, although the policy states that an employee may be subject to termination if (b)(6) has "excessive" unexcused absences or three or more unexcused absences in a rolling calendar year, there is no evidence that the Employee had any prior unexcused absences. Accordingly, the Region should consider whether, under an alternative *Wright Line* analysis, the Employer discharged the Employee not because (b)(6) violated its attendance policy, but rather because (b)(6) informed (b)(6) Employer that (b)(6) would be absent in order to participate in union activities.[33]

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employee's discharge violated Section 8(a)(1) and (3).

/s/
J.L.S.

ADV.10-CA-192458.Response.RoHoHo.PapaJohns.(b)(6)

[33] *See, e.g., Regal Health & Rehab Center, Inc.*, 354 NLRB 466, 466, 480-81 (2009) (employer unlawfully discharged employee it knew was involved in a union organizing campaign by applying a more stringent absentee notice requirement in her case than what is written in the employer's attendance policy), *reaffirmed and incorporated by reference*, 355 NLRB 352 (2010).