EYM King of Missouri, LLC d/b/a Burger King *and* Workers Organizing Committee—Kansas City.
Case 14–CA–150321

January 24, 2017

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND MCFERRAN

On February 9, 2016, Administrative Law Judge Christine E. Dibble issued the attached decision.[1] The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party each filed an answering brief, and the Respondent filed reply briefs.

The National Labor Relations Board has considered the decision and the record in light of the exceptions[2] and briefs and has decided to affirm the judge's rulings,[3] findings,[4] and conclusions and to adopt the recommended Order as modified and set forth in full below.[5]

ORDER

The National Labor Relations Board orders that the Respondent, EYM King of Missouri, LLC d/b/a Burger King, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Disciplining employees for engaging in a strike or supporting Workers Organizing Committee—Kansas City or any other union.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline issued to Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful discipline will not be used against them in any way.

(b) Within 14 days after service by the Region, post at its 1102 East 47th Street, Kansas City, Missouri, facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Di-

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[1] On June 23, 2016, the Board issued a decision that addressed Cases 14–CA–148915 and 14–CA–150794, which are included in the judge's decision. *EYM King of Missouri, LLC*, 364 NLRB No. 33.

[2] The Respondent has 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. In affirming the judge's finding that Store Manager LaReda Hayes received the strike notice for employees Kashanna Coney, MyReisha Frazier, and Myesha Vaughn, we observe that Hayes admitted receiving it.

The Respondent has requested oral argument. The request is denied as the record, exceptions, and briefs adequately present the issues and the positions of the parties.

We reject the Charging Party's contention that the Board should disregard the Respondent's exceptions because they fail to comply with Secs. 102.46(b)(2) and (c)(3) of the Board's Rules and Regulations. The Respondent's exceptions substantially comply with the Board's Rules and Regulations and are sufficient to warrant Board consideration.

[3] The Respondent excepts to the judge's exclusion of the following proffered evidence: (1) the Respondent's proffered exhibit 24, purportedly showing the Union's use of identical strike notices at various restaurants; (2) additional evidence of uniform enforcement of its absenteeism policy; and (3) testimony and an offer of proof concerning whether the Workers Organizing Committee would organize future strikes. Assuming arguendo the judge erred in these rulings, we find that the additional evidence would not affect our disposition of this case.

[4] We agree with the judge that the employees' 1-day strike on April 15, 2015, did not constitute unprotected intermittent strike activity, and we therefore agree with the judge's ultimate finding that the Respondent violated Sec. 8(a)(1) of the Act by disciplining six employees for participating in that strike. We emphasize that employees had engaged in only that one strike against the Respondent at the time it issued the discipline. Because the single 1-day strike was not an intermittent strike, we find it unnecessary to rely on the judge's analysis of when intermittent strike activity is protected. In addition, we observe that all six employees engaged in protected strike activity on April 15, 2016, consistent with their strike notice, which stated, "We offer to return to work unconditionally after April 15th for our next regularly scheduled shift." Finally, in finding the discipline unlawful, we do not rely on *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See *CGLM, Inc.*, 350 NLRB 974, 974 fn. 2 (2007) (rejecting application of *Wright Line* in similar circumstances, where "the very conduct for which employees are disciplined is itself protected concerted activity," quoting *Burnup & Sims*, 256 NLRB 965, 976 (1981)), enfd. 280 Fed.Appx. 366 (5th Cir. 2008). Accord: *Atlantic Scaffolding Co.*, 356 NLRB 835, 838 (2011).

The Respondent requests that the Board take administrative notice of strikes organized by the Workers Organizing Committee on November 29, 2012, and November 15, 2015. We find it unnecessary to do so because it would not affect our disposition of this case. The 2012 strike predated the Respondent's ownership of Burger King restaurants, including the one involved in this case. With respect to the November 2015 strike, the Respondent's unlawful discipline of employees in April 2015 cannot be legitimated by events occurring 6 months later.

[5] We shall modify the judge's recommended Order to reflect the Board's findings, and we shall substitute a new notice to conform to the Order as modified.

[6] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

rector for Region 14, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 16, 2015.

(c) Within 21 days after service by the Region, file with the Regional Director for Region 14 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. January 24, 2017

Mark Gaston Pearce, Chairman

Philip A. Miscimarra Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discipline you for engaging in a strike or supporting Workers Organizing Committee—Kansas City or any other union.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to our unlawful discipline issued to Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful discipline will not be used against them in any way.

EYM KING OF MISSOURI, LLC, D/B/A BURGER KING

The Board's decision can be found at www.nlrb.gov/case/14–CA–150321 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Lyn R. Buckley, Esq., for the General Counsel.
John L. Ross, Esq. and *Jason T. Weber, Esq.,* for the Respondent.
Fred Wickham, Esq., and *Brian Noland, Esq.,* for the Charging Union.

DECISION

STATEMENT OF THE CASE

CHRISTINE E. DIBBLE, Administrative Law Judge. This case was tried in Overland Park, Kansas, on August 11–13, 2015. The Workers' Organizing Committee—Kansas City (WOCKC/Union) filed the charge in case number 14–CA–148915 on March 26, 2015.[1] The first amended charge in case

[1] All dates are in 2015 unless otherwise indicated.

number 14–CA–148915 was filed by WOCKC on April 22. On April 17, WOCKC filed a charge in case number 14–CA–150321. An amended charge in case number 14–CA–150321 was filed on June 16. WOCKC filed the charge in case number 14–CA–150794 on April 24, and filed an amended charge on June 16. The General Counsel issued the complaint on May 27 and a consolidated complaint on June 24. EYM King of Missouri, LLC d/b/a Burger King (Respondent) filed a timely answer and an amended answer on June 9 and July 6, respectively.

The consolidated complaint alleges that the Respondent violated Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) when on or about April 17, the Respondent, through Kelly Sharts, told employees that Respondent's "higher management" wanted to discipline employees for engaging in union and protected concerted activities, including work stoppages.[2] The consolidated complaint also alleges that the Respondent violated Section 8(a)(1) and (3) of the Act when on or about March 26, the Respondent refused to consider for hire or refused to hire Terrance Wise;[3] and on or about April 16, the Respondent issued written discipline to its employees Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myesha Vaughn.[4] In her brief, counsel for the General Counsel moved to amend the consolidated complaint to delete paragraph 5(a) "eliminating the allegation that [LaReda] Hayes made statements on April 16 and 23, 2015 which violate the Act." (GC Br. 3.)[5] The motion to amend the consolidated complaint is granted. Consequently, I will not consider or rule on the allegation set forth in paragraph 5(a) of the consolidated complaint.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, the Union, and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company, engaged in the retail operation of Burger King (BK) franchise restaurants selling food and beverages to the general public, including at its restaurants located at 1102 East 47th Street, Kansas City, Missouri and 3441 Main Street, Kansas City, Missouri. During the 12-month period ending July 31, 2015, the Respondent derived gross revenues in excess of $500,000. The Respondent also purchased and received at its facilities in Missouri goods valued in excess of $5000 directly from points outside of the State of Missouri and remitted royalty and advertising fees on behalf of its Missouri facility valued in excess of $5000 to the Burger King Corporation, which is the franchisor of the BURGER KING® system, and is headquartered in the State of Florida. Although the Respondent does not acknowledge that it meets the specific monetary amounts set forth in the consolidated complaint, it does not contest jurisdiction. See also, General Counsel Exhibit 33 (Respondent voluntarily stipulates that it meets the specific monetary limits to establish jurisdiction). The Respondent admits, and I find, that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

At all material times, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Overview of Respondent's Operation and Managerial Staff

On March 26, the Respondent assumed ownership of several BK restaurants from Strategic Restaurants (Strategic). Included in the purchase were BK restaurants at 1102 E. 47th Street in Kansas City, Missouri (47th Street) and 3441 Main Street in Kansas City, Missouri (Main Street). In addition to Kansas City, the Respondent also acquired ownership of BK restaurants in several other cities throughout the State of Missouri. As part of its operations, the Respondent employed, among other employees, district managers, general managers, shift managers, cashiers, cooks and crew. Since July 1, Aaron Knox (Knox) has worked for the Respondent as a district manager and oversees eight BK restaurants in Missouri, including the 47th Street location. Prior to the changeover in ownership, Knox worked for Strategic for 5 years. Tammy Young (Young) works for the Respondent as a district manager overseeing nine restaurants and assisting with managing the Main Street location. She previously worked for Strategic for 5 years as a manager. The Respondent also hired Kelly Ragar (Ragar) as a district manager to supervise six stores in Springfield, Missouri.

The Respondent employed approximately 45 employees at its 47th Street BK. Since March 26, LaReda Hayes (Hayes)[6] has been the general manager of the store. Previously, she worked for Strategic at the 47th Street location in the same capacity. Under Strategic's ownership, she reported directly to District Manager Thomas Reyes (Reyes). During Hayes' tenure with both employers, she had an assistant manager and several shift managers working for her, including Assistant Manager Ann Williams (Williams) and shift managers Mary Briscoe (Briscoe), Tena Jacobs (Jacobs), and Yon Nonnina (Nia) Cline (Cline). There was testimony that Sharrell (last name unknown) was also a manager at the 47th Street BK.[7]

Minimal evidence was introduced about the staff and management team at the Main Street BK. It is, however, undisputed that Kelly Sharts (Sharts) was the store manager until she resigned on June 15.

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[2] This allegation is alleged in par. 5(b) of the consolidated complaint.

[3] This allegation is alleged in par. 6(b) of the amended consolidated complaint.

[4] This allegation is alleged in par. 7(b) of the amended consolidated complaint.

[5] Abbreviations used in this decision are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "CP Exh." for the Charging Party's exhibit; "R. Exh." for the Respondent's exhibit; "GC Br." for the General Counsel's brief; "CP Br." for the Charging Party's brief; "R. Br." for the Respondent's brief; and "R. Reply" for the Respondent's reply brief.

[6] The record reflects that Hayes' employees call her "Reda" and several witnesses refer to her by that name in their hearing testimony.

[7] In their briefs, the parties have spelled the name as "Sharroll", "Sherroll" and "Sharrell." In this decision I will refer to the manager as "Sharrell."

B. Union organizer Terrence Wise's WOCKC activities

Terrence Wise (Wise) worked for various BK restaurants for 11 years and at its 47th Street location from February 1, 2012, to March 25, 2015.[8] He was a general crew member which meant he could perform various nonmanagerial tasks in the restaurant. In early 2015, Wise worked from 9 a.m. to 5 p.m., but towards the end of his employment with Strategic he worked the 10 p.m. to 6 a.m. shift.[9] During his tenure at the 47th Street BK, Hayes was his general manager. At various time Cline, Jacobs, and Sharrell were his shift managers. Williams was his assistant manager.

WOCKC is a local outpost of the national Workers Organizing Committee (WOC).[10] WOCKC, with assistance from the WOC, conducts local campaigns for higher wages, better working conditions, and unionization. In spring 2013, Wise became active in WOCKC and eventually assumed a leadership role in the organization. In his WOCKC leadership capacity, Wise has spoken at and helped to organize strikes, rallies, protests, health and safety campaigns, and petition marches. Wise has also been interviewed by television and radio news outlets and featured in numerous local and national publications. In addition to his activities on behalf of WOCKC, Wise filed charges with NLRB against Strategic, and took the lead among his coworkers at the 47th street restaurant in encouraging them to participate in petitioning management for improved terms and conditions of their employment. (GC Exhs. 9, 10, 12–14, 18; Tr. 47–48.)

Wise began participating in WOCKC sanctioned strikes in spring 2013. He has participated in strikes on July 29–30, 2013; August 29, 2013; December 15, 2013; May 15, 2014; September 4, 2014; December 4, 2014; and April 15, 2015. Only one of the strikes has lasted more than a day. WOC coordinated the nationwide 1-day strikes. Wise explained that workers at a restaurant would encourage their coworkers to participate in strikes and other organizing activities. Prior to going out on strike, a third-party representative and one or more workers would give the general manager a strike notice listing the names of striking workers. Strike notices were also posted to the WOC Facebook page which listed upcoming strike dates. After the strikes, a third-party representative would return to the workplace with the workers and present the manager with a return to work notice that noted their unconditional offer to return to work.

Hayes has been aware of Wise's involvement in WOCKC since its inception, and first became aware of his participation in strike activity about July 2013 when she discovered a flyer in his backpack advertising a rally for $15 an hour. Wise explained to her the purpose of the rally and his involvement. In mid-March 2015, he also engaged in a health and safety action with coworkers Suzie de la Cruz Camillo (Camillo), Kashanna Coney (Coney), and West Humbert (Humbert). They signed and presented a petition to Hayes that requested the repair of equipment. In addition, Hayes was aware of Wise's and employee Osmara Ortiz's (Ortiz) work with WOCKC because advertisements with their pictures appeared on the sides of city buses that passed in front of the 47th Street BK and Hayes commented on it. Ortiz has also been featured in the news media, given interviews, and spoken at WOCKC events. Other employees at the 47th Street BK who have been interviewed by the local news media concerning union organizing activities are Camillo, Humbert, Myesha Vaughn (Vaughn), and MyReisha Frazier (Frazier).

C. Disciplinary actions taken against Wise

During his tenure at the 47th Street BK, Wise was subject to disciplinary action on several occasions. Under Strategic ownership, the restaurant had a "kitchen minder" that told the cooks which food to cook, the amount of food to cook, and when to cook it. If too much food was prepared, the procedure was for Hayes to count and record the excess ("wasted") food after the breakfast, lunch, and dinner shifts. After the count was taken, she sometimes allowed employees to give the wasted food away or keep it for themselves.[11] During the course of his employment under her management, Hayes verbally counseled Wise on two occasions for preparing too much food. There is no evidence noting the exact dates of these counseling sessions.

Williams and Hayes also issued Wise written discipline on several occasions for being tardy and absent without notifying management,[12] and switching shifts without prior approval. (Tr. 339.) On April 21, 2014, Williams issued Wise a written counseling for arriving at work 55 minutes late without notifying management. (R. Exh. 4.) She also issued him a written counseling on May 5, 2014 for coming to work 15 minutes late. (R. Exh. 5.) Hayes testified that she counseled Wise on two occasions for sending employees on workbreak without her permis-

[8] Testimony regarding the time frame for Wise's employment at the 47th Street location was confusing. Initially his testimony indicated that he began work at the 47th Street BK in 2009. Wise later testified, however, that he worked at the 47th Street location under Strategic's ownership from December 2012 until March 2015. Hayes also testified that she worked with him for 3 years at the 47th Street BK. (Tr. 29–30, 77–78, 382.) I credit Hayes' more specific testimony on this point; and find that Wise worked with Hayes at the 47th Street BK from December 2012, to March 26, 2015.

[9] I cannot find a reference in the record noting the days of the week Wise worked prior to March 26. However, Hayes testified that when Wise applied to work for the Respondent, he noted his unavailability to work on Sundays and could only work from 9 a.m. to 5 p.m. on Saturdays. She appeared to imply that up until that point Wise was available to work any day of the week.

[10] On the national level, WOC is also referred to as "Fight for $15."

[11] Hayes denied allowing employees to give the "wasted" food to customers or homeless people. She testified that Wise gave "wasted" food to homeless people without her permission. However, Wise insisted that Hayes allowed him to give away food, and that on occasion she also gave food to the homeless. Hayes' testimony was vague on key points. She could not recall when it occurred, what employees were involved, or the number of times it occurred. Her vague testimony combined with the witnesses' demeanor, and the lack of written documentation of the discipline leads me to credit Wise's testimony on this point.

[12] Strategic maintained a policy that if an employee was going to be late or absent, the employee had to notify management prior to the start of the employee's shift. The Respondent required an employee to notify management at least 3 hours prior to the start of the employee's shift if the employee was going to be late or absent. Failure to notify management within the appropriate timeframe is referred to as "no call/no show."

sion. (Tr. 384–385.) Wise denied that he was ever disciplined for this action. I credit Wise's testimony on this point.[13]

There was also an incident that involved Wise being accused of stealing hamburgers from the restaurant. It is common practice for employees, after their shift, to ask managers if they can have free food from the restaurant. Normally, the managers allow it. During his Sunday shifts, Wise often did not get to take a break because the shift was usually short staffed. Consequently, whenever he worked a Sunday shift, Wise would ask a shift manager if he could take a burger home. The managers would allow him and other workers who did not receive a break to take home one or two hamburgers after their shift. In February 2014, he left the store after his shift with a couple of hamburgers in his pocket. Shift manager, Cline, was coming into the store to begin her shift as Wise was leaving. She asked him what was in his coat pockets because it looked to her that he was concealing items. She was not satisfied with his response so she opened his pockets and discovered the hamburgers. Cline took the hamburgers and told him to have a good day. Although Cline reported the incident to Hayes, Wise was never disciplined for it.

Wise acknowledged that Cline took hamburgers from his coat pockets but denied he was trying to steal them. He claims that the prior shift manager, Sharrell, gave him permission to take the hamburgers after his shift. He contends that Sharrell had left by the time Cline came on duty so Cline was unaware that he had received prior authorization to take the hamburgers. Cline and Hayes testified that Wise was not disciplined for the incident because local management had received instructions from Strategic's "upper management" that all disciplinary actions against Wise and employees on the "strike committee" had to be submitted to the human resources manager for prior approval. Hayes claimed that she stopped submitting requests for approval to human resources to discipline Wise because they ignored her requests. Consequently, Hayes contends she did not issue Wise discipline for the hamburger incident because she felt it would have been futile.

I find that each party's version of the hamburger incident is problematic. Despite being asked specific questions on cross-examination about the allegation of hamburger theft, Wise testified "I don't recall this event." He also denied that Cline searched him and took hamburgers from his coat pocket. (Tr. 118–119.) Despite his initial denial that the incident occurred, on rebuttal he curiously could recall every detail of the incident, including a description of the coat he was wearing, the conversation he had with Cline, when the incident occurred, and the number of hamburgers he had in his pocket.[14] Consequently, I do not find plausible his initial denial and/or testimony that he could not recall the incident or later rendition of the event. Hayes initially testified that although she felt the hamburger incident justified Wise's termination, she did not recommend his termination to Strategic's human resources because she felt it would not be acted on. She later testified, however, that she did recommend him for termination for the hamburger incident but Strategic did not act on the recommendation prior to the changeover in ownership. Hayes was also woefully unsure of whether the hamburger incident occurred in 2014 or 2015. Hayes also admitted that she did not counsel or otherwise discipline Wise for the incident. Consequently, I find that Hayes' testimony about Wise' attempted theft of hamburgers, particularly as it relates to the timing of the hamburger incident, to be so confusing that it must be discounted.[15]

Based on the totality of the circumstances and the evidence, I find that there was not a directive from Strategic or the Respondent curtailing local management's ability to discipline Wise or any other employee. I also find that the hamburger incident occurred in February 2014. According to Cline, there were about 40 employees on the "no write-up list." (Tr. 322–323.) However, I cannot credit Hayes' or Cline's testimony that Strategic precluded them from issuing discipline to Wise or employees on the "strike committee" without prior approval from Strategic's human resources. Neither Hayes nor Cline provided a copy of the directive restricting managers' authority to discipline certain employees without prior approval from Strategic's human resources. Even assuming that such a directive existed, Hayes admitted that it was not in effect as of May 2014. Also, it is undisputed that the Respondent allowed local management to issue discipline to employees without restrictions. Therefore, if the directive existed, it would have been for the time period of June 2014 to March 26, 2015. Hayes' testimony revealed that she was clearly unsure on the timing of the hamburger incident. On direct and cross-examinations, Hayes repeatedly vacillated between 2014 and 2015 as being the year the incident occurred. She also repeated several times that she was unsure when the incident occurred. Consequently, I cannot rely on her testimony on this point either.

D. April 15, 2015 WOCKC Strike

WOC has been responsible for coordinating nationwide strikes in the campaign to set the minimum wage at $15 an hour

[13] Wise denied sending or being counseled for sending employees on break. He insisted that Hayes would allow the employees on a shift to decide the order in which they would take their breaks. Wise also contended that Hayes would ask him to arrange breaks for employees in the kitchen and he would send them on break according to the order that they came to work. There is no documentation of disciplinary action being taken against him for sending employees on break without permission from management.

[14] Wise testified that he had two hamburgers in his coat pockets, but Cline testified to eight hamburgers. I find that the number of hamburgers Wise had in his coat pockets is irrelevant to the issues before me.

[15] By the time of the hearing, Sharrell was not employed by the Respondent. (Tr. 72.) Both parties, however, cite the other side's failure to call Sharrell to testify as a reason for finding that party has or has not established discriminatory pretext. Either party could have called Sharrell as a witness to corroborate their version of the hamburger incident but chose not to exercise that right. Moreover, at the time of the incident, Wise and/or Hayes could have spoken to Sharrell to clarify whether she had given Wise permission to take the hamburgers. There was no testimony or evidence that this occurred. Consequently, I reject the Respondent's and General Counsel's arguments on this point. Even if Sharrell had testified, I still would not have found credible Hayes' testimony that the hamburger incident was a reason for her decision not to hire Wise. My reasons for this finding are discussed above and later in the decision.

for fast food workers. On a strike day, community organizations and local unions provide food and help to register strikers for the day's action. Prior to the strike, WOC uses individuals from the local community to deliver strike notices to employers. The strike notices contain the name and signature of the striking employees, date of the strike, and an offer to unconditionally return to work after the strike. The normal procedure for delivering the strike notice is for the WOC representative or volunteers to deliver it to the employers' managers, take a photograph of the strike notice inside the employers' buildings, and text the photograph with the time stamp to the WOC coordinating official.

On April 15, WOCKC engaged in a 1-day strike as part of a nationwide campaign organized by WOC. On April 15, Jonathan Thatch (Thatch), a volunteer for WOC, delivered a strike notice to Hayes at 2:30 p.m. at the 47th Street BK[16] listing several of the 47th Street BK employees as participants: Vaughn, Frazier, Coney.[17] (R. Exh. 25; Tr. 267–268.) A strike noticed was also prepared that listed Camilo, Humbert and Ortiz as strike participants. However, there is no conclusive evidence that this notice was delivered to Hayes. The strike and activities associated with the strike lasted from about 4 a.m. to 6 p.m. Camillo, Humbert, Ortiz, Coney, and Vaughn were scheduled to work at the 47th Street BK on the day of the strike, but did not call a store manager at least 3 hours prior to the start of their shift to notify them that they would not be at work. Consequently, the 47th Street BK was short staffed on April 15. On April 16, management at the 47th Street BK was given a return to work notice listing the names of the strikers who agreed to return to work unconditionally. On April 16, Hayes prepared written warnings for Humbert, Camilo, Coney, Frazier, and Ortiz for failing to appear for their scheduled shifts on April 15. At the start of their next shift, she issued each employee a written warning. Distribution of the warnings occurred from April 16 to April 22. (GC Exh. 41.)

Employees from the Respondent's Main Street location also participated in the strike on April 15: Oliverio Flores (Flores), Danielle James (James), Sharon Parker (Parker), and Sharron Jones (Jones). On April 15, a strike notice with the employees' names and signatures was delivered to management at the restaurant. On April 16, Flores, James, Parker, Jones, Daniel Tucker (Tucker) and a community minister presented store management with a return to work notice stating the employees were returning to work without any conditions.

[16] Hayes denied receiving the notice but I credit Thatch's testimony on this point. Thatch provided convincing testimony that on April 15, he provided a strike notice to Hayes. On the witness stand he looked at and described the picture that he took on his mobile phone of the strike notice in Hayes' hand. The picture was date stamped April 15. (Tr. 267–268.) Thatch's testimony regarding the description of the picture is undisputed. Although Hayes denied making the notation at the top of the strike notice indicating it was received at 2:30 p.m., I do not find her credible on this point. Her testimony was in clear contradiction to Thatch's credible testimony and the objective evidence.

[17] Andricka Brown (Brown) and Destiny Smith (Smith), employees at the Respondent's 47th Street BK, also participated in the strike but were not disciplined because they were not scheduled to work on April 15, 2015. (R. Exh. 25.)

E. Jones alleged conversation with Sharts

Since 2008, Jones had been employed as a cashier at the Main Street BK.[18] Under Strategic's ownership, she participated in about five or more strikes. Jones first testified that on each of those occasions, she signed a strike notice that was delivered to Sharts. She also attested that the day after the strikes, she and other striking employees would return to work and present Sharts with return to work notices. However, later in her testimony Jones denied that the strike notices or return to work notices were given to Sharts. She claimed they were presented to "the other gentleman manager." (Tr. 226.) Her testimony on this point is nonsensical, and thus not credited. Jones gives no reason for changing her testimony minutes after she unequivocally testified that the strike notices and return to work notices under Stategic were given to Sharts. Consequently, I find that this type of shifting testimony makes me doubt her veracity as a witness. Therefore for this and other reasons, I do not find credible Jones' testimony of her alleged conversation with Sharts regarding a mandate from the Respondent to issue written discipline to strikers.

Jones testified that on April 17, 2015, Sharts told her that she had been instructed by upper management to issue the striking employees written discipline. According to Jones, Sharts said that the Respondent's general managers got an email instructing them to "write all employees that went on strike up for no [calls] and no shows." (Tr. 222.) Jones further testified that Sharts said not to worry about being "written-up" because Sharts had removed the affected employees from the work schedule so they would not be subject to discipline. Sharts remained the store manager at the Main Street restaurant after EYM acquired ownership, but resigned on or about June 15 to accept a position with another employer.

I do not find credible Jones' testimony about her conversation with Sharts for two reasons. First, I have previously made clear my dissatisfaction with Jones' veracity. Second, I find much more credible the testimony of the Respondent's other managers [Knox, Young, Ragar, and Hayes] that they never received an email directing them to issue discipline to employees that participated in the April 15 1-day strike. Moreover, there is no objective documentation to corroborate Jones' highly suspicious testimony or contradict the consistent and credible testimony of the Respondent's other managers on this point.

F. Rehire of Employees at the 47th Street BK

Shortly before the Respondent acquired the 47th Street restaurant, Hayes met with her employees, including Humbert and Ortiz, and informed them that if they wanted to continue working for the Respondent after the change in ownership, they would have to complete a job application and other personnel documents. A few days prior to the changeover, she distributed job applications to employees.

Several of the individuals employed by Strategic applied to

[18] After Strategic sold its interest in its local restaurants to EYM, Jones applied for a job with EYM. She was given an application for employment, employee handbook, W–4 form, and "pay card information" with instructions to return the packet by March 30, 2015. Jones was hired.

work for the Respondent. Shift Manager Jenkins gave Humbert a job application which he took home to complete, but forgot to return the next day at work. He was told that he should have completed the application at the job site, so he returned it to Jenkins the next day. Jenkins then provided him with the job application, W–2 form, and employee handbook. Humbert completed and signed his application and other documents on March 28 and 29, 2015. Several days after their conversation about applying for a job with the Respondent, Hayes gave Ortiz a job application and a package containing personnel materials. (GC Exh. 40.) She took the job application and other materials home. On March 31, 2015, Ortiz returned the completed and signed documents to Hayes. From the time of the changeover until she completed her job application for the Respondent, Ortiz never stopped working at the restaurant.

After the Respondent took ownership of the business, Hayes, who had sole hiring authority for the 47th Street location, rehired, among other employees, Humbert, Ortiz, Brown, Camillo, Coney, Frazier, Smith, and Vaughn. Hayes informed Drucilla McCoy (McCoy), Joshua Comeaux (Comeaux), and Kadesha Jackson (Jackson) that even if they applied for employment with the Respondent, she would not hire them. Consequently, none of the three employees applied for a job with the Respondent.

G. Respondent's refusal to hire Wise

One day prior to EYM's taking ownership of the 47th Street BK, Hayes met with Wise, Maria Cervantes (Cervantes), Maria Hernandez (Hernandez), and Rahman Salee (Salee) and told them as part of the changeover in ownership, they would have to submit a new job application and other personnel documents. Wise testified that Hayes gave him a job application which he completed and submitted that same day. He contends, however, that Hayes gave Cervantes, Hernandez, and Salee an application and a packet that contained other documents. Wise admits that Hernandez and Cervantes were given additional time to review and complete their application because they could not read English.

Wise testified that on March 26, when he arrived for his morning shift, Hayes approached him and stated she received an email from upper management that she had to terminate him and three more employees with immediate effect. According to Wise, Hayes expressed regret that she had to fire him because he was one of her best workers. He also alleged that she told him the Respondent did not give her a reason for his termination; and he was going to be difficult to replace because he was one of her best workers. Wise insisted that Hayes said "I really never had a problem with the Labor thing you were doing. To each his own. She said, my only problem with you was sometimes maybe you'd leave your name tag home or you'd have a lot of food cooked up, but I always knew you would take care of my customers." (Tr. 69.) Wise testified they continued to discuss some of the unprofessional behavior of other employees and the change in ownership. In addition, Wise attested that Hayes told him she would give him a good reference and, if he applied, she would put in a "good word" with the manager at the BK on Blue Parkway Boulevard. Wise insisted that Hayes ended their conversation by reiterating that she never had a problem with him, wished him the best of luck, and gave him a final paycheck.

Hayes denies, almost in its entirety, Wise's version of their conversation. She insisted that she gave Wise the same application that other employees received. According to Hayes, she distributed job applications to every employee that wanted to apply for a job with the Respondent, and did not give an employee the full employment package until she had decided to hire him/her. Hayes testified that after reviewing Wise's application, on March 26, she spoke with him in the lobby and informed him that because of changes in his availability and instances of his insubordination, she was not going to hire him to work for the Respondent. She claims that Wise responded that he knew the Respondent had the choice of hiring whoever it wanted. Hayes vehemently denied telling Wise that she received an email instructing her to fire him, told him she hated to "let him go" because he was one of her best workers, recommended that he apply at a BK not owned by the Respondent, or offered to give him a good recommendation. Finally, Hayes insisted that she did not give Wise his last paycheck on March 26, because final paychecks from Strategic were not issued to employees until a week or two after the Respondent took ownership of the business.

There is no evidence to corroborate Wise's recounting of his conversation with Hayes. She categorically denies making the statements Wise attributed to her. On this point I find that Hayes is equally as credible as Wise. Since the General Counsel has the burden of proving the allegations in the complaint by a preponderance of the evidence, I credit Hayes' version of her conversation with Wise informing him that he would not be rehired. See *Central National Gottesman*, 303 NLRB 143, 145 (1991) (finding that the General Counsel did not meet its burden of proof because the testimony that the allegation occurred was equally credible as the testimony that denied the allegation); *Blue Flash Express*, 109 NLRB 591, 591–592 (1954) (General Counsel did not meet its burden of proof because the General Counsel's and employer's witnesses were equally credible) (questioned on other grounds) *Allegheny Ludlum Corp. v. NLRB*, 104 F.3d 1354 (D.C. Cir. 1997). Consequently, I find that on the morning of March 26, Hayes informed Wise that she was not going to hire him to work for the Respondent because of his change in availability and insubordination. I also find there is no evidence to contradict Hayes' testimony that Wise was issued his final paycheck 1 to 2 weeks after the Respondent took ownership and operation of the restaurant. There was credible testimony from several witnesses that Strategic issued final paychecks to employees about one to 2 weeks after the changeover in ownership.

III. LEGAL STANDARDS

Section 8(a)(1) of the National Labor Relations Act (NLRA/the Act) provides that it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right "to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargain-

ing or other mutual aid or protection." See *Brighton Retail, Inc*., 354 NLRB 441, 441 (2009). An employer violates Section 8(a)(1) of the Act if it disciplines or discharges an employee for engaging in activity that is "concerted" within the meaning of Section 7 of the Act. If it is determined that the activity is concerted, a violation of Section 8(a)(1) will be found if the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the adverse employment action was motivated by the employee's protected, concerted activity. *Relco Locomotives Inc.*, 358 NLRB 37 (2012) (citing *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB* 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988)). Once the General Counsel establishes such an initial showing of discrimination, the employer may present evidence, as an affirmative defense, showing it would have taken the same action even in the absence of the protected activity. The General Counsel may offer evidence that the employer's articulated reasons are pretext or false. *Relco,* supra. In addition, the Act also protects applicants for employment. *NLRB v. Town & Country Electric, Inc*., 516 U.S. 85, 87 (1995).

The Board applies the *Wright Line*[19] analysis to evaluate whether an adverse employment action violates 8(a)(3) of the Act. The burden is on the General Counsel to initially establish that a substantial or motivating factor in the employer's decision to take adverse employment action against an employee was the employee's union or other protected activity. In order to establish this initial showing of discrimination, the evidence must prove: (1) the employee engaged in union or concerted activities; (2) the union or concerted activities were protected by the Act; (3) the employer knew of the concerted nature of the activities; and (4) the adverse action taken against the employee was motivated by the activity. Circumstantial evidence may be used to show animus. *Camaco Lorain Mfg. Plant*, 356 NLRB 1182, 1185 (2011); *Praxair Distribution, Inc.*, 357 NLRB 1048, 1048 fn. 2 (2011).

Once the General Counsel has met its initial showing that the protected conduct was a motivating or substantial reason in employer's decision to take the adverse action, the employer has the burden of production by presenting evidence the action would have occurred even absent the protected concerted activity. The General Counsel may offer proof that the employer's articulated reason is false or pretextual. *Hoodview Vending Co.,* 359 NLRB 355, 359 (2012). The General Counsel retains the ultimate burden of proving discrimination. *Wright Line,* id. However, where "the evidence establishes that the reasons given for the Respondent's action are pretextual—that is, either false or not in fact relied upon—the Respondent fails by definition to show that it would have taken the same action for those reasons, absent the protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis." *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (citing *Limestone Apparel Corp*., 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982)). The *Wright Line* analysis is not applicable when there is no dispute that the employer took action against the employee because the employee engaged in protected concerted activity. *Phoenix Transit System*, 337 NLRB 510, 510 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003).

[19] 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982).

IV. DISCUSSION AND ANALYSIS

A. Respondent's refusal to hire Wise

The General Counsel alleges that the Respondent violated Sections 8(a)(1) and (3) of the Act by refusing to hire Wise effective March 26, 2015. The Respondent counters that Wise was not rehired solely because of his insubordination, tardiness, and a change in his availability. A *Wright Line* analysis is appropriate in this case because the Respondent's motive is at issue. In order to establish the elements of a discriminatory refusal to hire case, the General Counsel must show: (1) the employer was hiring or had concrete plans to hire at the time of the alleged discrimination; (2) the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire or, in the alternative, that the employer has not adhered uniformly to such requirements, or were applied as a pretext for discrimination; and (3) that anti-union animus contributed to the decision not to hire the applicants. Once these elements are established, the burden shifts to the respondent to show that it would not have hired the applicants even in the absence of their union activity or affiliation. *FES (a Division of Thermo Power)*, 331 NLRB 9 (2000), supplemental decision 333 NLRB 66 (2001), enfd. 301 F.3d 83 (3d Cir. 2002).

I find, for the reasons discussed below, that the General Counsel has established that the Respondent's refusal to hire Wise was because of his union and protected concerted activities in violation of Sections 8(a)(1) and (3) of the Act.

1. Wise's protected union and/or concerted activity

The evidence clearly establishes and I find that Wise engaged in protected union and concerted activity. Wise was an early supporter of the WOC and WOCKC union organizing campaign and the fight for $15 an hour for fast food workers. The evidence is undisputed that he participated in rallies and strikes, regularly spoke on behalf of the movement in the media, discussed the benefits of unionization with employees, filed charges with NLRB, and encouraged coworkers to sign petitions and participate in strikes and rallies. Wise's acts were the epitome of protected union and concerted activity.

2. Respondent's knowledge of Wise's protected union and/or concerted activity

I find that the evidence establishes the Respondent had knowledge of Wise's protected union and concerted activity. The evidence is uncontroverted and Hayes admits that she has been aware of Wise's involvement in WOCKC since its inception. In July 2013, she also knew of his participation in a strike and rally for $15 an hour for fast food workers locally and nationally. Hayes admitted that she was aware of Wise being extensively quoted in the media about WOC and his work with it. Consequently, I find that the Respondent had knowledge of Wise's protected concerted and union activity at the time a decision was made not to hire him.

3. Adverse employment action based on discriminatory animus

The remaining step is for the General Counsel to establish whether the Respondent refused to hire Wise because of discriminatory animus. If the General Counsel establishes an initial showing of discrimination, the burden shifts to the Respondent to show, as an affirmative defense, that it would not have hired Wise even in the absence of his union and concerted protected activities.

It is undisputed that the Respondent was hiring at the time of the alleged discrimination. Likewise, Wise had experience relevant to the position because he had been performing it for the previous 11 years for BK and 3 years under Hayes' supervision. Last, the General Counsel contends that the evidence shows that the Respondent's action was motivated because of Wise's protected concerted and union activities. The General Counsel sets forth several bases supporting this argument: (1) Hayes' stated reasons for not hiring Wise shifted and were not credible; (2) prior charges filed by Wise against Hayes are evidence of her proclivity to violate his Section 7 rights; and (3) and none of the other three employees who were not re-hired were comparable to Wise. The Respondent counters that Wise was discharged because he: (1) disobeyed instructions by cooking too much food; (2) had excessive tardiness; and (3) changed his availability to work (R. Br. 7–8, 13–14.) According to Hayes, she did not re-hire Wise because when he applied for employment with the Respondent, Wise limited his availability; he engaged in several instances of insubordination; and he had a record of excessive tardiness. She also testified that his alleged attempted theft of hamburgers was a consideration in her decision not to hire him.

The General Counsel argues that the Respondent, for the first time in its position statement, advances the argument that Wise's availability was the reason Hayes did not hire him. During the hearing, the General Counsel moved for the admission into evidence of the Respondent's position statement because, "[the position statement] showed that Respondent was making its arguments for the first time at hearing. (Tr. 438–439.)" (GC Br. 22.) I previously credited Hayes' version of the conversation she had with Wise on March 26. During that conversation, she told him that the change in his availability was one of the reasons he would not be rehired. Since the Respondent's position statement was not the first time this argument was advanced, the General Counsel's motion for its admission into evidence is denied.

The evidence established that in early 2015, Wise normally worked from 9 a.m. to 5 p.m., but towards the end of his tenure with the Respondent he worked from 10 p.m. to 6 a.m. Although it is clear that Wise noted on his application that he was not available to work on Sunday and could only work from 9 a.m. to 5 p.m. on Saturday, I do not find Hayes' articulated reason credible. The evidence shows that, except for Humbert and Frazier, Wise was no more limited in his availability than some other employees who applied and were hired. Moreover, Hayes testified that Cline could only work certain hours because she had another job, and Williams was limited in her availability because she went to school during the day. Nevertheless, there is no evidence that Hayes refused to rehire them because of their restricted availability.

The General Counsel contends Hayes' reasons for her refusal to hire Wise were "not the real reasons for the refusal to hire at all, they were arguments crafted for defense at hearing." (GC Br. 22.) Specifically, the General Counsel argues Hayes' actions do not support her assertion that Wise's actions justified her refusal to hire him. I agree. Hayes and Clines testified that sometime after May 2014, they were precluded from disciplining, without prior approval from Strategic's human resources department, Wise and other employees involved with WOC. Hayes claims that she submitted numerous requests to Strategic for approval to discipline Wise but never received a response. According to Hayes, she felt it was futile to continue submitting proposed disciplines of Wise to human resources so she stopped. However, I previously found that Hayes and Cline were not credible on this point. Again, I do not find it credible or plausible that Strategic required its managers to get pre-approval before issuing Wise discipline. Moreover, I find that Hayes' scant record of disciplining Wise for the infractions she alleged were serious is evidence of discriminatory pretext. She only acknowledged issuing him three disciplinary actions since he started working for her in 2012. The evidence reveals that she issued him two written counseling actions and a warning. Hayes alleged that on several occasions Wise sent employees on break without first asking her permission. Despite the seriousness of the offense, she claimed that she could not remember the details or produce documentation that he was disciplined for allegedly usurping her authority by sending employees on work breaks. I find it highly unlikely that she would not be able to remember the specifics of events that she later used to support a decision not to re-hire Wise.

Hayes also complained that Wise was insubordinate on many occasions which contributed to her decision not to hire him. However, she could only cite one instance of alleged insubordination, Wise cooking too much food and giving it to homeless people. I do not find her testimony credible on this point. She initially testified that throughout his employment with her as his manager, Wise refused to follow her instructions not to cook too much food. However, later she testified that it was not a problem throughout the 3 years she was his manager. (Tr. 380, 382.) Hayes also indicated that she felt Wise had the attitude that he was in charge of the restaurant. I found this statement is subjective, self-serving and without credible evidence to corroborate it.

Hayes testified that she did not hire Wise "because of his insubordination, his tardies (sic), his no shows, and him feeling like he can run the restaurant without super—without management supervision." (Tr. 348–349.) Also, she noted that the reported incident involving his attempted theft of hamburgers was a factor in her decision not to hire him. I do not find Hayes credible. Hayes admits that in 2014, she only gave Wise two write-ups for attendance. Nevertheless, she claims Wise's cumulative tardiness was so serious that it warranted termination. As previously noted, Hayes testified that over a 3-year period Wise constantly ignored her instructions not to cook too much food. Yet she gave contradictory testimony on this point. Initially, Hayes testified that throughout his tenure under her supervision Wise would overcook food and she would counsel him each time it happened in her presence. However, she later

stated that she only counseled him about it twice over about a 3 year period. While Hayes alleged that the Respondent limited her ability to discipline Wise, she admits there were no such restrictions on her ability to discipline him under the Respondent's ownership. Further, I have already found not credible her assertion that she received an email limiting her authority to discipline. Moreover, I did not find Hayes to be an overall credible witness. Another example is her testimony regarding Wise's alleged attempted theft of hamburgers from the store, which I have discredited for reasons stated earlier.

Hayes insisted there were no other employees who had the combination of infractions as Wise and that was the basis for her decision not to rehire him. However, I do not find her reasons credible because of her shifting and inconsistent stories. For example, Hayes testified that Wise's instances of tardiness were factors in her decision not to rehire him. Wise admitted he was late to work on at least two occasions and/or did not call in at least 3 hours before his shift on one occasion. Likewise, Hayes could only specifically recall the three incidents cited. These incidents of tardiness or no show/no call all occurred in 2014. There is no other evidence of Wise being tardy or disciplined for tardiness for the years Hayes was his manager. Referring to the March to June 2015 time frame, Hayes initially testified that it was unusual for employees to be late. However, she later admitted that some employees had multiple write-ups, but were not terminated for being tardy or absent without prior approval. Hayes also testified that throughout his tenure working for her, Wise constantly cooked too much food and gave it away to the homeless without prior approval from her. However, the evidence revealed that she only counseled him twice over a 3-year period for his alleged acts of insubordination on cooking too much food. When confronted by this fact on cross-examination, she admitted that it was not a problem for the 3 years that Wise worked for her. Consequently, I do not find her testimony believable because a significant portion of Hayes' testimony contained these types of shifting accounts.

The Respondent posits as a defense that Hayes' failure to hire McCoy, Jackson, and Comeaux is proof that her decision not to hire Wise was nondiscriminatory. The General Counsel responds that those employees were not similarly situated to Wise because they never applied to work for the Respondent. Consequently, the Respondent could not and did not refuse to hire them. I do not find the Respondent's defense believable. Even if Hayes is to be believed, then why did she not also tell Wise it would be futile for him to apply because she was not going to hire him because of his multitudes of alleged infractions? It casts doubt on her credibility; and also makes me discount, without corroborating evidence, her testimony on why McCoy, Jackson, and Comeaux were not hired to work for the Respondent.

Based on the evidence, I find that the Respondent refused to hire Wise for discriminatory reasons in violation of Sections 8(a)(1) and (3) of the Act, as alleged in paragraph 7 of the complaint.

B. Employees allegedly told Respondent wanted striking employees disciplined

The General Counsel argues that the testimony is not disputed that Sharts told an employee, Jones, that the Respondent sent its general managers an email instructing them to issue written discipline to employees who participated in the 1-day strike held on April 15. The Respondent insists it has credibly disputed Jones' accusations and contends that its witnesses are more credible than Jones on this charge. The Respondent also argues that despite the General Counsel's urging, the judge should not draw an adverse inference against the Respondent for failing to call Sharts as a witness because she was not employed by the Respondent at the time of the hearing. Last, the Respondent insists that even assuming the truthfulness of Jones' testimony, the employees could have been subject to discipline because the April 15, strike was an intermittent strike and thus unprotected.

I find that the General Counsel has failed to establish that the Respondent told employees they would be disciplined for engaging in union and concerted protected activities in violation of Sections 8(a)(1) of the Act for the reasons discussed below.

The General Counsel argues that, taken in context, Sharts' alleged statements to Jones would "reasonably tend to restrain, coerce or interfere with rights guaranteed by the Act." *Bloomfield Health Care Center*, 352 NLRB 252 (2008), quoting *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), enfd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). The Board has established an objective test for determining if "the employer engaged in conduct which would reasonably have a tendency to interfere with the free exercise of employee rights under the Act." *Santa Barbara New-Press*, 357 NLRB 452, 476 (2011). This objective standard does not depend on whether the "employee in question was actually intimidated." *Multi-Ad Services*, 331 NLRB 1226, 1228 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The mere threat of an unspecified reprisal is sufficient to support a finding that the employer has violated Section 8 (a)(1) of the Act. *Metro One Loss Prevention Services Group*, 356 NLRB 89 (2010).

The record established that Jones testified to a conversation she allegedly held with Sharts on or about April 17. According to Jones, Sharts told her that a global email was sent to all of the Respondent's store managers instructing them to issue written discipline to employees who went on strike on April 15. Jones claims Sharts said that because she felt the discipline was unfair, she was going to change the scheduling records to reflect that those employees who struck were not scheduled to work on April 15. There is no evidence that any of the striking employees at the Main Street restaurant were disciplined.

Since the General Counsel did not produce Sharts, a copy of the email Jones alleged was sent by the Respondent, or any other corroborating evidence, the General Counsel's case depends entirely on the credibility of Jones. The Respondent, however, did produce other managers to refute Jones' testimony that a global email was sent to its managers directing them to discipline employees who went on strike. I already found them to be more credible than Jones on this issue. Consequently, I credit the testimony of Hayes, Knox, Young, and Ragar and find that the Respondent did not send its store managers an email instructing them to issue written discipline to employees who participated in the strike on April 15. I do not find that Jones' testimony about the substance of her conversation with Sharts, if it occurred, was true.

The General Counsel argues that because the Respondent failed to obtain Sharts' testimony "an adverse inference may be drawn regarding any factual question on which the witness is likely to have had knowledge. 285 NLRB 1122, 1123 (1987). This is particularly true where, as here, the witness is the Respondent's agent." (GC Br. 4.) I reject this argument. A judge may consider all the circumstances in determining whether an adverse inference is warranted or the effect or scope of the adverse inference. See *Spurlino Materials, LLC*, 357 NLRB 1510, 1521–1522 (2011). A party's failure to explain why it did not call the witness may support drawing an adverse inference. See *Martin Luther King, Sr. Nursing Center*, 231 NLRB 15, 15 fn. 1 (1977). Ultimately, however, the judge has discretion to decide whether an adverse inference is warranted when a party fails to call witnesses reasonably assumed to be favorably disposed toward the party. The Board and the Federal courts have also consistently held that it is not an abuse of discretion if the judge decides not to take an adverse inference against a party for not calling a witness even if that witness is the party's former supervisor. *Advocate South Suburban Hospital v. NLRB*, 486 F.3d 1038, 1048 and fn. 8 (7th Cir. 2006) (adverse inference warranted only when the missing witness is peculiarly in the power of the other party to produce); *Christie Electric Corp*., 284 NLRB 740, 748 fn. 137 (1987) (declining to draw an adverse inference for the failure to call a former supervisor).

In the case at issue, Sharts could have been assumed to be favorably disposed towards either party. If the Respondent had called Sharts to testify, it is not unreasonable to assume that she might have contradicted Jones' testimony and revealed that she had not received an email from the Respondent instructing her to discipline the striking employees. Likewise, if called by the General Counsel, Sharts might have supported in whole or in part Jones' version of their conversation. I am also disinclined to draw an adverse inference against the Respondent because it explained that because Sharts was no longer its employee, it did not call her as a witness. *Property Resources Corp.*, 285 NLRB 1105, 1105 fn. 2, 1108 (1987), enfd. F.2d 964 (D.C. Cir. 1988). There is no evidence that disputes the Respondent's contention that Sharts resigned her position with the Respondent about June 15, to accept another job.

Accordingly, I find that the General Counsel failed to meet its burden of proof regarding this allegation and recommend that paragraph 5(b) of the complaint be dismissed.

C. Striking employees at the 47th Street BK disciplined on April 16

1. Case law and the parties' legal arguments

The General Counsel charges that the Respondent violated the Act when it disciplined six employees because they exercised their Section 7 guaranteed right to strike. Moreover, the General Counsel rejects the proposition that the employees lost the protection of the Act because they were engaged in intermittent strikes. Notwithstanding, the Respondent contends the work stoppage met all the factors of an intermittent strike. The Respondent argues that even assuming that participation in the strike was protected concerted activity, management had no knowledge of the employees' protected concerted activity when adverse action was taken against them. The Supreme Court has affirmed that workers without bargaining representatives or established procedures for resolving their grievances may take collective and concerted action to voice their grievances about terms and conditions of employment. Likewise, the employees may not be discharged or otherwise discriminated against for engaging in protected concerted work stoppages to protest working conditions. See *NLRB v. Washington Aluminum Co*., 370 U.S. 9 (1962). The scope of protected activity, however, is not unlimited. The Board has consistently held that partial and intermittent strikes are not protected. *Pacific Telephone & Telegraph Co*., 107 NLRB 1547, 1548 (1954) (multiple "hit and run" stoppages intended to "harass the company into a state of confusion" not protected). The Board defines an intermittent strike as "a plan to strike, return to work, and strike again." *Farley Candy Co*., 300 NLRB 849, 849 (1990). A work stoppage becomes an intermittent strike when "the stoppage is part of a plan or pattern of intermittent action which is inconsistent with a genuine strike or genuine performance by employees of the work normally expected of them by the employer." *Polytech, Inc*., 195 NLRB 695, 696 (1972). "A partial strike is a concerted attempt by employees, while remaining at work, to bring economic pressure to bear on their employer, as by refusing to work overtime, engaging in a slowdown, or accepting some tasks and refusing to perform others." *Coastal Insulation Corp.*, 354 NLRB 495, fn. 82 (2009); *Audubon Health Care Center*, 268 NLRB 135, 136 (1983) ("A partial strike, in which employees refuse to work on certain assigned tasks while accepting pay or while remaining on the employer's premises is a method of striking which is not condoned by the Board"). The employer bears the burden of showing a strike is unprotected. See, e.g., *Silver State Disposal Services.* 326 NLRB 84, 85 (1998).

The Board does not require a fixed framework for analyzing whether a series of strikes constitute unlawful intermittent strikes. Rather, several factors are considered including: frequency and timing, whether the strikes were part of a common plan, whether there was Union involvement, whether the strikes were intended to harass the employer into a state of chaos, whether the strikes were for distinct acts of the employer, and whether the alleged discriminatees intended to "reap the benefits of strike action without assuming the vulnerabilities of a forthright and continuous strike. . . ." See *Honolulu Rapid Transit Co., Limited,* 110 NLRB 1806 (1954); *Swope Ridge Geriatric Center.,* 350 NLRB 64 (2007); *New Fairview Hall Convalescent Home*., 206 NLRB 688 (1973), enf. denied 344 F.2d 998 (8th Cir. 1965); *WestPac Electric*, 321 NLRB 1322 (1996). Each factor, however, includes various exceptions and caveats.

The Respondent insists that the employees were engaged in an intermittent strike and therefore not protected by the Act. It argues that the "April 15, 2015 strike was the *ninth* in a series of one-day strikes nationally since November 29, 2012, and the *seventh* in Kansas City since July 2013." (R Br. 10) Moreover, the Respondent contends that WOKC and WOC orchestration of strikes, rallies, and other actions associated with organizing the strikes were part of a plan to achieve their economic goal to increase the wages of low-wage workers nationally. According

to the Respondent, the strikes, rallies, and attendant events were "intentionally scheduled at times during the strike day to achieve maximum disruption of restaurant business." (R. Br. 16.) These actions, the Respondent insists, show that the strike "had the same economic purpose of raising wages and was not in response to any distinct action of EYM in the operation of the East 47th Street restaurant" and the disciplined employees admitted they intend to participate in similar future one-day strikes. (R. Br. 17, 21.) Even assuming the employees engaged in concerted protected activity, the Respondent argues it had no knowledge of the employees' reasons for not reporting to work and denies the disciplines were issued because of discriminatory animus.

2. Frequency and timing of strikes and whether the strike's intent was to harass

Although the Respondent contends that the April 15 strike was the ninth strike nationally and the seventh in a series of strikes in Kansas City, the evidence is undisputed that April 15, was the only time the employees had struck against the Respondent. The strike occurred about 4 months after the WOCKC 1-day strike against Strategic and other industry employers. (R. Reply Br. 7) The Respondent insists, however, that it is the "character of the strike" rather than the ownership of the business by a succeeding purchaser that dictates whether it is an intermittent strike. However, the Respondent cites no case law to support this proposition. Clearly, a single one-day strike does not constitute intermittent strikes. The Board has often declined to find that even two work stoppages amount to intermittent strikes without a showing that at least the employees sought to overtake the work site, attempted to work on their own terms, engaged in violence, or prevented other employees from working. See *Crenlo, Division of GF Business Equipment, Inc.*, 215 NLRB 872, 878 (1974), enfd. in pertinent part 529 F.2d 201 (8th Cir. 1975) (finding two in-plant work stoppages about the amount of a wage increase were protected by the Act); *Robertson Industries*, 216 NLRB 361 (1975) (finding that two strikes were not intermittent work stoppages, in part because the strikes "involved different situations and different people"). None of those factors are present in the case at hand. The Charging Party notes correctly that there is no Board precedent to support the argument that "strikes against other employers in the same industry could constitute intermittent strikes." (CP Br. 19) Even if, as the Respondent argues, Wise and the Union intend to continue holding one-day strikes in the future, it does not render the strike at issue unprotected. Employees who return to work after striking may continue to advocate about concerns that caused them to strike, and may also decide to strike again in the future to "continu[e] their earlier efforts to have their work-related problems resolved." *Robertson Industries*, 216 NLRB at 362; see also *Texas Gas Corp*., 136 NLRB 355, 364–365 (1962) (finding that the union made a genuine unconditional offer to return to work, even though the union representative acknowledged that employees might go on strike again if negotiations about employee concerns failed to produce an agreement).

The Respondent insists that the strikes, including the action at issue, have been deliberately scheduled so as to "harass EYM and other fast food employers into a state of chaos." (R. Br. 16–17.) The evidence shows, however, that only 8 of the 25 employees at the Respondent's 47th Street BK participated in the strike. Moreover, two of the eight employees were not scheduled to work on the day of the strike. The only evidence that the strike negatively impacted the Respondent's operation was Hayes' testimony that she was "short-staffed" four employees for the dinner crowd. According to her, this caused complaints from customers about the longer than usual wait times for service; and the employees who worked that day had to work harder. It is difficult for me to discern how a few minutes longer wait time for customers to place an order or receive their food or employees having to work harder amounts to harassment of the Respondent into a state of chaos. The situation experienced at the 47th Street BK on April 15 was likely no more chaotic than a typical day where one or more employees failed to notify management they would not be at work. Furthermore, there is no evidence the Respondent experienced a significant drop in sales, had employees quit in frustration, permanently lost customers, or suffered any other adverse impact because of the striking employees' absences. Simply because a strike might have been effective does not render it unprotected.[20] In *Swope Ridge*, the Board noted, "Clearly, the fact that the strike may have been designed to disrupt the Respondent's operations and at the same time to provide an incentive for employees to participate in the strike does not render the strike unprotected. Moreover, contrary to the Respondent's assertion that it has been effectively deprived of its right to permanently replace employees engaged in periodic 2-day economic strikes, there appears to be no legal impediment to permanently replacing such economic strikers regardless of the length of each strike. Id. at 67. See also *Atlantic Scaffolding Co.*, 356 NLRB 835, 837 (2011) (holding that the protected nature of the work stoppage in question was not invalidated by the effective timing of the work stoppage). I acknowledge that the Board has held that it's the "inherent character" rather than the impact of the strikes that are probative of whether the strikes are protected concerted activity. See *Pacific Telephone & Telegraph Co*., 107 NLRB 1547, 1549–1550 (1954); *Swope Ridge Geriatric Center*, 350 NLRB at 67. Nonetheless, the Respondent has failed to produce evidence, other than Hayes' and Wise's limited testimony, to support its case on this point.

3. Union involvement and whether strike part of a common plan

Although WOCKC was not (and had not asked to be recognized as such) the striking employees' exclusive bargaining representative, it is undisputed that WOCKC was intricately involved in orchestrating the April 15 strike. Therefore, the question becomes whether the strike was part of a common plan by WOCKC to exert additional economic pressure on the Respondent to accede to their demands. I find that the evidence does not support this factor. In support of its case, the Respond-

[20] In the matter at issue, it does not appear that the strike was effective because there is no evidence that the employees received a wage increase to $15 an hour or any of the other changes in terms and conditions of employment that the employees sought from their employer(s).

ent points to Wise's testimony that one of the purposes of the strike was to put pressure on the fast food industry to pay a higher minimum wage. While Wise admitted that in organizing the strike, the Union utilized similar tactics for the strikes, I do not find that there was enough commonality to show there was a common plan to exert pressure on the industry, in particular the Respondent, to pay a higher minimum wage. The evidence is not conclusive that all the striking employees provided their different employers with the same worded strike notice and return to work notice, followed the same procedure for participating in the strikes, or that the strike had an economic impact on all the different employers. Moreover, unlike cases in which the employees were represented by a union, there is no evidence that WOCKC had a strategy of using the strike (or even if I were to consider the past strikes under Strategic's ownership) to harass the Respondent during ongoing collective-bargaining negotiations or any negotiations for higher minimum wages or changes to other terms and conditions of employment.

4. Whether strike taken to address distinct acts of the Respondent

It is undisputed that WOCKC organized employees to participate in the April 15 strike as part of a nationwide campaign to advocate for a higher minimum wage in the fast food industry. Multiple employers in the industry were the targets of the strike. The Respondent argues that the only purpose of the strike was to gain a higher minimum wage; and the Respondent was not targeted because of any distinct acts it had committed. I find, however, that the Respondent's employees also participated in the April 15 strike to protests grievances they specifically had against the Respondent. The strike notice they submitted to the managers at the 47th Street BK stated they were striking because locally their workers have been subjected to injury because of lack of protective equipment. The notice also explained that they were protesting "unfair labor practices, unsafe working conditions, unpredictable scheduling and wage theft occurring *here* . . ." (GC Exhs. 21, 23.) (Emphasis added.)

Even if the Respondent had established a few of the factors for analyzing whether the strike was part of a series of unlawful intermittent strikes, the surrounding circumstances, as discussed above, should indicate to the Respondent that improvement of local working conditions was also a reason for the work stoppage. The Board has explained that, "even if the purpose of the walkoff is not clearly communicated to the employer at the time, if from surrounding circumstances the employer should reasonably see that improvement of working conditions is behind the workoff, it may not penalize the employees involved without running afoul of Section 8(a)(1)." *CGLM., Inc.*, 350 NLRB 974, 980 (2007).

5. Whether employees intended to reap the benefits of a strike without risk

The Respondent argues that Wise's testimony supports a finding that "the reason for the succession of one-day strikes is to avoid the vulnerabilities of a forthright, continuous strike, while seeking to reap the benefits of a strike." (R Br. 19.) Moreover, the Respondent contends that the Union's strike tactics made it "almost impossible" for the Respondent to lawfully hire replacement workers; and the Union's reimbursement of the employees' loss of a day's wages negates the argument that they suffered a hardship by striking. The General Counsel counters that the strikers lost 1-day of wages which is significant for them because they are low-wage employees. Further, the General Counsel notes that even though the strike was for one day, they still risked the Respondent permanently replacing them.

As previously noted, the Respondent has the burden of establishing the strike held on April 15 is part of a series of intermittent strikes. However, the Respondent has provided minimum evidence to establish this last factor. While the Respondent points to Hubert's testimony that he received strike pay, there is no evidence or testimony that the other employees received the same payment. Even assuming that it is more probable than not that if Hubert received strike pay the other employees also received it, there is still no evidence that the Respondent faced a legal barrier to permanently replacing the striking employees. Moreover, Hubert's limited testimony is insufficient to show that the striking employees were trying to dictate the terms and conditions of their employment. See *Honolulu Rapid Transit Co*., 110 NLRB 1806 (1954); *Polytech, Inc.*, 195 NLRB 695 (1972). Consequently, I find that the employees at issue did not participate in the one-day strike as a way of reaping the benefits of a strike without assuming its risks.

Accordingly, I find that the April 15 strike does not meet the definition of an intermittent strike, but rather it was concerted protected activity.

6. Whether the Respondent was aware of employees' protected concerted activity

The General Counsel argues that since the strike is protected activity, a *Wright Line* analysis is not appropriate because "the existence of the 8(a)(1) violation does not turn on the employer's motive" but rather whether the conduct lost the protection of the act. (GC Br. 7) However, the Respondent and the Charging Party argue their positions using the *Wright Line* analysis.

Under the legal theory argued by the General Counsel, I find that the employees' action did not lose protection of the act because, as discussed in detail above, it was not an intermittent strike. There is also no allegation or evidence that it was a partial strike. Moreover, there is not an allegation or evidence that the strike activity of the six employees was abusive, defamatory, threatening, or prevented the Respondent's customers from accessing its premises.

Analyzing the case under *Wright Line,* the remaining factors (since I have already found the strike was protected concerted activity) the General Counsel must prove are: whether the Respondent, through Hayes, was aware of their protected and concerted activity; and whether, as a result of their protected strike action, Hayes issued the employees written discipline. If the General Counsel is able to establish a *prima facie* case, the burden of persuasion shifts to the Respondent to show that it would have taken the same action even in the absence of the protected activity. *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Coastal Insulation Corp.*, supra.

Again, Hayes did not receive a strike notice informing her that Camilo, Humbert, and Ortiz would be participating in a

strike on April 15. According to her, at the time she prepared the discipline, she was unaware of the reasons for their failures to appear for work. Although the General Counsel failed to establish that on April 15, Hayes was aware of a strike notice for Camilo, Humbert, and Ortiz, she admitted, and I have found that Hayes did receive a strike notice on April 15, at about 2:30 p.m. naming Vaughn, Frazier, and Coney as strike participants. She also acknowledged that by 2:30 p.m. on April 15 she was aware that a strike was in progress. Notwithstanding, Hayes admitted that on April 16, she prepared and began to issue the six employees discipline and did not care that their names were on the strike notice because "[t]hey just didn't show up for their shift." (Tr. 390.) Her admission and the evidence are clear indications that she was aware prior to preparing the disciplines that the employees had participated in the strike. By 2:30 p.m. on April 15, Hayes should reasonably have been aware from surrounding circumstances that the absent employees were on strike. There was an announcement of the upcoming strike. (GC Exh. 3.) Hayes admitted that she knew Ortiz, Humbert, and Camillo had been active in WOCKC events and the other employees had also been featured in various local media. The fact that the six employees, all of whom are active in WOCKC, were absent on the day of the strike would not appear as coincidental to a reasonable person. Moreover, there is no evidence that Hayes did not receive the return to work notices provided for all six employees. *CGLM., Inc.*, at 980. Consequently, I find that by April 15 at about 2:30 p.m. Hayes was aware that all six of the employees were not at work because they were on strike.

7. Discriminatory Animus/Respondent has not sustained its burden

The Respondent argues that Hayes issued the employees written warnings for failure to follow company policy in reporting their absences from work, rather than because of discriminatory animus. However, the Board has noted, "the existence of or lack of unlawful animus" is not material when "the very conduct for which employees are disciplined is itself protected concerted activity." *Burnup & Sims, Inc.*, 256 NLRB 965, 975 (1981). Moreover "Calling a strike . . . an absence from work justifying discharge is to write Section 13 out of the Act." *Anderson Cabinets*, 241 NLRB 513, 518, 519 (1979). Section 13 of the Act states that "[n]othing in this Act . . . shall be construed so as either to interfere with or impede or diminish in any way the right to strike. . . . " Even if the employees did not notify Hayes that they would not be at work on April 15, it is immaterial. The failure of the employees to report to work was "a concerted action for mutual aid and protection."*Lisanti Foods, Inc.*, 227 NLRB 898, 902 (1977). See also *Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003). She knew the employees were on strike, she did not speak with them prior to issuing the discipline, nor did she conduct an independent investigation prior to issuing the discipline. In this case although it is unnecessary to find discriminatory animus, Hayes' own testimony establishes that she issued the discipline because of discriminatory reasons. Moreover, the Respondent cannot and has not established that it would have taken the same action against these employees in the absence of their protected concerted activity.

Consequently, I find that, in violation of the Act, the employees were issued discipline because they went on strike.

CONCLUSIONS OF LAW

1. The Respondent, EYM King of Missouri, LLC d/b/a Burger King, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Workers' Organizing Committee—Kansas City is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing and refusing to hire Terrence Wise on March 26, because he engaged in protected concerted activities, the Respondent has violated Section 8(a)(1) and (3) of the Act.

4. By issuing written discipline to its employees Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myresha Vaughn on April 16, the Respondent has violated Section 8(a)(1) of the Act.

5. The above violations are unfair labor practices that affect commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act except as set forth above.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily failed and refused to hire Terrence Wise, must offer him the position at issue and make him whole for any loss of earnings and other benefits he suffered as a result of the discrimination against him from the date of the discrimination to the date of his reinstatement. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as provided in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Terrence Wise for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

The Respondent having issued discipline to employees Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myresha Vaughn for engaging in protected concerted activity must rescind the discipline and ensure all reference to them are removed from the employees' personnel files and any other files the Respondent maintains.

The Respondent having engaged in the discriminatory actions as set forth above in the Conclusions of Law must post the attached Notice to Employees at the restaurants at 1102 East 47th Street, Kansas City, Missouri, and 3441 Main Street, Kansas City, Missouri in English and Spanish. Further, the Respondent must read the attached Notice to Employees at both

locations during each shift the Respondent maintains.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[21]

ORDER

The Respondent, EYM King of Missouri, LLC d/b/a Burger King, Kansas City, Missouri, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to hire any employee because the employee engaged in protected concerted activity or supported Workers Organizing Committee—Kansas City or any other union.

(b) Disciplining employees for engaging in protected concerted activity or supporting Workers Organizing Committee—Kansas City or any other union.

2. Take the following affirmative action necessary to effectuate the purposes and policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Terrence Wise the position at issue or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Terrence Wise whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful disciplines issued to Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myresha Vaughn, and within 3 days thereafter notify them in writing that this has been completed and that the unlawful disciplines will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days after service by the Region, post at its facilities at 1102 East 47th Street, Kansas City, Missouri and 3441 Main Street, Kansas City, Missouri, copies of the attached notice marked "Appendix."[22] Copies of the notice, on forms provided by the Regional Director for Region 14 Sub-region 17, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees and members are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since March 26, 2015.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated: February 9, 2016

APPENDIX

NOTICE TO EMPLOYEES
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT refuse to hire or otherwise discriminate against any employee for engaging in protected concerted activity or for supporting the Workers Organizing Committee—Kansas City or any other union.

WE WILL NOT discipline, threaten or otherwise discriminate against any employee for engaging in union or other concerted activities protected by Section 7 of the National Labor Relations Act (the Act).

WE WILL NOT in any like or related manner interfere with, restrain, or coerce our employees in the rights guaranteed to them by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Terrence Wise the position at issue or, if that position no longer exists, to asubstantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Terrence Wise whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the

[21] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[22] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

decision.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful refusal to hire of Terrence Wise, and within 3 days thereafter notify Terrence Wise in writing that this has been completed and that he will not be retaliated against in any way.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate quarters.

WE WILL compensate Terrence Wise for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL, within 14 days from the date of the Board's Order, rescind and remove from our files any reference to the unlawful disciplines issued to Susana De la Cruz Camilo, Kashanna Coney, MyReisha Frazier, West Humbert, Osmara Ortiz, and Myresha Vaughn, and within 3 days thereafter notify them in writing that this has been completed and that the disciplines will not be used against the employees in any way.

EYM KING OF MISSOURI, LLC D/B/A BURGER KING

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/14–CA–148915 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.