Starbucks Corporation d/b/a Starbucks Coffee Company *and* Philadelphia Baristas United and Echo Nowakowska and Tristan J. Bussiere. Cases 04–CA–252338, 04–CA–256390, 04–CA–256401, 04–CA–258416, 04–CA–256398, 04–CA–256399, and 04–CA–257024

February 13, 2023

DECISION AND ORDER

BY CHAIRMAN MCFERRAN AND MEMBERS WILCOX AND PROUTY

On June 21, 2021, Administrative Law Judge Andrew S. Gollin issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, the Respondent filed a reply brief, and the General Counsel (with the Board's permission) filed a sur-reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

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

The Respondent is engaged in the operation of retail coffee stores worldwide and operates more than 25,000 locations, including, as relevant here, two stores in Philadelphia, Pennsylvania, located at 1002 South Broad Street (Broad and Washington) and 3400 Civic Center Boulevard (Civic Center). In 2019, two employees at the Broad and Washington location—Tristan Bussiere and Echo Nowakowska—began having conversations with coworkers about issues with the store's manager. In June 2019, Bussiere, Nowakowska, and other employees began meeting about their concerns and to develop a course of action to address them, including through seeking union representation. In July 2019, Bussiere and Nowakowska were part of an in-store demonstration demanding changes to the employees' working conditions, such as removal of the store's manager, greater managerial accountability for discrimination based on race, disability, or LGBTQ+ status, and early implementation of the Philadelphia Fair Workweek Ordinance. Shortly thereafter, the store manager resigned and, in the weeks and months that followed, Bussiere and Nowakowska continued to speak with coworkers at Broad and Washington and other stores about their workplace concerns and organizing a union. During this same time, the Respondent monitored employees' social media activity and, in October 2019, several management officials

[1] The Respondent also filed a motion requesting an oral argument in this proceeding, and the General Counsel filed an opposition to the Respondent's motion. The Respondent's request is denied, as the record, exceptions, and briefs adequately present the issues and positions of the parties.

[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.

No exceptions were filed to the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) by surveilling employees Echo Nowakowska and Tristan Bussiere at the Broad and Washington store on January 29, 2020.

[3] Consistent with the judge's recommended Order and the violations found, we amend the judge's recommended remedy to provide make-whole relief to Tristan Bussiere for the Respondent's unlawful denial of training opportunities in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, in accordance with our decision in *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall compensate Bussiere and Nowakowska for any direct or foreseeable pecuniary harms incurred as a result of the unlawful adverse actions against them, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons,* supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Further, we shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *Paragon Systems, Inc.,* 371 NLRB No. 104 (2022), *Danbury Ambulance Service, Inc.*, 369 NLRB No. 68 (2020), and *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute new notices to conform to the Order as modified.

We have included the violations that occurred at the Civic Center location in the notice to be posted at the Broad and Washington location, because discriminatee Tristan Bussiere was primarily an employee at the Broad and Washington location, and the violations at the Civic Center location arose from conversations between Bussiere and employees at that location when he worked a shift there.

Member Wilcox would find that, in the circumstances of this case, the Respondent should be required to post its remedial notices at all of its facilities in the city of Philadelphia. She notes that the Respondent's response to the Sec. 7 activity at issue here extended beyond the Broad and Washington and Civic Center stores and demonstrated the Respondent's intent to interfere with all such activity in Philadelphia. Indeed, the record shows that the Respondent knew Nowakowska and Bussiere were attempting to organize Starbucks employees in other local stores as well as at their own store. Significantly, on multiple occasions a manager above the store level, or a manager from another store, came to Broad and Washington to meet with employees in response to Sec. 7 activity or to participate in imposing discipline. Moreover, the record also shows that employees were communicating with each other between the Respondent's Philadelphia stores, increasing the likelihood that many employees at other stores were informed of the misconduct that occurred in this case.

shared reports from the Broad and Washington store about employee concerns being raised to the new store manager. The Respondent's communications indicate it was keeping "an even closer eye" on the employees at that store.

As discussed in more detail in the judge's decision, in late 2019 and early 2020, the Respondent engaged in numerous actions alleged to violate Section 8(a)(1), including threatening, interrogating, and surveilling employees at the Broad and Washington and Civic Center stores, and Section 8(a)(3), including taking several adverse employment actions against Bussiere and Nowakowska and, ultimately, terminating their employment. After a hearing, the judge found nearly every violation alleged to have been committed by the Respondent. On exception, the Respondent challenges almost all of the judge's findings. We adopt the judge's findings. As we will explain, we reject (1) the Respondent's unsupported exceptions to certain Section 8(a)(1) findings; (2) the Respondent's asserted defense under Section 10(b) of the Act to allegations first made in the amended complaint; (3) the Respondent's challenges to the 8(a)(3) findings involving employees Bussiere and Nowakowska; and (4) the Respondent's argument that the two employees should not be awarded reinstatement and backpay.

I. THE RESPONDENT'S UNSUPPORTED EXCEPTIONS TO CERTAIN 8(A)(1) FINDINGS

The judge found that the Respondent violated Section 8(a)(1) by: (1) Regional Director Marcus Eckensberger threatening Nowakowska and Bussiere at a July 25, 2019[4] meeting for engaging in protected activities; (2) Store Manager David Vaughan informing Nowakowska on November 20 that her scheduled work hours were reduced because of her protected concerted activities; (3) District Manager Brian Dragone telling Bussiere on November 21 to stop making concerted complaints about Vaughan; (4) Shift Supervisor Leanne Bissell prohibiting employees on February 17, 2020, from concertedly complaining with other employees about management and their terms and conditions of employment; and (5) Store Manager Vaughan prohibiting employees on February 19, 2020, from concertedly discussing their terms and conditions of employment. The Respondent has excepted to the judge's findings of these violations. However, the General Counsel asserts that the Respondent's exceptions as to these findings should be disregarded because they are procedurally deficient under Section 102.46(a) of the Board's Rules and Regulations.

We agree. The Respondent does not state, either in its exceptions or supporting brief, any grounds on which the judge's purportedly erroneous findings should be reversed.[5] Therefore, in accordance with Section 102.46(a)(1)(ii) of the Board's Rules and Regulations, we shall disregard these exceptions. See *Natural Life, Inc. d/b/a Heart & Weight Institute*, 366 NLRB No. 53, slip op. at 1 fn. 3 (2018), enfd. mem. 827 Fed. Appx. 724 (9th Cir. 2020); and *Holsum de Puerto Rico, Inc.*, 344 NLRB 694, 694 fn. 1 (2005), enfd. 456 F.3d 265 (1st Cir. 2006).

II. THE RESPONDENT'S 10(B) DEFENSE TO ALLEGATIONS ADDED IN THE AMENDED COMPLAINT

Section 10(b) of the Act requires that unfair labor practice charges be filed and served within 6 months of the allegedly unlawful conduct. However, the Board will permit the litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within 6 months of a timely filed charge and is closely related to the allegations of the timely charge. The Board's test for determining whether the otherwise untimely allegation is closely related to the timely charge is set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers whether (1) the otherwise untimely allegations involve the same legal theory as the allegations in the timely charge; (2) the otherwise untimely allegations arise from the same factual situation or sequence of events as the allegations in the timely charge (i.e., the allegations involve similar conduct, usually during the same time period, and with a similar object); and (3) a respondent would raise the same or similar defenses to both the otherwise untimely and timely allegations. See *Alternative Energy Applications, Inc.*, 361 NLRB 1203, 1203 (2014).

At the hearing, the Acting General Counsel moved to amend the complaint to add the allegations that the Respondent violated Section 8(a)(3) and (1) by denying Bussiere training activities at the Broad and Washington store on October 25 because of his union activity and violated Section 8(a)(1) by Store Manager Navy Ros surveilling employees' protected activities at the Civic Center store on December 3 and interrogating an employee about her protected concerted activity at the Civic Center store between December 3 and 13. Applying *Redd-I*, the judge determined that the new allegations

[4] All subsequent dates are 2019, unless otherwise noted.

[5] To the extent the Respondent's exception to the judge's finding that it violated Sec. 8(a)(1) on November 20 when Store Manager David Vaughan informed Nowakowska that her work hours were reduced because of her protected concerted activities could be construed as challenging the judge's decision to credit Nowakowska's testimony, we have (as stated above) carefully reviewed the record and find no basis for overruling the judge's credibility determinations.

occurred during the same time period as the timely filed charges and were closely related to the complaint allegations. The judge thus granted the Acting General Counsel's motion to amend the complaint and add these three allegations.[6] Having done so, the judge found the violations as alleged.

In its exceptions, the Respondent argues that the judge erred in permitting the Acting General Counsel to amend the complaint to add these three allegations because they are time-barred by the six-month statute of limitations in Section 10(b) and are not closely related to the timely filed charges which form the basis for the complaint. We find the Respondent's arguments without merit.

The Respondent first contends that the conduct underlying the new allegations took place in October and December of 2019, but that the Acting General Counsel did not request to amend the complaint until February 2, 2021, more than nine months after the Section 10(b) statutory period expired. As explained above, however, the relevant question is whether the allegations sought to be added involved conduct that *occurred within six months of a timely filed charge*. Here, they did. The conduct underlying the added allegations occurred in October and December 2019, and the first charge was filed on November 25, 2019, with subsequent charges filed in January and February 2020.[7] Thus, as the judge found, the allegations the Acting General Counsel sought to add at the hearing involved conduct that clearly occurred within six months of the timely filed charges in this case.

Further, the Respondent contends that the judge erred in finding that the *Redd-I* factors were met, because the new allegations do not involve the same legal theory as the original charges and the factual predicates do not involve similar conduct. It also contends, as to the Bussiere training allegation, that the allegation would require a different legal defense from the other timely allegations. We disagree. The allegation that Bussiere was unlawfully denied opportunities to train new baristas involved Section 8(a)(3), like the charges involving the Respondent's discipline and discharge of Bussiere filed during the same time frame. In addition, this allegation involved the same store and the same store manager as other timely filed charges related to Bussiere; it was similar to the alleged violation, occurring around the same time, that the Respondent also denied Nowakowska work opportunities because of her union activity; and the Respondent's defense to the allegation would have been similar to its defense to other, timely filed Section 8(a)(3) charges related to Bussiere.[8] As to the surveillance and interrogation allegations involving Manager Ros, although they involved a different store than the timely filed charges did, they involved the same legal theory as the timely filed Section 8(a)(1) surveillance and interrogation allegations related to the Broad and Washington Store and alleged similar conduct by the Respondent occurring around the same time period. Further, the surveillance and interrogation allegations at the Civic Center location arose from conversations between Bussiere and employees at that location when he worked a shift there.

In these circumstances, we find no error in the judge's decision to grant the Acting General Counsel's motion to amend the complaint and add these three allegations, which the judge found meritorious. Thus, in the absence of any exceptions on the merits, we adopt two of the judge's findings: that the Respondent violated Section 8(a)(1) by Store Manager Navy Ros surveilling employees' protected activities at the Civic Center store on December 3 and by Ros interrogating an employee about her protected concerted activity at the Civic Center store between December 3 and 13.[9] Regarding the 8(a)(3) violation related to Bussiere's training opportunities, the Respondent makes additional arguments on the merits, which we discuss further below.

III. THE RESPONDENT'S CHALLENGE TO THE 8(A)(3) FINDINGS

The judge also found that the Respondent violated Section 8(a)(3) and (1) in numerous respects by its ad-

[6] The judge found "[a]ll three factors are satisfied as the added allegations of surveillance/interrogation and an adverse action against Bussiere involve the same class of statements or conduct and the same sections of the Act; they involve similar factual situations or events and occurred during the same time period as the timely allegations; and the company has raised similar defenses to the timely charges." Although we agree with the judge's ultimate conclusion, we provide below a more detailed statement of our reasons for doing so.

[7] As relevant here, on November 25, 2019, a charge was filed alleging that the Respondent violated Sec. 8(a)(1) by disciplining Bussiere for engaging in Sec. 7 activity and, on January 6, 2020, the charge was amended to more broadly allege that the Respondent had taken adverse employment actions against Bussiere in response to his Sec. 7 activity. The January 6, 2020 charge also alleged, among other things, that the Respondent had interrogated and surveilled employees in response to their Sec. 7 activity. Further, on February 14 and 26, 2020 charges were filed alleging that the Respondent violated Sec. 8(a)(3) by disciplining and discharging Bussiere for engaging in union activity.

[8] See, e.g., *Redd-I*, 290 NLRB at 1118 (in assessing whether a respondent would raise the same or similar defenses to both allegations, the Board considers "whether a reasonable respondent would have preserved similar evidence and prepared a similar case in defending against the otherwise untimely allegations as it would in defending against the allegations in the timely pending charge").

[9] Even generously interpreting the Respondent's exceptions brief as disputing the merits of the 8(a)(1) violations related to Ros, we agree with the judge, for the reasons he states, that these two violations were established by the record evidence. We find it unnecessary to pass, however, on the judge's finding that Ros also unlawfully interrogated a shift supervisor.

verse employment actions against Nowakowska and Bussiere. With respect to each alleged violation, we agree with the judge both that the General Counsel satisfied her initial burden under *Wright Line*,[10] and also that the Respondent failed to meet its *Wright Line* defense burden of proving that it would have taken each of these adverse employment actions even absent Nowakowska's and Bussiere's protected activity.[11] We thus find, in agreement with the judge, that the Respondent violated Section 8(a)(3) and (1) when it issued disciplinary warnings to Nowakowska on October 29 and December 18, 2019,[12] and to Bussiere on November 21, 2019, and February 5, 2020.[13] In addition, we agree with the judge that the Respondent also violated Section 8(a)(3) and (1) by reducing Nowakowska's scheduled work hours in November and December 2019, and by withholding barista training opportunities from Bussiere on October 25, 2019.[14] Finally, we agree with the judge that the Respondent violated Section 8(a)(3) and (1) when it discharged Nowakowska on January 26, 2020,[15] and when it discharged Bussiere a month later on February 26, 2020.[16]

IV. THE RESPONDENT'S CHALLENGE TO REINSTATEMENT AND BACKPAY FOR NOWAKOWSKA AND BUSSIERE

Having found that the Respondent violated Section 8(a)(3) and (1) by discharging Nowakowska and Bussiere, the judge ordered the Board's standard remedies of backpay and reinstatement. In so doing, the judge rejected the Respondent's contention that, even if their discharges were unlawful, Nowakowska and Bussiere were not entitled to reinstatement and full backpay because they violated the Respondent's no-recording policy and Pennsylvania State law prior to their discharges. In its exceptions, the Respondent renews its challenges to the reinstatement and backpay period of Nowakowska and Bussiere. For the reasons explained below, we reject the Respondent's arguments and, in agreement with the judge, order the standard backpay and reinstatement remedies here.

As the Respondent acknowledges, under established Board precedent, where an employer claims that an unlawfully discharged employee is not entitled to reinstatement, based on alleged misconduct occurring before her discharge, it is the employer's burden to prove (1) that the employee engaged in that misconduct and (2) that the employer would have disqualified any similarly situated employee from continued employment. See

[10] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

[11] In finding that the Respondent violated Sec. 8(a)(3) and (1), the judge applied *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120 (2019), in which the Board held that there must be a causal relationship between the employee's protected activity and the employer's adverse action. Member Wilcox notes her agreement with Chairman McFerran's concurring opinion in *Tschiggfrie*, wherein she found the majority's "clarification" of *Wright Line* principles was unnecessary as the "concepts [discussed by the majority there] are already embedded in the *Wright Line* framework and reflected in the Board's body of *Wright Line* cases." Id., slip op. at 10. See *New York Paving, Inc.*, 371 NLRB No. 139, slip op. at fn. 6 (2022).

Member Prouty agrees with his colleagues and the judge that, applying well-established Board precedents, the Respondent violated the Act as alleged. Because *Tschiggfrie*'s "clarification" of *Wright Line*'s principles does not alter that conclusion, Member Prouty expresses no view on *Tschiggfrie*, in which he did not participate.

[12] With respect to Nowakowska's October 29 warning, we find that the Respondent knew of Nowakowska's ongoing Sec. 7 activity even apart from Store Manager Stephanie Vernier's knowledge that Nowakowska attended a union meeting a week prior to receiving the October 29 warning.

[13] Regarding the November 21 disciplinary warning issued to Bussiere, we note that the Respondent makes no specific argument to refute the judge's finding that the warning was unlawfully motivated.

With respect to Bussiere's February 5 warning, which the Respondent claims was issued because Bussiere attempted to enter a room in violation of instructions while Vaughan was in the process of discharging another employee there, Member Prouty would rely not only on the evidence cited by the judge but on the Respondent's video of the room. The video appears to contradict Vaughan's testimony that he got up from his chair to bar the door against Bussiere.

[14] As to the withholding of training opportunities from Bussiere, in addition to relying on the judge's analysis, we note that the Respondent failed to make any specific argument to refute the allegation. In addition, we note that Vaughan gave inconsistent reasons at trial (Bussiere's deficient performance) and to District Manager Dragone (Bussiere's "negative attitude") for not providing Bussiere with training opportunities. Shifting justifications like these support an inference of unlawful motive. See, e.g., *Commercial Erectors, Inc.*, 342 NLRB 940, 943-944 (2004); *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1115 fn. 18 (1999).

[15] We reject the Respondent's arguments that Store Manager Vaughan was not involved in the decision to discharge Nowakowska and that his expressed animus against union activity was therefore irrelevant. District Manager Dragone, who issued the discharge, was clearly following Vaughan's heated recommendation (made in an email only one day earlier) that Nowakowska be fired, and the judge properly attributed the Respondent's animus to Dragone as well as to Vaughan. In addition, the protected activity in which Nowakowska engaged was not limited, as the Respondent implies, to her co-leadership of two in-store demonstrations by employees that occurred months before her discharge. Vaughan's "venting" email to Dragone, sent the day before the discharge, along with the previous violations in which Vaughan was involved, confirm that he was also reacting to Nowakowska's day-to-day protected activity, which continued until her termination. Her protected activity was therefore not isolated in time from the discharge.

[16] Member Prouty agrees with his colleagues and the judge that the Respondent's justification for Bussiere's discharge—that he "knowingly communicat[ed] false information" to another barista that the barista was in danger of termination for absenteeism—was pretextual. Member Prouty would also find that Bussiere's communication, which involved alerting a co-worker that the co-worker might be discharged and asking him if he needed help, constituted concerted activity for mutual aid or protection within the meaning of Sec. 7, and that his discharge was unlawful on that additional, independent basis.

Marshall Durbin Poultry Co., 310 NLRB 68, 69–70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994). Specifically, the employer must "establish that the discriminatee's conduct would have provided grounds for termination based on a preexisting lawfully applied company policy"; moreover, "any ambiguities will be resolved against the employer."[17] *John Cuneo, Inc.,* 298 NLRB 856, 857 fn. 7 (1990). The premise of this analytical framework, of course, is that the employer was not aware of the employee's alleged misconduct *before* her discharge. See *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961, 962 (2015), enfd. 825 F.3d 128 (3d Cir. 2016). For if the employer *was* so aware, but either did not rely on the misconduct in discharging the employee, or has failed to establish that it would have discharged the employee for the misconduct alone, then the employer necessarily cannot show that the misconduct would have disqualified the discriminatee from reinstatement. See *High Performance Tube, Inc.*, 251 NLRB 1362, 1362 (1980), enfd. 640 F.2d 382 (5th Cir. 1981).

Here, the judge concluded that the Respondent knew or had reason to know that, prior to their respective discharges, Bussiere and Nowakowska were recording management officials in the store, and that the Respondent failed to take any meaningful action in response. The judge thus found no basis for concluding that traditional backpay and reinstatement remedies were unwarranted for Bussiere and Nowakowska.

On exception, the Respondent argues, as it did to the judge, that it had no evidence that Bussiere and Nowakowska had actually recorded management officials or other employees until it received a response to its subpoena requests in advance of the unfair labor practice hearing in this case. The Respondent additionally contends that that it should not be required to reinstate Nowakowska and Bussiere because they violated the Respondent's no-recording policy and acted in violation of Pennsylvania State law. As to the no-recording policy, the Respondent asserts that the judge ignored evidence that it terminated two employees in 2018 for violating the policy and ignored regional director Eckensberger's testimony that if an employee is terminated for violating the policy, the employee is not eligible for rehire. As to Pennsylvania State law, the Respondent argues that it is a felony to record an oral communication without the consent of all parties and contends that, in ordering reinstatement here, the judge erred in failing to consider the Respondent's legitimate interest in protecting the individual privacy of both its employees and customers in Pennsylvania.[18] Because Bussiere and Nowakowska likely violated Pennsylvania law, an order requiring the Respondent to reinstate them would be unconscionable, the Respondent insists.

We agree with the judge, however, that the record sufficiently establishes that the Respondent knew of the employees' recording activity prior to their discharges, but did not discharge them for that activity.

The judge details several instances of Nowakowska and Bussiere using recording devices in interactions with Store Manager Vaughan. In addition, as the judge found, Vaughan reported the recording activity to district manager Brian Dragone who, in turn, reported the conduct to Partner Resource Manager Gerald Henderson. Operations Coach Melissa Maimon, who assisted Vaughan, also reported recording activity at the Broad and Washington store to Dragone, and he shared that information with several other management officials, including Regional Director Eckensberger and the partner resources director of the mid-Atlantic region. In these circumstances, we agree with the judge that the Respondent knew of Nowakowska's and Bussiere's recording activity prior to their discharges, but did not rely on the conduct to discharge the employees or otherwise assert that they would have been discharged for the conduct even absent their protected activity.[19]

Even assuming (contrary to the record evidence) that the Respondent was *not* aware of the recording until after the employee's discharges, we would nevertheless reject

[17] This appropriately is a demanding standard because, at the remedial stage of a case, the respondent's unlawful conduct already has been firmly established. See *Coronet Foods, Inc. v. NLRB*, 981 F.2d 1284, 1287 (D.C. Cir. 1993).

[18] The Pennsylvania state law referenced by the Respondent is set forth at 18 PA. CONS. STAT. § 5702 and, according to the judge, that statute criminalizes recording an oral communication, unless all parties to the conversation consent. The judge also stated that the statutory definition of "oral communication" requires a justifiable "expectation that such communication is not subject to interception." The judge, however, declined to address the Respondent's arguments based on Pennsylvania State law, finding it unnecessary to do so since the Respondent's no-recording policies before the judge referred only to federal law, not State law.

[19] In its exceptions, the Respondent contests the judge's reliance on the finding that it "knew or should have known" about Nowakowska's and Bussiere's recording activity. The Respondent asserts that the judge failed to adhere to Board law, challenges the equal employment opportunity cases cited by the judge, and asserts that the facts of this case preclude a finding that the Respondent knew or should have known of the recording activity. In finding reinstatement of Nowakowska and Bussiere to be appropriate here, we rely on established Board law already described. We find that because the record evidence establishes that the Respondent knew of the recording activity prior to their discharges, but did not rely on the conduct to discharge the employees or argue that it would have discharged them even absent their union activity, it has necessarily failed to prove that their misconduct would have disqualified Bussiere and Nowakowska from reinstatement.

the Respondent's arguments here that it should not be required to reinstate Bussiere and Nowakowska. Under Board law, an employee who makes an audio or video recording in the workplace may be engaged in activity protected by Section 7 of the Act depending on the facts and circumstances of a particular case. See *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021). As relevant here, the Board has found that employees have engaged in protected workplace recordings when such recordings were made to police the parties' collective-bargaining agreement or preserve evidence for use in a future proceeding, including a possible grievance. See id. The Board has also found such recordings to be protected when made to document meetings held by an employer regarding unionization and in an effort to collect and compare information a union needs to respond to arguments advanced by the employer at the meeting about unionization. See *ADT, LLC*, 369 NLRB No. 23, slip op. at 1 fn. 3, 7–8 (2020). In many instances, workplace recordings, often covert, have been an essential element in vindicating employees' Section 7 rights. See *Whole Foods Market, Inc.*, 363 NLRB 800, 802 fn. 8 (2015) (and cases cited therein), enfd. 691 Fed. Appx. 49 (2d Cir. 2017).

Here, Nowakowska testified that she recorded meetings with managers between July and October 2019 out of concern that the Respondent was seeking to retaliate against her protected activities, and she wanted to preserve "a neutral . . . source of what was said" in her conversations with management. Similarly, Bussiere testified that, during this same time frame and on the advice of a union organizer, he recorded meetings with management to preserve evidence of what was said in the meetings with management and so he would have proof if the Respondent attempted to discipline him for pretextual or retaliatory reasons. With both employees, their testimony demonstrates that their recording activity sought to document their conversations with management about terms and conditions of employment, including potential discipline, and to preserve evidence for any future employment-related actions that may arise. Indeed, some of the recordings by Bussiere and Nowakowska ultimately served as evidence of the Respondent's 8(a)(1) violations and thus assisted in vindicating the employees' Section 7 rights. In these circumstances, consistent with established precedent, the employees' recording activity constituted activity protected by Section 7 of the Act. See, e.g., *Hawaii Tribune Herald,* 356 NLRB 661, 661 (2011), subsequent history omitted (covert recording by an employee held protected where the employee sought to document potential violations of the Act).[20]

As the activity at issue is protected by Section 7, contrary to the Respondent's assertions, neither its no-recording policy nor State law would form a basis for disqualifying Bussiere and Nowakowska from reinstatement. As to the Respondent's no-recording policy, assuming, without deciding, that it constitutes a facially neutral, lawful policy and that the Respondent had, as it asserts, applied the policy to discharge other employees, the Respondent would nevertheless be prohibited from invoking that policy as a basis for not reinstating Bussiere and Nowakowska. Under established Board law, an employer is prohibited from applying a facially neutral policy in a manner that would restrict protected Section 7 activity. See, e.g., *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 4 (2021). As a result, under the circumstances presented here, to allow the Respondent to use its no-recording policy as a shield to prevent reinstatement of Bussiere and Nowakowska would effectively permit the Respondent to impose another adverse consequence on the discriminatees in response to and in retaliation for their protected activities.

Similarly, we reject the Respondent's contention that Bussiere and Nowakowska should be disqualified from reinstatement because their workplace recordings may have violated Pennsylvania State law. Assuming the Pennsylvania State law cited by the Respondent would apply to the workplace recordings by Bussiere and Nowakowska and that the Respondent has an interest in protecting the privacy concerns implicated by the no-recording law, enforcement of the State law would be preempted here. In this regard, when a state purports to regulate conduct that is arguably protected by Section 7 or an unfair labor practice under Section 8, "due regard for the [NLRA] requires that state jurisdiction must yield." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 244 (1959). Thus, since the workplace recordings by Bussiere and Nowakowska constituted activity protected by Section 7, *Garmon* preemption

[20] Citing *Hawaii Tribune Herald*, the Respondent asserts that the recording at issue here lost the Act's protection because, in the Respondent's view, it may have violated Pennsylvania State law. In previous cases involving work rules prohibiting workplace recording or disciplines of an employee for workplace recording, the Board has noted the presence or absence of potentially applicable state law and, where such a law was in place, whether or not the employer's applicable rule was based on that law. See, e.g., *ADT, LLC*, supra, 369 NLRB No. 23, slip op. at 8-9; *T-Mobile USA, Inc*., 363 NLRB 1638, 1641 fn. 12 (2016); *Whole Foods Market Inc.*, supra, 363 NLRB at 803 fn. 13; *Hawaii Tribune Herald*, supra, 356 NLRB at 661, 675. The Board, however, has never held that a workplace recording protected by Sec. 7 of the Act would lose its protection simply because a State law exists that prohibits recordings of oral communications.

would preclude invocation of the State law against them for these protected activities. See, e.g., *Pain Relief Centers, P.A.*, 371 NLRB No. 143, slip op. at 2 (2022). In these circumstances, then, the Pennsylvania State law is no impediment to the Respondent's reinstatement of the discriminatees and we therefore agree with the judge that the Board's standard backpay and reinstatement remedies are appropriate for Bussiere and Nowakowska.

ORDER

The Respondent, Starbucks Corporation, d/b/a Starbucks Coffee Company, Philadelphia, Pennsylvania, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with adverse actions for engaging in protected concerted activities.

(b) Prohibiting employees from concertedly discussing or raising complaints about management officials or the employees' terms and conditions of employment.

(c) Informing employees that their hours were reduced because they supported a union or engaged in other protected concerted activity.

(d) Placing employees under surveillance while they engage in union or other protected concerted activities.

(e) Coercively interrogating employees about their union or other protected concerted activities.

(f) Reducing the scheduled work hours of employees because of their support for and activities on behalf of the union.

(g) Withholding training opportunities from employees because of their support for and activities on behalf of the union.

(h) Issuing disciplinary warnings to employees because of their support for and activities on behalf of the union.

(i) Discharging or otherwise discriminating against employees for supporting Philadelphia Baristas United or any other labor organization.

(j) 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, offer Tristan Bussiere and Echo Nowakowska full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

(b) Make Tristan Bussiere and Echo Nowakowska whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Tristan Bussiere and Echo Nowakowska for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

(d) File with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Tristan Bussiere's and Echo Nowakowska's corresponding W-2 form(s) reflecting the backpay award.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful disciplines and discharge of Tristan Bussiere and the unlawful disciplines and discharge of Echo Nowakowska, and within 3 days thereafter, notify the employees in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

(f) 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 back pay due under the terms of this Order.

(g) Within 14 days after service by the Region, post at its 1002 South Broad Street, Philadelphia, Pennsylvania facility, copies of the attached notice marked "Appendix A" and post at its post at its 3400 Civic Center Boulevard, Philadelphia, Pennsylvania facility, copies of the attached notice marked "Appendix B."[21] Copies of the

[21] If the facilities involved in these proceedings are open and staffed by a substantial complement of employees, the notices must be posted within 14 days after service by the Region. If the facilities involved in these proceedings are closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notices must be posted within 14 days after the facilities reopen and a substantial complement of employees have returned to work. If, while closed or not staffed by a substantial complement of employees due to the pandemic, the Respondent is communicating with its employees by electronic means, the notices must also be posted by such electronic means within 14 days after service by the Region. If the notices to be physically posted were posted electronically more than 60 days before physical posting of the notices, the notices shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date]." 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

notices, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by 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 facilities involved in this proceeding, 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 July 25, 2019.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 4 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. February 13, 2023

_____
Lauren McFerran, Chairman

_____
Gwynne A. Wilcox, Member

_____
David M. Prouty, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX A

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.

"Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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 threaten you with adverse employment actions for engaging in protected concerted activities.

WE WILL NOT prohibit you from concertedly discussing or raising complaints about management officials or your terms and conditions of employment.

WE WILL NOT inform you that your work hours were reduced because you supported a union or engaged in other protected concerted activity.

WE WILL NOT reduce your scheduled work hours for supporting the union.

WE WILL NOT withhold training opportunities from you for supporting the union.

WE WILL NOT issue disciplinary warnings to you for supporting the union.

WE WILL NOT discharge or otherwise discriminate against any of you for supporting the Union or any other labor organization.

WE WILL NOT place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT coercively question you about your union or protected concerted activities.

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

WE WILL make Tristan Bussiere whole for any loss of earnings and other benefits suffered as a result of our unlawful withholding of training opportunities, plus interest.

WE WILL make Echo Nowakowska whole for any loss of earnings and other benefits suffered as a result of our unlawful reduction of scheduled work hours, plus interest.

WE WILL, within 14 days from the date of the Board's Order, offer Tristan Bussiere and Echo Nowakowska full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights previously enjoyed.

WE WILL make Tristan Bussiere and Echo Nowakowska whole for any loss of earnings and other benefits resulting from the discrimination against them, less any net interim earnings, plus interest, and WE WILL also make such employees whole for any other direct or fore-

seeable pecuniary harms suffered as a result of the adverse actions, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Tristan Bussiere and Echo Nowakowska for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Tristan Bussiere's and Echo Nowakowska's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the unlawful disciplines and discharge of Tristan Bussiere and the unlawful disciplines and discharge of Echo Nowakowska, and WE WILL, within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

STARBUCKS COFFEE COMPANY

The Board's decision can be found at www.nlrb.gov/case/04-CA-252338 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.

APPENDIX B

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 place you under surveillance while you engage in union or other protected concerted activities.

WE WILL NOT coercively question you about your union or protected concerted activities.

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

STARBUCKS COFFEE COMPANY

The Board's decision can be found at www.nlrb.gov/case/04-CA-252338 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.

David Rodriguez and *Nicholas S. Allen, Esqs.,* for the Acting General Counsel.
Nina K. Markey and *Marie Duarte, Esqs.,* for the Respondent.

DECISION

INTRODUCTION[1]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. The Acting General Counsel alleges that Starbucks Coffee Company (Starbucks or Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act) in response to the protected concerted and union activities of Echo Nowakowska and Tristan J. Bussiere, two baristas who worked at a downtown Philadelphia store. On July 22, 2019, Nowakowska and Bussiere were part of an in-store demonstration demanding changes to their working conditions, including the removal of their store manager, greater managerial accountability for dis-

[1] Abbreviations are as follows: "Tr." for transcript; "Jt. Exh." for Joint Exhibits; "GC Exh." for General Counsel's Exhibits; "R. Exh." for Respondent's Exhibits. Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based on my review and consideration of the entire record.

crimination based on race, disability, or LGTBQ+ status, and early implementation of the Philadelphia Fair Workweek Ordinance.[2] Starbucks responded by meeting with employees and later replacing the store manager. Nowakowska and Bussiere, however, continued to speak out, attend meetings, and post on social media about workplace issues and organizing a union. In October and November 2019, Starbucks disciplined and took other adverse actions against Nowakowska and Bussiere for allegedly failing to follow corporate policies. On November 25, 2019, Philadelphia Baristas United filed an unfair labor practice charge against Starbucks accusing it of retaliation. Later that day, Nowakowska and Bussiere led a group of supporters in another in-store demonstration to serve management with a copy of the charge. A week later, the *Philadelphia Inquirer* published an article about the two and their efforts, entitled "Starbucks Workers Organize for Rights." Starbucks eventually discharged Nowakowska and Bussiere for allegedly continuing to violate corporate policies.

The Acting General Counsel alleges that Starbucks violated Section 8(a)(1) of the Act by: telling employees they should not concertedly make demands to management; informing an employee that it reduced her hours because she engaged in protected concerted activity; requiring an employee to cease making concerted complaints about management; surveilling and interrogating employees; prohibiting employees from concertedly complaining about management and employees' terms and conditions of employment during work time while permitting employees to talk about other work and non-work subjects; and prohibiting employees from concertedly discussing their terms and conditions of employment during work time while permitting employees to talk about other work and non-work subjects. The Acting General Counsel alleges Starbucks also violated Sections 8(a)(1) and (3) of the Act by: disciplining Nowakowska and Bussiere, reducing Nowakowska's work hours, denying Bussiere training opportunities, and later discharging Nowakowska and Bussiere, because they engaged in protected concerted and union activities. Starbucks denies these allegations and raises various affirmative defenses, including that Nowakowska and Bussiere are not entitled to reinstatement because after-acquired evidence establishes they would have been discharged for surreptitiously recording conversations with members of management and employees without their consent in violation of corporate policies and the laws of the Commonwealth of Pennsylvania.

For the reasons stated below, I find merit to all but one of the alleged violations. As part of the remedy, I recommend that Nowakowska and Bussiere be offered reinstatement with full backpay.

STATEMENT OF THE CASE

On November 25, 2019, Philadelphia Baristas United filed the charge in Case 04-CA-252338, which it amended on January 6 and August 11, 2020. On February 14, 2020, Nowakowska filed charges in Cases 04-CA-256390 and 04-CA-256401, and Bussiere filed charges in Cases 04-CA-256398 and 04-CA-256399. On February 26, 2020, Bussiere filed the charge in Case 04-CA-257024. Nowakowska filed the charge in Case 04-CA-258416 on March 25, 2020, and later amended it on May 15, 2020. On August 11, 2020, Bussiere amended the charges in Cases 04-CA-256398 and 04-CA-257024.

On August 26, 2020, the Acting Regional Director for Region 4 of the National Labor Relations Board (Board), on behalf of the General Counsel, issued a consolidated complaint alleging Starbucks had violated Section 8(a)(1) and (3) of the Act. On September 9, 2020, Starbucks filed its answer, which it amended on October 14, 2020. The hearing occurred on February 2-5, 8, and 10, 2021 by videoconference due to the compelling circumstances created by the Coronavirus (COVID-19) pandemic. At the hearing, I granted the Acting General Counsel's motion to amend the consolidated complaint to add and delete certain allegations for the reasons stated on the record.[3] (GC Exh. 33) (Tr. 19-27). The original and amended

[2] The Philadelphia Fair Workweek Ordinance imposes scheduling and pay requirements on covered employers in the food service, hospitality, and retail industries. Employers must provide advance, written notice of work schedules; provide predictability pay for all employer-initiated changes to the posted schedule; allow employees to refuse to work additional hours not included in the posted schedule; offer existing employees the right to additional shifts before hiring new employees; and schedule nine hours of rest between certain shifts, unless the employee provides written consent and receives a set payment for the change. Philadelphia Code Chapter 9-4600. The FWW Ordinance was to go into effect on January 1, 2020, but implementation was delayed until April 1, 2020 because of COVID-19. See Chris Marr and Ander Wallender, *Philadelphia Worker Scheduling Law Takes Effect During Pandemic*, BLOOMBERG LAW DAILY LABOR REPORT (March 31, 2020) (available at https://news.bloomberglaw.com/daily-labor-report/philadelphia-worker-scheduling-law-takes-effect-during-pandemic.)

[3] The added allegations were that: (1) since on or about October 25, 2019, Respondent, by David Vaughan, Jr., refused to assign Bussiere barista trainer opportunities, in violation of Sec. 8(a)(3) and (1); (2) on or about December 3, 2019, the Respondent, through Navy Ros, at a Starbucks store located at 3400 Civic Center Blvd. in Philadelphia, Pennsylvania engaged in surveillance of employees to discover their concerted activities, in violation of Sec. 8(a)(1); and (3) between December 3 and 13, 2019, a more specific date currently unknown to the Acting General Counsel, the Respondent, through Navy Ros, at a Starbucks store located at 3400 Civic Center Blvd. in Philadelphia, Pennsylvania, interrogated employees about their protected concerted activity, in violation of Sec. 8(a)(1). If a charge is filed and served within 6 months after the violations alleged in the charge, the complaint (or amended complaint), although filed after the six months, may allege violations not alleged in the charge if (a) they are closely related to the violations named in the charge, and (b) occurred within 6 months before the filing of the charge. *Redd-I, Inc*., 290 NLRB 1115, 1116 (1988). In evaluating whether allegations are "closely related" under *Redd-I*, the Board considers: (1) whether the otherwise untimely allegation and the allegations in the timely charge are of the same class, i.e., whether the allegations involve the same legal theory and usually the same section of the Act; (2) whether the otherwise untimely allegation and the allegations in the timely charge arise from the same factual situation or sequence of events; and (3) whether the respondent would raise the same or similar defenses to the otherwise untimely allegation and the allegations in the timely charge. All three factors are satisfied as the added allegations of surveillance/interrogation and an adverse action against Bussiere involve the same class of statements or conduct and the same sections of the Act; they involve similar factual situations or events and occurred during the same time period as the timely alle-

allegations are collectively referred to as "the amended consolidated complaint."

During the hearing, all parties were afforded the right to call and examine witnesses, present any relevant documentary evidence, and argue their respective legal positions. On February 17, 2021, Starbucks answered the amended consolidated complaint. The Acting General Counsel and Starbucks filed post-hearing briefs, and Starbucks filed a reply brief, which I have carefully considered.[4]

FINDINGS OF FACT[5]

Jurisdiction

Starbucks is a corporation headquartered in Seattle, Washington that is engaged in the operation of retail coffee stores worldwide, including a store at 1002 South Broad Street, in Philadelphia, Pennsylvania (Broad & Washington). During the prior year, Starbucks received gross revenues in excess of $500,000 and purchased and received at Broad & Washington goods and supplies valued in excess of $50,000 directly from points outside the Commonwealth of Pennsylvania. Starbucks admits, and I find, it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Operations and Hierarchy

Starbucks has more than 25,000 locations in over 75 countries. (Jt. Exh. 2(a)). It employs baristas, shift supervisors, and managers at its retail stores. The baristas prepare beverages and serve food, process customer payments, clean and stock the store, handle product merchandizing, and provide "excellent customer service." (Jt. Exh. 2(a)). The shift supervisors (SSV) perform these same functions and help guide the baristas in their work, including providing informal coaching on adherence to Starbuck's policies and communicating with management regarding job performance. (Tr. 499). The store manager (SM) oversees operations, directs all work, and is responsible for personnel decisions, scheduling, and payroll.[6] (Jt. Exh. 2(a), p. 13). The store managers, but not the shift supervisors, are admitted supervisors within the meaning of Section 2(11) of the Act.

The retail stores in the United States are divided into districts, and those districts are divided into regions. Store managers report to a district manager (DM), and the district managers report to a regional director (RD). The store manager for Broad & Washington is David Vaughan, Jr. He reports to DM Brian Dragone, who reports to RD Marcus Eckensberger. Eckensberger is responsible for the mid-Atlantic operations, including all the retail stores in the Philadelphia area. The regional vice president over U.S. retail stores for the mid-Atlantic region is Camille Hymes. The executive vice president for U.S. retail stores is Denise Nelsen.

Employees are all referred to as "partners." Starbucks' Partner Resources Department handles employment-related matters and investigations. Gerald Henderson was the partner resource manager covering Broad & Washington until November 2019. He was replaced by Michael Rose. Both Henderson and Rose reported to Nathalie Cioffi, the partner resources director for the mid-Atlantic region.

Starbucks' Media Relations Department regularly monitors and analyzes print, television, and social media for any commentary about the company and is responsible for protecting the Starbucks brand. (Tr. 90–91; 696–697).[7]

Policies, Mission and Values, and the "Barista Approach"

The Partner Guide and the Partner Resource Manual contain policies applicable to those working at retail stores. (Jt. Exhs. 2-3). The Partner Guide sets forth the company's mission and values. The mission is to "inspire and nurture the human spirit—one person, one cup, and one neighborhood at a time," and the values include: creating a culture of warmth and belonging, where everyone is welcome; acting with courage, finding new ways to grow; being present, connecting with transparency, dignity and respect; and delivering the very best, and being accountable for results. (Jt. Exh. 2(a)).

The "Barista Approach" is intended to aid in bringing Starbucks' mission and values to life through ensuring commitment to customers, focus on quality, and dedication to one another. Commitment to customers focuses on creating a warm and welcoming environment and demonstrating a commitment to customer service. Focus on quality includes following standard work methods and guidelines by working in assigned positions

gations; and the company has raised similar defenses to the timely charges.

[4] At the conclusion of the hearing, I allowed each party to file a reply brief to respond to the opposing side's posthearing brief. The Acting General Counsel elected not to file a reply brief, but later moved to file a sur-reply brief to respond to arguments raised in Starbucks' reply brief. On April 15, 2021, I issued an order denying that motion.

[5] The Findings of Fact are a compilation of the credible testimony and other evidence, as well as logical inferences drawn therefrom. To the extent testimony contradicts with the findings herein, such testimony has been discredited, either as in conflict with credited evidence or because it was incredible and unworthy of belief. In assessing credibility, I primarily relied upon witness demeanor. I also considered the context of the witness's testimony, the quality of their recollection, testimonial consistency, the presence or absence of corroboration, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. sub nom., 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of a witness's testimony. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008) (citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), revd. on other grounds 340 U.S. 474 (1951)). Certain specific credibility determinations are set forth below.

[6] Baristas are assigned to a "home" store. They can pick up additional shifts or be lent out to work at other area stores. Regardless, they must notify their store manager who will handle payroll for all work.

[7] In April 2018, two African American men were arrested inside a Starbucks' store in downtown Philadelphia for refusing the manager's demand that they make a purchase or leave. Video of the arrests was posted online and resulted in negative publicity and protests. Now, whenever there is a disruption or incident, district and regional management are notified and coordinate a response. (Tr. 97–99). Media Relations also will monitor to determine what, if any, traction the disruption or incident receives in the media.

and routines, crafting and serving quality products, and ensuring food is visually appealing, stocked, and signed appropriately. Dedication to one another includes building rapport with partners and displaying a positive attitude that enables the team to work together effectively, helping create an environment of warmth and belonging where everyone is welcome, seeking opportunities to recognize fellow partners, and following established policies and guidelines. (Jt. Exh. 5, p. 12).

Layout of Broad & Washington Store

Upon entering Broad & Washington, most customer seating is on the right, and the café area is on the left. Toward the front, there is a large "community" table that is approximately eight feet long with six chairs around it. There is a pillar behind that table as customers move into the café area. Beyond the community table on the right is a booth of sorts against the wall with four or five "single feet" tables. At the end, in the back right, is a table with two chairs. Further down on the right is a small hallway with the bathrooms. (Tr. 128–129). On the left side of the store, in the café area, is the bar/counter with the registers. At one end of the counter is where customers pick up their orders and at the other end is the glass pastry case with food products and bottled beverages. Behind the bar/counter are espresso machines, coffee makers, sinks, refrigerators, and small counter ovens. Beyond the pastry case, in the back left of the store, is a doorway into the back area, which is a room with a table, a computer, chairs, lockers, and several storage shelves with products and supplies. There are security cameras in the café and in the back area that record video but not audio.[8]

Initial Employee Discussions, Complaint, Notice of Union Meeting, and Visit from Corporate

Tristan J. "TJ" Bussiere and Echo Nowakowska began working for Starbucks in 2018. Both moved to work at Broad & Washington in about January 2019, shortly after the store opened. After a few months, Bussiere and Nowakowska began having concerns about the store manager, Erin Graves. They spoke with a few other partners who shared those concerns. In June 2019, Bussiere contacted a labor organizer at One PA, a non-profit advocacy group, to get information about possibly organizing a union. He, Nowakowska, and a few other partners, as well as representatives from One PA, began meeting about their concerns and to plan a course of action. They determined to first file an internal complaint against Graves.

On July 15, Bussiere contacted Partner Resources to file the complaint. He was directed to contact DM Brian Dragone. Bussiere spoke to Dragone that same day about the concerns with Graves, and Dragone told him there was not enough information to launch an investigation. (Tr. 320–326).

Later that day, Dragone received a message from Graves that one of her partners informed her Bussiere and Nowakowska would be meeting with One PA that Friday, July 19. Dragone forwarded this information to RD Marcus Eckensberger and partner resource manager Gerald Henderson. They shared the information with partner resources director Nathalie Cioffi. (GC Exh. 29).

On July 16, Cioffi sent Henderson to interview partners at Broad & Washington.[9] (GC Exh. 29). Henderson later reported to Cioffi what he had learned.

About a week later, Cioffi emailed Eckensberger and regional vice president Camille Hymes. (GC Exh. 29). The email chain addressed Bussiere's July 15 complaint about Graves, the union meeting, and Henderson's partner interviews. It noted Henderson spoke to three partners (other than Bussiere) "about the vibe in the store," and none of them "indicated anything negative." (GC Exh. 29). Hymes later emailed executive vice president Denise Nelsen, copying Cioffi and Eckensberger, that there would be a detailed recap about each partners' "engagement and concerns, if any" in the next week. (GC Exh 30).

July 22 Demand Letter and Demonstration

In July, partners from Broad & Washington prepared a demand letter for management. In the letter, they demanded that: (1) Graves step down or be removed as store manager; (2) she not be promoted or relocated to any managerial or corporate position within Starbucks; (3) whoever replaced her as store manager must be held accountable for discriminatory language and actions against workers of color, LGTBQ+ workers, and workers with disabilities or illnesses, which applies to discrimination by customers against workers, by coworkers against workers, and by managers against workers; (4) immediate enforcement of the Philadelphia Fair Workweek ("FWW") Ordinance; and (5) more humane consideration for workers' life circumstances as they affect scheduling and coverage needs due to second jobs, childcare, illness, and family emergencies. (Jt. Exh. 1). The letter was signed by Bussiere, Nowakowska, baristas Oak Killmon, Brooke Hayne, and Chloe Heldt, and former shift supervisors Diamond Fennell and Liz Ellis. (Jt. Exh. 1) (Tr. 113–114).

On July 22, Bussiere led a group of current and former partners into Broad & Washington during business hours to deliver their demand letter to Graves. As planned, Nowakowska, who was working at the time, went and retrieved Graves from the back area. When Graves came out, Bussiere read the letter out loud and handed Graves a copy. The group (except for Nowakowska) then left chanting, "Hey hey, ho ho, Erin Graves has got to go." (GC Exhs. 20 and 34). The demonstration lasted about five minutes. One or more participants used their cell phones to record video and audio of the event. Video of the demonstration was later posted on social media.

Bussiere also emailed a copy of the demand letter to Graves, Dragone, and Henderson from the email address "broadandwashingtonunited@gmail.com." (GC Exh. 17). The subject line read "Broad and Washington Workers' Demands." The cover email gave Starbucks three days to respond. Later

[8] The security cameras are for partner and customer safety, to monitor activities involving cash, and to capture any video and/or audio recordings. (Jt. Exh. 2(a), p. 36).

[9] Cioffi testified she sent Henderson to understand the allegations against Graves. However, in her July 23 email to regional vice president Camille Hymes, Cioffi wrote that Henderson was sent "[w]hen we heard of the intent of [Bussiere] to go to the Union meeting ..." (GC Exh. 29). Henderson ceased working for Starbucks in early 2020 and was not called to testify at the hearing. Based on the documents, I find Cioffi primarily sent Henderson to investigate and interview partners to gather information about the union meeting and support for the union.

that day, Henderson replied to the group's email, stating that there would be an investigation into their concerns.

July 23 Meeting with Cioffi and Henderson

The next day, Cioffi and Henderson went to Broad & Washington and interviewed partners. They met with Bussiere and Nowakowska together and asked them about their concerns. Cioffi asked specifically about the claims of race discrimination. Initially, Nowakowska stated she would only discuss her issues about Graves, but later stated she and the others would put together a detailed summary of their concerns and provide it to management.

ALLEGED UNFAIR LABOR PRACTICES

July 25 Email and Meetings with Cioffi and Eckensberger

Nowakowska and Bussiere spoke with the others and put together a detailed summary of their concerns. On July 25, Bussiere emailed that summary to Cioffi, Henderson, and Dragone. It was a 13-page, single-spaced document sent from "broadandwashingtonunited@gmail.com" with the subject "Broad and Washington United – statement." (GC Exh. 18). The "statement" addressed complaints about Graves on topics such as scheduling, bullying and discrimination, and health and safety issues.

Later that day, Cioffi and Eckensberger met with Nowakowska and Bussiere at Broad & Washington. Cioffi and Eckensberger began by thanking them for preparing and sending the email. Eckensberger also informed them that Starbucks had a strict no-retaliation policy. Bussiere and Nowakowska then asked a series of questions, including how the complaints would be investigated. Bussiere expressed concern about the confidentiality of the investigation. Eckensberger responded:

> Where we're at today, though, when—we're walking that line, where you surely have a voice and your voice is so, so important to us, but we were being careful not to disrupt the code of conduct in the first place, right? Which includes filming in the store, people are allowed to film their own parties, which includes very publicly presenting the demands, so that kind of almost—does that—and then now, if people are trying to magnify that, is it still confidential in your mind, or do you want it to be? Cause we can help. I mean, [if you wanted it] to be confidential, we're happy, but I'm almost thinking you potentially wanted it public or no?

(R. Exh. 1(b), pp 37–38).

Nowakowska then asked whether she and Bussiere were going to be disciplined. Eckensberger said they would not. But he added, "I do think we're on the verge there of the policy, so I do think it's good, just to kind of talk about that." (R. Exh. 1(b), p. 39). There was nothing else said on that topic. Next, they discussed whether the investigation should be done internally or by a third party. During this discussion, Cioffi and Eckensberger emphasized the importance of maintaining an "open dialogue" and allowing management the opportunity to investigate and fix the concerns. (R Exh. 1(b), pp. 50–51).

Toward the end of the meeting, Cioffi expressed surprise that she had not heard about these concerns about management before. Bussiere responded that the partners he spoke to felt "that they can't speak up about [issues] without being retaliated against unless they unify, and unifying is really hard when everybody feels like they're going to be retaliated against …" (R Exh. 1(b), p. 52). Cioffi then asked Bussiere and Nowakowska if they had any recommendations for how to help build back trust. Nowakowska replied the company should remove Graves following a third-party investigation and fast-track (early) implementation of the FWW Ordinance. Then, partners would know they could raise issues and the company would listen and act. Eckensberger replied that "was not within [the company's] mission and values." Bussiere asked what was not within the company's mission and values, and Eckensberger answered "demand reply, demand reply" was not. He reiterated the company wanted to continue to have conversations, "an open dialogue," to seek to understand the partners' concerns. Bussiere commented that conversations without any action do not communicate accountability. Cioffi responded that the investigation would, and Eckensberger agreed. Cioffi also stated the company wanted to ensure that due process was given before taking any action. Eckensberger added that Nowakowska and Bussiere would expect the same if complaints were made against them. (GC Exh. 1(b), pp. 54–56).

On July 29, the four met again at Broad & Washington. Eckensberger informed Bussiere and Nowakowska that Starbucks had assigned an investigator who had begun looking into their complaints. They then discussed scheduling. Eckensberger said Starbucks would not commit to early implementation of the FWW Ordinance, but he was looking into rolling out a new scheduling app to assist partners with trading shifts. (Tr. 151).

On August 1, Eckensberger, Henderson, and Dragone met with Graves, and she later resigned. A month later, Starbucks hired David Vaughan Jr. as the new store manager. Dragone informed Vaughan about the circumstances that led to Graves being replaced. (Tr. 1107–1110).

Social Media Posts

In the weeks and months that followed, Bussiere and Nowakowska continued to speak with co-workers at Broad & Washington and at other stores about workplace concerns and about organizing a union. They also created public Instagram accounts with usernames like @phillybaristajustice to post about their activities. There were posts about the July 22 demonstration/letter and Graves' "removal" as store manager. One post in early August contained an image of the demand letter, edited to show checkboxes for each of the demands, and checks in the boxes for Graves' removal and non-promotion or transfer. The text read, "TWO DEMANDS DOWN, THREE TO GO! Fair Work Week Now!" (GC Exh. 20, p. 7). A post later that month stated Graves' removal was due to the "workers' strength, unity, and visibility" and because Starbucks "feared further worker action and negative media attention." (GC Exh. 20, p. 19).

For the next several months, representatives from Starbucks' Media Relations Department monitored these public Instagram accounts and tracked the "likes," "shares" and "comments" to

those and related posts. (Jt. Exh. 21)(GC Exhs. 37(n)-(o)).[10]

October 22 Union Organizing Meeting

On October 22, Nowakowska and Bussiere attended a meeting at the home of Diente Fo, a barista from Starbucks' 34th & Walnut store. The meeting was conducted by Philly Workers for Dignity, another non-profit organization involved in union organizing. Fo believed the purpose of the meeting was to discuss issues with Starbucks' policies, so he invited partners from his store to attend, including his store manager, Stephanie Vernier. At the time, Fo was unaware they would also be discussing union organizing.

Vernier arrived late for the meeting. When she entered the room, there were several taped posters to the walls containing step-by-step organizing strategies. (GC Exh. 3). Vernier introduced herself and identified that she was a store manager. Nowakowska and Bussiere immediately gathered their belongings and went outside. Nowakowska texted one of the Philly Workers for Dignity representatives that Vernier had to leave. Before anything could be said, Vernier excused herself and left the meeting.[11] (Tr. 344–346).

Denial of Training Opportunities

In early 2019, Bussiere was certified as a barista trainer. Trainers are paid a bonus for each new hire they train. On around October 22, Bussiere approached Vaughan and said he was interested in training new hires at Broad & Washington. Vaughan said they could talk about training opportunities in the future, if there were any new hires. (Tr. 350–351). On October 25, Vaughan emailed Dragone that he could not use Bussiere as a barista trainer based on his "negative behavior." (GC Exh. 37(s)). Vaughan never told this to Bussiere, and he never assigned Bussiere to train any new baristas.[12] Vaughan later testified he did not select Bussiere to train because he was not performing his duties properly and, therefore, could not be entrusted to train others. (Tr. 943).

Internal Communications

On October 24, Melissa Maimon, an operations coach assigned to help Vaughan during his first few months as store manager, sent Dragone an email marked "Urgent and Confidential," stating that Vaughan was getting questions from partners, primarily about scheduling, sick leave, and the lack of training opportunities. Maimon commented, "It feels like the energy in the store is ramping up again with partners looking to add 'demands' to their work environment without wanting to have real conversations about them. I think it will get a little dicey over the next few weeks as [Vaughan] continues to hire new partners, and the FWW trainings begin." (GC Exh. 32)(presumably "FWW" stands for Fair Workweek). Dragone forwarded Maimon's email to Henderson, adding, "[T]hese are some notes [Maimon] took for me when she was at [Broad & Washington] yesterday. My spidey-sense was already tingling." Henderson forwarded both emails to Cioffi, writing, in part, "I wanted to share that we're keeping an even closer eye on [Broad & Washington]" and "want[ed] to move with urgency, but tactical after my learning from a few months ago." (GC Exh. 32).

October 29 Written Warning to Nowakowska

When Vaughan began as store manager, he emphasized to partners the importance of making customer connections. In late September, he told partners their connections were not where they needed to be, and he would start writing people up if they did not improve. At the time, he told Nowakowska he had no issues with her performance. (Tr. 172).

On October 23, Nowakowska was working at Broad & Washington making drinks when a group of female customers came in together and placed orders. Nowakowska made one of the drinks and called it out. She made eye contact with the customer, but the customer did not come and pick up the drink. Nowakowska continued making the others' drinks. Vaughan then came and picked up the drink from the counter, called the customer over, and apologized to her for having to wait. Vaughan then told Nowakowska she needed to call out the drinks, and the customer did not know it was her drink on the counter. Nowakowska told Vaughan she had called out the drink, but the customer did not pick it up. She asked Vaughan what she needed to do differently, and he told her to keep calling out the customer's name. She then followed those instructions.

On October 29, Nowakowska was again working at Broad & Washington making drinks. When Vaughan arrived at the store that day, he immediately told Nowakowska not to "slam" cups on the counter. She asked what he meant because she wasn't slamming cups. Vaughan told her she was not handing drinks out properly. He then demonstrated how he wanted her to hand out beverages. Nowakowska followed his instructions. After about a half an hour, Vaughan left the bar and went to the back area. Later that day, shift supervisor Gigi Hernandez told Nowakowska Vaughan did not want her working on the bar anymore and to move over to the register. That was the only comment Hernandez made to Nowakowska about her performance that day.

Toward the end of her shift, Vaughan called Nowakowska into the back area and he and Dragone gave her a written warning, stating:

> On 10/23/19 store manager observed Echo slam a beverage on the handoff counter. Echo did not call the beverage out using the customer's name, nor did she say thank you or try to connect with the customer--all of which are expectations of a barista. The customer who ordered drink

[10] Dragone also monitored these accounts. The group from Broad & Washington met with partners from the 16th & Market store and agreed, as part of an effort to show solidarity, that they would add the word "Justice" to their nametags. One partner posted the plan on their public Facebook page and asked customers to take photos with those partners to show their support. Dragone emailed Camille Hymes about the post, noting that during his visits to area stores that day he saw one partner at 16th & Market with "Justice" on their nametag. (GC Exh. 37(l)).

[11] Vernier, an admitted statutory supervisor and agent, was not called to testify, and her absence was unexplained.

[12] Vaughan hired four new baristas at Broad & Washington. Vaughan assigned Lauren Wainwright, Eddie Heyward, and Andrea Rassul to train them. Vaughan assigned Heyward to train two, but the record does not reflect when.

> was standing in front of Echo; the Store mgr had to apologize to the customer since she was visibly upset. The store manager coached Echo in the moment.
>
> On 10/29/19 the [Shift Supervisor] on duty, Gigi, coached Echo on connecting with customers and properly handing out beverages & not slamming them down, making eye contact, thanking the guest.
>
> On 10/29/19 the store mgr again coached Echo two additional times about saying hello to our guests, making connection with customers and not slamming beverages on the counter.

(Jt. Exh. 7).

Nowakowska disputed several of the statements in the warning as inaccurate or untrue. (Tr. 175) (Jt. Exh. 7).[13] Nowakowska had not received any discipline prior to this warning.

October 30 Email

On October 30, Dragone sent Henderson an email with the subject line "Broad & Washington Updates October 2019." Under a section labelled "Misc. notes," Dragone wrote "2 of 4 partners who instigated demands have departed (resigned)," "[o]ne partner who has challenged [Vaughan] departs this week," and "4 total new partners hired." (GC Exh. 37(t)). Nowakowska and Bussiere were the two who remained employed.[14] The email went on to list several concerns related to Bussiere, which included reports that he and Nowakowska were "constantly complaining" to employees about Vaughan. It also noted that Nowakowska had received a written warning [on October 29] for "not exhibiting barista basics behaviors" and that Bussiere had received a written warning for lateness.[15]

Reduction of Nowakowska's Scheduled Hours and November 20 Conversation with Vaughan

Dragone's email to Henderson also summarized a recent reduction in scheduled hours at Broad & Washington. The number of scheduled hours at the store steadily declined beginning in October and for the next several weeks.[16] According to the weekly schedules, Nowakowska went from being scheduled 30-32 hours a week in October to around 19 hours a week from mid-November through late December.[17] Her reductions of 30-40 percent was one of the most significant of any of those who remained on the schedule.[18]

On about November 20, Nowakowska spoke with Vaughan about her reduced hours at Broad & Washington. Vaughan told Nowakowska that he reduced her hours due to her workplace performance. He said that part of what he considers for scheduling is what he called "employee excellence," and he would not schedule her if she was coming into the store and causing a disruption. Nowakowska asked him what she could do to get more hours. Vaughan referred her to the points he raised in her October 29 written warning about demonstrating a commitment to customer service. He told Nowakowska he scheduled himself to work with her so he would have an opportunity to review her performance.[19] (Tr. 192-194). At some later point, Vaughan offered Nowakowska evening shifts, but she declined citing scheduling conflicts. She later asked Vaughan if she could pick up additional shifts at other stores, and he agreed.[20]

November 21 Discipline of Bussiere and Alleged Threat

On November 21, Dragone, partner resource manager Michael Rose, and Vaughan met with Bussiere to issue him a written warning for failing to meet the Barista Approach expectations. The managers planned to meet with Bussiere in the back area where they usually issue discipline, but Bussiere asked to meet in the café area because he suspected he was

[13] In general, I have credited Nowakowska over Vaughan whenever their testimony conflicts. I found Nowakowska to have a sincere and honest demeanor and a clear, consistent, and detailed recollection. Vaughan, on the other hand, had a poor or inconsistent recollection, and his responses were often unsupported, contradictory, or undermined by the credible evidence. For example, Vaughan wrote in the warnings that he saw Nowakowska slam a beverage on the counter and fail to call it out using the customers' name, but he testified he saw the cup on the counter, and when he asked Nowakowska if she had called out the order, she told him she had. Vaughan also testified that shift supervisors Gigi Hernandez and Leanne Bissell repeatedly witnessed similar issues with Nowakowska's drink presentation and reported that she was "slamming cups down." (Tr. 870–871). Hernandez, however, was not called to testify, and Bissell, who was called as a witness for the company, did not testify about this topic. Vaughan further testified he personally coached Nowakowska multiple times prior to October 23 about not slamming cups, but there is no documentation or other evidence to support that. Vaughan also testified Nowakowska became "combative" when he tried to coach her, but there is no reference to this in the warning. Regarding October 29, Vaughan appeared to testify by reading from the warning, as opposed to his independent recollection of what happened, and only when prompted did he later claim to have personally observed Hernandez coach Nowakowska about these issues.

[14] Brooke Hayne and Chloe Heldt both resigned from Starbucks in mid-October. (Tr. 257-258). According to the weekly schedules, Oak Killmon stopped working at Broad & Washington by mid-August.

[15] On September 16, Vaughan issued Bussiere a written warning for arriving over an hour late for work. A month earlier, Hippensteel issued Bussiere a coaching for the same conduct. (R. Exhs 10–11).

[16] For the week of September 30, Broad & Washington partners were collectively scheduled for a total of around 450 hours. By the week of December 1, they were scheduled for a total of around 220 hours.

[17] In late December, Starbucks increased Nowakowska's scheduled hours at Broad & Washington to about 28-29 hours a week, and that continued until her discharge. (GC Exh. 5).

[18] Seven others saw a reduction in hours. Two saw an increase (Shams and Siburt), which was unexplained.

[19] Vaughan testified he and Nowakowska spoke at some point regarding her reduction in hours. He testified they discussed the opportunity for her to pick up hours at other stores, the shift in the business, customer connection, and "all the things that surrounded that." (Tr. 898–899). Vaughan, however, did not refute, or even respond to, Nowakowska's testimony that he told her he would not schedule her if she was "coming into the store and causing a disruption." This omission is striking because it is alleged in the complaint as an independent 8(a)(1) violation. Under the circumstances, I do not find his failure to address this to be an oversight, but rather an admission.

[20] By picking up these shifts at other stores, there is no dispute Nowakowska suffered no overall loss of hours/pay while her hours at Broad & Washington were reduced. The Acting General Counsel, however, contends it is discriminatory because it is more burdensome to pick up shifts than to be scheduled due to the fact the former is an *ad hoc* process based on the store's need and the partner's availability. Additionally, if a partner agrees to pick up a shift at another store, they cannot use sick time if they become ill and unable to work.

going to be disciplined that day and had arranged to have a few supporters nearby secretly listening in on the meeting. The warning stated as follows:

> On 10/24/19 Store Manager coached TJ for not wearing hat and apron on back line.
> On 11/1/19 store mgr received email from another SM stating when he was [i]n Broad and Washington that morning TJ was behind the line making drinks without hat or apron. Store Manager David coached TJ.
> On 11/20/19 SM David walked [i]n at 7am TJ was behind the line without hat making drinks. TJ was again coached.
> At least 2 times per week TJ has not properly stocked the pastry case during opening routines. TJ had to be coached multiple times per week to display breakfast sandwiches. This in turn negatively [i]mpacts customer experiences and sales growth because customer[s] believe we do not have product available.
> On October 29th TJ received a verbal warning multiple times throughout his shift that he [i]s to not leave the sales floor. He then continued to violate this verbal warning.
> November 16th TJ was coached on staying on the sales floor for his scheduled coverage shift. TJ walked away from the warming station at least three times and walked to the [back area], causing warming to become backed up. Thus, leading to a negative customer experience. TJ. was asked on multiple occasions why was he leaving the floor. TJ. stated, "He was not aware he was not supposed to leave the floor." TJ. has been coached on multiple occasions that during peak hours he [i]s [i]n a planted position and is not supposed to leave his station(s) unless to hand off warming items or brew coffee.
> * SM has been approached by several partners stating that TJ behavior has become a distraction on the floor.

(Jt. Exh. 15) (Asterisk added to reflect handwritten star on document).

Before discussing the warning, Dragone addressed an October 29 text message Bussiere sent to Vaughan about an alleged interaction that occurred that day between the two of them. (GC Exh. 8) In the text, Bussiere stated that while the two were working behind the bar, Vaughan's hand inadvertently brushed against Bussiere's leg, and Vaughan reacted by repeatedly warning Bussiere not to "push" him. Bussiere denied pushing Vaughan and questioned whether everything was okay with Vaughan. Vaughan forwarded Bussiere's text to Dragone, stating "that no such interaction, or anything close to it, actually happened." (GC Exh. 37(t)). Dragone later spoke to shift supervisor Gigi Hernandez who worked on October 29. He later asked Cora Siburt, a barista who worked that day, to provide a statement about what she observed. Siburt sent Dragone an email on November 1 supporting Vaughan and accusing Bussiere of "fake drama." (Jt. Exh. 14). She also stated Bussiere made her feel uncomfortable trying to whisper in her ear about what had happened with Vaughan while she was working. At the November 21 meeting, Dragone told Bussiere he had investigated the claims in Bussiere's text and determined they were false. He did this without speaking to Bussiere or Nowakowska, who also worked that shift.

Dragone then went through the warning. He handwrote a star next to the point about Bussiere being a distraction on the floor. He told Bussiere that partners reported his behavior and complaining about Vaughan distracted them from performing their jobs to the point that they felt they needed to voice those concerns to both the store manager and the district manager. Bussiere stated he had the right to talk about working conditions with co-workers. Dragone responded that when Bussiere applied to work for Starbucks he agreed to the Barista Approach and the expectations that partners create a positive work environment for one another and a warm and welcoming environment for customers. Bussiere questioned whether this was not an unfair labor practice. Rose reiterated he was to follow the Barista Approach.

November 25 Demonstration Presenting Unfair Labor Practice Charge

On November 25, Philadelphia Baristas United filed an unfair labor practice charge alleging that Starbucks had taken adverse actions against Nowakowska and Bussiere in retaliation for their statutorily protected activities. Later that day, Bussiere and Nowakowska led a group of about 20 supporters into Broad & Washington and handed Dragone a copy of the charge and copies for the other managers. (GC Exh. 22). Some participants used their cell phones to record or take photos of the demonstration. Dragone told Bussiere and Nowakowska he would talk with them, but the others did not have permission to video or take photos in the store. After handing Dragone copies of the charge, the group left. The demonstration lasted less than five minutes. Bussiere and Nowakowska then handed out flyers to people outside of the store. The flyer demanded that Starbucks cease its "unequal discipline, reduction of hours, and otherwise retaliatory treatment toward organizers and activists." (GC Exh. 28).

Video of the November 25 in-store demonstration was posted on public social media platforms. Starbucks Media Relations Department regularly monitored these platforms.[21]

November 27 Written Warning to Nowakowska

On around November 27, Nowakowska was working in the morning. Vaughan assigned her exclusively to warm food and brew coffee, which is a "planted position" she had never been assigned before. Vaughan was working the register. At one point, he told Nowakowska she was not bringing the food out fast enough, and it was getting cold. He told her to not put food in the oven before the order was rung up, and to bring food to the customers before putting another item into the oven. She began doing that. Ten minutes later, Vaughan told her she was not using the ovens efficiently, and she needed to put the food in the oven before running it to a customer, which was the opposite of what he previously said. She then changed what she was doing to follow his instructions. When Nowakowska went to brew coffee, Vaughan took over warming the food, telling

[21] Bussiere also created a Twitter account with the username @phillybarista and reposted earlier material from the Instagram accounts, as well as about the November 25 demonstration. He also posted using the hashtags #PhillyBaristaJustice, #JusticeforBroadandWashington, and/or #JusticeforStarbucks. As with the public Instagram account, Starbucks monitored this public Twitter account. (Jt. Exh. 21).

her she was not warming efficiently enough. Vaughan did this for several minutes and then observed Nowakowska. She had just finished several food orders, and a new order ticket came out. Vaughan then told her she had been letting this ticket sit there for too long and she needed to do better. Nowakowska looked at the ticket, and then checked the time, and both said 8:05 a.m. Nowakowska told Vaughan that it was 8:05. Vaughan did not respond. Nowakowska said it again and louder, "David, it's 8:05." Still no response. She then saw Vaughan head to the back area.

Vaughan later sent an email to Dragone stating he wanted to issue Nowakowska a warning for her conduct that day, both for her performance and for yelling at him in front of customers. He prepared a draft final written warning and sent it to Dragone for his review. (Jt. Exh. 9).[22] Dragone responded that rather than issuing Nowakowska the warning, Vaughan should provide her with the food warming policy and the communications policy and review them with her.[23] As discussed below, Vaughan later met with Nowakowska on December 18 to present her with these policies.

December 2 Newspaper Article, Distribution, and Social Media Posts

On December 2, the *Philadelphia Inquirer* published a lengthy article, entitled "Starbucks Workers Organize for Rights," that focused on Bussiere and Nowakowska and their efforts to raise collective concerns and organize a union to represent Starbucks employees in the Philadelphia area. (GC Exh. 22).[24] It provided a detailed summary of the events, starting with the July 22 in-store demonstrations and continuing through the November 25 charge and in-store demonstration. It addressed how Bussiere, Nowakowska and other partners were trying to organize a union and address workplace issues at downtown Philadelphia stores, as well as the company's response of disciplining Bussiere and Nowakowska.

Bussiere later posted the article on various public social media sites. Nowakowska also distributed paper copies at several Starbucks locations "to spread the word about the organizing effort and to make other baristas aware of what was happening." (Tr. 202). Starbucks' Media Relations Department began tracking public comments about the article, noting that the sentiment behind the mentions were mostly informational "but in support of the barista movement." (GC Exh. 37(o)).

December Conversations and Emails about Bussiere at Civic Center Blvd. Store

On December 3, Bussiere picked up a shift at the Penn Medicine Starbucks store at 3400 Civic Center Blvd. in Philadelphia. When he arrived, Bussiere met the store manager, Navy Ros, who asked what store he was from. Bussiere told Ros he was from Broad & Washington, and she then recognized his name from the December 2 *Philadelphia Inquirer* article. Ros then left the floor to the back room before leaving for the day. Ros listened to Bussiere out front asking the shift supervisor some questions, and she heard them discussing the Philadelphia Fair Workweek Ordinance. Ros heard Bussiere ask the shift supervisor what she knew about it, and the supervisor responded she only heard a little about it so far, but she knew supervisors had to make sure partners clock in and out on time. Ros later left for the day without commenting about their discussion.

While at the store, Bussiere posted a copy of the *Philadelphia Inquirer* article on the store's public community board. This board typically is used to post free or company-sanctioned community events or activities. Ros saw the article on the board when she next worked, two days later. Ros then saw Brian Dragone at a city-wide manager meeting. Dragone was Ros's acting district manager at the time. She told him about the article posted on the community board and Bussiere working at her store a few nights earlier. Dragone asked Ros to prepare an email about what happened that night. Ros later spoke with the shift supervisor and another barista that worked that night to determine what happened and what was discussed. On December 13, Ros emailed Dragone the following summary of those conversations:

> I later asked Suvi [the shift supervisor] how the rest of her night went and how she felt about working with TJ.
>
> She stated that he worked; he kept busy. She said that the conversation that I overheard was pretty much the extent of it. TJ also asked her how she felt about her manager and how the hours were here. He also asked general questions about how things were going in our district and how many hours people were getting, scheduling, if we saw a labor reduction, if people's hours were cut. Her exact words were that she only felt "slightly weirded out by it" and she essentially shut down the

[22] In the November 27 warning, Vaughan wrote multiple guests were waiting for food while Nowakowska was assigned to the warming station. He and shiftSsupervisor Gigi Hernandez attempted to coach her on properly using both warming ovens, but she did not respond, causing further delays. When Vaughan tried to coach her again, according to the form, "she became combative and raised her voice loudly stating 'David, I heard you the first time.' Echo then continued to call my name in a loud tone causing everyone in the store to turn our way." (Jt. Exh. 9). I have credited Nowakowska over Vaughan for the reasons previously stated.

On April 1, 2020, Starbucks submitted a position statement during the Region's investigation stating it issued the November 27 warning to Nowakowska, and it attached a copy. (GC Exh. 41). At the hearing, Vaughan and Nowakowska confirmed the warning was not issued. Starbucks failed to explain this discrepancy.

[23] Vaughan testified that Dragone suggested they try to coach Nowakowska rather than issue her the warning. However, Dragone's December 3 "Executive Summary-Broad & Washington Philadelphia" email noted the November 27 warning was submitted to Partner Resources and delivery (to Nowakowska) was pending its approval. (GC Exh. 37(d)). The record does not reflect whether Partner Resources approved, but I suspect it was not; hence the three-week delay between the November 27 event and December 18 meeting to go over the policies.

[24] The article addresses how the organizing efforts had broadened beyond Broad & Washington, and that Nowakowska and Bussiere were meeting weekly with other area partners to discuss workplace issues, including scheduling, discipline, and dealing with "emotional labor," and how they could work together to demand changes. The article further noted how the organizing effort was unusual because it lacked the institutional support of a traditional union or labor group. (GC Exh. 22).

> conversation and that was it. He did not bring anything else up for the rest of the night.
>
> Malia is another barista that worked that night. She said that TJ was very chatty. I asked if he distracted her from her work and she said no. He introduced himself to Malia and initiated the conversation. I asked what did they talk about. She said, "Just some drama going on in their store." She said he told her that he and his partners either got someone fired or "kicked out." She said she was just like, "ok" and went about her business. He did not bring it up anymore.

(GC Exh. 36).[25]

December 18 Meetings and Signing of Policies

On December 18, Vaughan and Jean Hippensteel met with Nowakowska at Broad & Washington to present her with a copy of the "sequencing warmed food" policy and the "how to communicate" policy. (GC Exh. 23-24). Hippensteel and Vaughan both informed Nowakowska that this was not discipline; they simply wanted to inform her about the policies and to go over them with her because of the events of November 27. Nowakowska signed the forms and the meeting ended.

Vaughan and Hippensteel then met separately with Bussiere and presented him with a copy of the "attendance and punctuality" policy and the "community board" policy. (GC Exhs. 25-26). They told Bussiere the conversation was not a corrective action and that they just wanted to make sure he was clear on the policies. They discussed a recent situation in which Bussiere inadvertently agreed to cover two shifts at another store at the same time, resulting in the store being short an employee. Bussiere acknowledged his error and signed a copy of the attendance policy. Bussiere, however, questioned why he was being asked to sign the "community board" policy. Vaughan responded that they wanted to make sure he was aware of the policy. Hippensteel explained that items posted on the public community boards must first be approved by the store manager. No mention was made of the posting of the *Philadelphia Inquirer* article at the Civic Center Blvd. store. Bussiere refused to sign the policy, stating he wanted to understand it better. No further action was taken.

January 18 Discharge of Another Employee

On the morning of January 18, 2020, Bussiere was working at Broad & Washington with another barista named Kai Ayers.[26] Nowakowska also was at the store but not clocked in yet. At around 9 a.m., Hippensteel and Vaughan came into the store and headed to the back area. Vaughan asked partners not to enter the back area because they needed to meet privately with a partner. Shift supervisor Leanne Bissell also told partners that once Vaughan and Hippensteel were in the back, nobody could go in there.

Nowakowska later noticed that Ayers was no longer working behind the counter, and she spoke with Bussiere, and they were both concerned that Ayers was in the back, possibly receiving discipline. Nowakowska texted Ayers that they were "entitled to a witness" and she offered to "go back there." (GC Exh. 6). Ayers did not respond. A few minutes later, Ayers came out and reported they had been terminated for attendance. Nowakowska then talked with Ayers. The two of them went back to demand Ayers' termination form. Vaughan told Nowakowska she was not allowed in the back when she was not clocked in. Nowakowska pointed out that she had been in the back before when she was not working without anyone raising any issue. Vaughan again said it was not allowed. Nowakowska asked why Ayers had been terminated for using legally protected sick leave. Vaughan refused to answer.

While Vaughan and Hippensteel were meeting with Ayers, Vaughan claims Bussiere attempted to enter the back area. Bussiere and Nowakowska both deny this.[27] Surveillance footage does not reflect where Bussiere was when the interruption occurred. (GC Exhs. 15 and 43).[28]

A few days later, Bussiere was in the back area taking photos of the daily records book, which is a book that contains time punches, sick leave usage, and personal time-off usage. Vaughan saw this and told Bussiere he could not take pictures of these logs because they contain partners' personal information. Despite this warning, Bussiere was caught again taking pictures of the daily record book on January 22.

Vaughan's January 25 "Venting" Email to Dragone

On January 25, Vaughan sent Dragone an email "venting" about his experiences supervising Nowakowska and Bussiere.

[25] Ros was not questioned about the details or context of these conversations, and the shift supervisor and barista she spoke to were not called to testify. Ros's email is the only evidence presented regarding those conversations.

[26] Ayers, who was not called to testify, prefers the non-binary "they" pronoun.

[27] Vaughan initially testified he saw Bussiere enter the back area, but his testimony changed on cross examination. On direct examination, he testified "[Bussiere] came to the back door where, like, he didn't come in the back room, but he came into, like, towards the, to the back door after I asked him, maybe two to three times not to come back there." (Tr. 836). On cross examination, he testified "Echo was at the door, and I had to constantly tell TJ to not come to the backroom … TJ was questioning me, you know, and attempting to come to the back, but Echo was the one at the door." (Tr. 1030). Hippensteel testified someone tried to enter the back area but she could not see who from where she was standing. Bissell recalled at some point seeing Bussiere in the back area. (Tr. 1301-02). She stated "I didn't see, like, the door being, opened, but I did, like, see him -- because it's a window. So I saw him, like, I guess, getting a cup or getting some supplies for the front, even though we had asked him not to go back there." (Tr. 1313). A partner resources representative later called Bussiere about the incident, and Bussiere denied going in or attempting to go into the back area while Vaughan and Hippensteel were meeting with Ayers.

[28] The time-stamped video footage from the back area shows that, between 9:35:43 and 9:35:54 a.m., Vaughan leans back and turns his head toward the door twice, a few seconds apart, to talk to someone; the second time he holds his hand up indicating to someone not to enter. The video does not show to whom he was speaking. (GC Exhs. 15). Bussiere appears at the registers starting at 9:34:00 a.m., wearing a striped shirt and hat. He no longer appears on video starting at 9:35:00, and he reappears at 9:36:30 a.m. Nowakowska appears on camera between 9:35:44 and 9:35:50 a.m. on the customer-side of the counter. She appears headed in the general direction of the door to the back area. The video footage from behind the registers shows a third, unidentified partner who appeared to turn and head toward the back area during this exact time frame. (GC Exh. 43).

The email states in relevant part:

> [E]very time I try to coach a partner either or both TJ & Echo interject themselves & call themselves protecting the partner it has gotten to the point that every [time] i give a corrective action or coach the partners go to TJ or Echo and report me to them … Brian i'm telling you this has gotten outta hand TJ & Echo constantly ignore me & pretend like they don't hear me when I talk they disrespect me on a regular basis partners have come to me and express concern about their behavior TJ & Echo tell the customers lies & negative things about me & try to turn my team against me this is all for no reason other they don't want A store mgr they have told me they like the store better with no mgr this week … Brian its clear that neither one of [them] respect the missions and values of Starbucks one of the partners showed me a instagram post put by TJ on 1/20/20 where TJ referencing Starbucks As a monster he is fighting Brian I don't think you really understand how much TJ hates Starbucks TJ always expresses his very negative views about Starbucks & honestly TJ & Echo think they can do whatever they want & just threaten to call NLRB if anybody says anything to them I'm more than willing to deal with the backlash that would come with terminating the two of them because it doesn't matter if we terminate now or 1 year from now they will still call NLRB & spew vicious lies just like they do now while we pay them & give them benefits these two people obviously hate the brand and do everything they can to tarnish the name STARBUCKS.

(GC Exh. 37(j)).

Nowakowska's Discharge

On January 26, Dragone and Vaughan notified Nowakowska she was being discharged. The written notice stated that on January 16 and 22 Nowakowska treated customers in a hostile manner, including arguing and making demeaning statements, such as "would you like to make your beverage yourself?", "can you read?", and "now you want free butter?" The notice states that Nowakowska responded poorly when the shift supervisor addressed the situations with her by arguing about it in front of customers and refusing to stop. The notice also states Nowakowska was previously coached regarding customer service on October 23 and 29, and her behavior has not improved. (Jt. Exh. 12).

On around January 16, Nowakowska was making drinks at the bar with barista Cora Siburt. A regular customer came in and ordered a flavored iced tea drink with light ice. The customer was very particular about the amount of ice. As Nowakowska made the drink, she showed the customer the shaker to make sure it had the right amount of ice in it. She then mixed and poured the drink and gave it to the customer, without incident.[29]

On about January 22, Nowakowska was working at Broad & Washington with shift supervisor Leanne Bissell. A customer approached Nowakowska's register and ordered a tea with his "January mug." The January mug is a holiday promotional item Starbucks sells in December that entitles the customer to free coffee or tea for the entire month of January. Nowakowska was going to take the customer's mug to fill it with water and the tea bags when the customer told him his mug already had coffee in it and he wanted the tea bags for later. Nowakowska told him the policy was the free beverage had to go in the mug. The customer argued that he paid for the mug and should be able to get the free tea bags to use later. Nowakowska attempted to explain the policy and the reasoning for it. At some point, Bissell intervened and told Nowakowska to just give the customer the tea bags. As Nowakowska went to get the tea bags, the customer also asked for two pads of butter. Butter is usually rung up and provided complementary to customers who purchase a food item. The customer, however, had not ordered any food, and Nowakowska commented, "now you want free butter." Bissell gave the customer the pads of butter. After the customer left, Nowakowska wanted to speak with Bissell about what happened. Bissell told her they could talk about it later after they helped the customers in line. Nowakowska stated she wanted to talk about it now. Bissell said, "no, we will talk about this after." Bissell did not speak with Nowakowska later. Instead, Bissell spoke to Vaughan and later prepared an email for Dragone summarizing what occurred. (Jt. Exh. 10). At the hearing, Nowakowska admitted saying to the customer "now you want free butter?" and acknowledged the statement was not consistent with good customer service.

It is unclear when and under what circumstances Starbucks alleges Nowakowska said to a customer "can you read?" Nowakowska denies making this statement. The only evidence presented about it was from Vaughan, who did not personally witness it. He testified he believed he heard from Siburt that a customer was complaining about her drink and wanted

[29] According to an email Siburt later sent to Vaughan on January 24, Nowakowska did "not take [these requests for lighter ice] well" and "asked the customer if she would like to make [the drink] herself" and "continued to make snarky comments and yell at [the customer], face to face" causing "a scene" while other customers were waiting in line. (Jt. Exh. 11). I credit Nowakowska over Siburt. As stated, Nowakowska had an honest and forthright demeanor with a clear and detailed recollection. Siburt, in contrast, had a guarded demeanor with an inconsistent recollection. Notably, there were significant discrepancies between her testimony and her January 24 email, suggesting possible embellishment or complete fabrication. For example, after angrily asking the customer if she wanted to make the drink herself, Siburt testified that Nowakowska slammed the shaker down and walked off the sales floor, leaving Siburt to finish making the drink and apologize to the customer, which is not at all reflected in Siburt's email. It also was not corroborated by any other evidence. Presumably, if Nowakowska had walked off the floor, it likely would have been captured by the surveillance camera behind the register, but surveillance footage from that day was not introduced into evidence. Siburt also testified that after Nowakowska walked off the floor, another partner came and helped make drinks for the other customers in line. But Siburt could not recall who this partner was, and Starbucks did not present any other witnesses to corroborate Siburt. Finally, Siburt, who remains employed by Starbucks and has since been promoted to supervisor, appeared to be biased against Nowakowska and Bussiere. She sent emails complaining to management about Nowakowska and Bussiere's "negative energy" and how their annoying and distracting complaining about Vaughan was having a deleterious impact on partner morale at the store.

Nowakowska to make certain modifications to it, and Nowakowska told the customer she did not request any modifications when she ordered it. The customer demanded that she had, and Nowakowska turned to the customer (presumably referring to the drink order) and said, "can you read?" (Tr. 1013-1014). Siburt was never questioned about this, and there is no reference to it in her email statement to Dragone. In weighing the evidence, I credit Nowakowska that she did not make the alleged statement.

January 29 Hippensteel and Korman's Presence at Broad & Washington

On January 29, following her discharge, Nowakowska went to Broad & Washington to meet with Bussiere. She sat at the long community table near the front while Bussiere was working. Later, Jean Hippensteel arrived to work with Vaughan on a project at the store. She sat at the table with two chairs near the back. At some point, Sean Korman, a store manager from the Broad & Jackson store, arrived at Broad & Washington. Korman briefly spoke to Hippensteel. The two worked together on civic outreach programs for the company. They regularly met at Broad & Washington because it was about halfway between their two stores, and it generally had more available seating than their stores. They were not scheduled to meet on this day, and the record does not reflect why Korman was there.

When Bussiere finished working, he sat across from Nowakowska at the large community table. Korman later sat at the other end of the table with his laptop computer. About 20-30 minutes later, Hippensteel finished helping Vaughan and went and sat across from Korman and began talking to him.

Bussiere and Nowakowska were at one end of the table, and Hippensteel and Korman were at the other end, with about six feet between them. Other than saying hello, Korman and Hippensteel did not speak or otherwise interact with Bussiere or Nowakowska. Bussiere and Nowakowska left the table and the store about 20-30 minutes after Hippensteel sat down.

February 5 Written Warning to Bussiere

On February 5, Vaughan met with Bussiere and issued him a written warning for insubordination, stating that:

> On 1/18/2020 TJ attempted to go into the back of the store while his store manager, David Vaughn Jr., was conducting a private conversation with another store partner which was of a sensitive nature. This occurred after the SM David and the shift supervisor on duty asked TJ to not do so.
>
> On 1/22/2020 TJ took pictures of the store's punch communication log. TJ took this action despite being specifically told by his store manager not to do so on 1/20/2020. The Daily Records book that the punch communication log is contained within also includes a disclaimer that reproducing it is against policy and that policy is also stated in the Partner Guide.

(Jt. Exh. 17).

The warning referenced the November 21 warning about insubordinate behaviors, including Bussiere's not following the store manager's direction. The warning concluded that further violation of Starbucks' policy or procedures will result in further disciplinary action up to termination.

February 17 Statements By Bissell to Bussiere

On February 17, Bussiere was working at Broad & Washington with shift supervisor Leanne Bissell and an unidentified barista from the 18th & Spruce store. While Bussiere and the other barista were behind the counter, they had a conversation by the pastry case. The barista asked Bussiere questions about the July and November demonstrations, and Bussiere explained what happened. They continued to discuss events at other stores in the area, including a lawsuit that a partner at the 13th & Chestnut store filed against the company alleging race discrimination.

Bissell overheard their conversation and texted Vaughan on how to address Bussiere's "negative" conversations and behavior. Vaughan responded that Bissell had the right to speak to Bussiere about having positive energy and conversations, and that conversations on the floor should align with Starbuck's mission and values. Bissell followed Vaughan's instructions and told Bussiere he could not talk negatively about store managers or lawsuits while on the clock, and that he needed to be having positive conversations.

On February 19, Bussiere asked Vaughan about what Bissell had said to him. Bussiere secretly recorded the conversation using his phone. The relevant portion of the conversation was as follows:

> BUSSIERE: Yesterday, Leanne took me to the back and told me that I'm not allowed to say anything negative about [Starbucks] management while I'm on the clock. Is that true?
> VAUGHAN: Whenever you're an employee you're supposed to be having upbeat conversations that align with Starbucks's missions and values. Part of your— When you clock in, you agree to work in a manner that align with Starbucks's mission and values. So, whatever it is that you're doing or saying needs to align with that because that's part of what you signed up to do.
> BUSSIERE: Okay. But if I'm talking about, like, the workplace, and if it's, like—
> VAUGHAN: If there's something specifically going on in the store, and the other partners— and you guys wanna talk about it, specifically, then that's fine. You can't bring out drama from another store, and negativity, drama about other people and other managers in the same room of one store, where you're talking (inaudible), talking to the customers, (inaudible), because what you're doing is causing just a realm of unnecessary drama.

(GC Exh. 12).[30]

[30] Starbucks allows partners to talk about personal matters, life outside of work, cultural events, the weather, etc. while working. The only other evidence of Starbucks limiting talk while working involved a different store where the partner was told by her store manager not to talk about things pertaining to wages, how partners were treated, or how partners don't get enough hours, because the manager did not want customers thinking partners did not enjoy working for Starbucks. (Tr. 735–736).

Bussiere's Discharg

In early February, Nowakowska shared with Bussiere a rumor she heard from another partner that supposedly originated from Cora Siburt that Simon Allen, a barista at Broad & Washington, was going to be discharged. On about February 16, Bussiere was working with Allen. They discussed the recent discharges at the store, and Bussiere told Allen about the rumor he had heard about Allen being the next to be discharged. Bussiere testified he told this to Allen to give him the opportunity to ensure he would be financially stable if he was, in fact, discharged. He also asked Allen if he needed anything. (Tr. 461-462). On February 19, Allen spoke to Siburt about what Bussiere said, and Siburt denied making the statement.[31] Later, Siburt, who was upset by the accusation, spoke to Vaughan and emailed Dragone. She denied that she spoke to Bussiere or said anything about Allen being terminated. (Jt. Exh. 18).[32]

Partner Resources spoke with Allen and Siburt. When it attempted to contact Bussiere to get his side, Bussiere hung up the phone and did not respond to follow-up calls.

Eckensberger made the decision to discharge Bussiere even though he seldom gets involved in discharge decisions. He spoke with Dragone to gather information, who, in turn, had spoken to Vaughan.[33] Following his investigation, Eckensberger concluded that knowingly spreading a false rumor about another partner's termination warranted discharge.

On February 26, Dragone and Rose met with Bussiere to present him with a notice of separation. It stated that Bussiere was being discharged for his statements to Allen, specifically "[k]nowingly communicating false information to the barista about his employment was inappropriate, disrespectful, and cruel. It was also disruptive to operations in that the barista was on duty serving customers at the [point of sale] at the time [Bussiere] was speaking to him about him losing his job. [Bussiere] has been previously counseled and disciplined about disrupting operations and partners while they are working." (Jt. Exh. 19). This refers to the November 21 written warning Starbucks issued to Bussiere.

Analysis

Alleged Unlawful Statements, Surveillance, Interrogation, and Restrictions

Paragraphs 4-9, and 13 of the amended consolidated complaint allege that Starbucks, through Marcus Eckensberger, David Vaughan, Jr., Brian Dragone, Navy Ros, Jean Hippensteel, Sean Korman, and Leanne Bissell, independently violated Section 8(a)(1) of the Act by their statements or conduct. Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. Section 7 guarantees employees 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 bargaining or other mutual aid or protection. The concept of "mutual aid or protection" focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). Concerted activity includes that which is engaged in with or on behalf of other employees, as well as where an employee brings truly group complaints to the attention of management. See *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

In deciding whether an employer's statement or conduct violates Section 8(a)(1), the Board applies the objective standard of whether it would reasonably tend to interfere with the free exercise of an employee's statutory rights, and does not consider the motivation or actual effect. *Midwest Terminals of Toledo*, 365 NLRB No. 158, slip op. at 21 (2017), enfd. 783 Fed. Appx. 1 (D.C. Cir. 2019*); Farm Fresh Company, Target One, LLC*, 361 NLRB 848, 860 (2014). The threats in question need not be explicit if the language used by the employer or his representative can reasonably be construed as threatening. *NLRB v. Ayer Lar Sanitarium*, 436 F.2d 45, 49 (9th Cir. 1970). When applying this standard, the Board considers the totality of the relevant circumstances. *KSM Industries*, 336 NLRB 133, 133 (2001).

Paragraph 4 alleges that Starbucks violated Section 8(a)(1) when Eckensberger threatened Nowakowska and Bussiere that they should not make concerted complaints by telling them that "demand reply, demand reply" is "not within [Starbucks'] mission and values." The Acting General Counsel argues that

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On the same day Bissell had this conversation with Bussiere, she attempted to initiate a new break policy of asking partners to use a timer to track their ten-minute breaks. When it was time for Bussiere to take his break, he attempted to take the timer with him to the back area. Bissell told Bussiere she wanted to keep the timer at the front of the store. Bussiere later came out and told Bissell "Leanne, make sure to let me know when you go on break so I can time you." Bissell emailed Dragone about the incident. (R. Exh. 33).

[31] Allen was not called as a witness. Disciplinary records show that between December 2019 and January 2020, Allen received a coaching, a written warning, and a final written warning for repeated attendance issues. (R. Exh. 19).

[32] In the email, Siburt discussed the divisive impact she believed Bussiere was having in the workplace:

> I also watch my coworkers alongside me feel the same way. We are all slowly being pulled down. Leanne even had a panic attack this morning in the back when TJ tried to instruct her on how to do HER job. I hate the way I've been feeling, but most importantly, I'm very upset to see the way all of my partners are being affected as well.
>
> ….
>
> And I love David, and the baristas whom I work with. And to see them all breaking down slowly and struggling to remain happy and positive just because of one person is heart breaking to me. We are a strong team. I know we are. But it's becoming harder and harder for us to remain calm and feeling safe here.

(Jt. Exh. 18).

[33] Eckensberger also testified he spoke to others before making the decision to discharge Bussiere, but his vague and inconsistent testimony about the steps he took suggest he did not conduct a truly independent investigation, separate from the information he received from Dragone and indirectly from Vaughan, before making the decision.

Starbucks regularly uses the phrase "mission and values" in coaching or discipline to refer to principles the company considers most important, and to say that conduct does not align with the company's mission and values is akin to saying the conduct is unacceptable and will result in adverse action. The threatening nature of Eckensberger's statement is compounded by his earlier warning that partners involved in the July 22 demonstration needed to be "careful not to disrupt the code of conduct" and that their conduct was "on the verge" of violating company policy, suggesting that, while the company would not be punishing them for these concerted actions, it might discipline them for similar action in the future. Starbucks counters that Eckensberger was merely explaining the company would not cede to the group's demands---specifically to discharge Graves---without conducting an investigation and providing her with due process, because failing to do so would be inconsistent with the company's mission and values. It also argues any suggestion these statements were threats against collective action is belied by the fact the company responded to the partners' demands by promptly replacing Graves as store manager and implementing a new scheduling app to allow them to more easily swap shifts.

Based on the circumstances, I conclude Eckensberger's "demand reply, demand reply" statement was a veiled threat. As stated, he first warned that partners needed to be careful because their conduct on July 22 was on the verge of violating company policy.[34] The Board has found that "be careful" warnings regarding protected activities convey the threatening message that those activities would place an employee in jeopardy. *Gaetano & Associates Inc*., 344 NLRB 531, 534 (2005); *St. Francis Medical Center*, 340 NLRB 1370, 1383-1384 (2003); *Jordan Marsh Stores Corp*., 317 NLRB 460, 462 (1995). He then stated their July 25 "demands" were contrary to the company's mission and values. It is reasonable for a partner to conclude that continuing to pursue demands deemed contrary to the company's mission and values would result in adverse action, particularly where, as the Acting General Counsel points out, there is ample evidence of Starbucks disciplining partners for not complying with its mission and values. Eckensberger's statements convey frustration with partners continuing to make demands, rather than engaging in the "open dialogue" the company preferred.[35] Finally, I reject that Eckensberger was simply stating a preference for continued communication and due process. His demand reply, demand reply statement occurred right after Nowakowska recommended that the company should remove Graves *following* a third-party investigation—an investigation that presumably would involve both communication and due process for Graves. I, therefore, conclude that Eckensberger's statements violated Section 8(a)(1), as alleged.

Paragraph 5 alleges Respondent violated Section 8(a)(1) when Vaughan informed Nowakowska that he reduced her work hours because she engaged in protected concerted activities by telling her he was not going to schedule her if she was "coming into the store and causing a disruption." The only disruption Nowakowska engaged in up to this point was the July 22 in-store demonstration, which I conclude was protected activity. It is unlawful for an employer to suggest that concerted expressions of dissatisfaction with working conditions are inconsistent with continued—or, in this case, full—employment. See generally, *Stoody Company*, 312 NLRB 1175, 1175 (1993). Vaughan, however, did more than suggest. He directly stated that continued "disruptions" to protest working conditions would result in continued loss of scheduled hours. I, therefore, find the statement violated Section 8(a)(1), as alleged.

Paragraph 6 alleges Respondent violated Section 8(a)(1) when on November 21 Dragone required Bussiere to cease making concerted complaints about Vaughan when he told Bussiere that those complaints were a distraction and an annoyance to other partners, and that they needed to stop. Employees have a protected right to complain about a supervisor—even to seek their discharge—when the supervisor's conduct can affect their terms and conditions of employment. *Mitsubishi Hitachi Power Systems Americas, Inc*., 366 NLRB No. 108, slip op. at 17-18 (2018); *Calvin D. Johnson Nursing Home*, 261 NLRB 289 (1982), enfd. 753 F.2d 1078 (7th Cir. 1983). An employer cannot restrict or prohibit such conduct simply because it is annoying, disturbing, or unwelcome to co-workers. *Ryder Transportation Services*, 341 NLRB 761 (2004), enfd. 401 F.3d 815 (7th Cir. 2005). *Frazier Industrial Co*., 328 NLRB 717, 718-719 (1999), enfd. 213 F.3d 750 (D.C. Cir. 2000). Also, statements or solicitations do not lose that Act's protection simply because they are repeated or persistent, as long as they are not said in an offensive or threatening manner. *Frazier Industrial*, supra. See also *Consolidated Diesel*, 332 NLRB 1019, 1020 (2000), enfd. 263 F.3d 345 (4th Cir. 2001). Here, there is no evidence that Bussiere' s complaints about Vaughan were made in an offensive or threatening manner. I, therefore, find Dragone's blanket proscription against Bussiere complaining to other partners about Vaughan violated Section 8(a)(1).[36]

Paragraph 7 alleges Respondent violated Section 8(a)(1) on January 29 when Hippensteel and Korman engaged in surveillance of Nowakowska and Bussiere while the two were sitting and speaking at the large community table at Broad & Washington. Management officials may observe open and public union or protected activity on the employer's premises, without violating Section 8(a)(1), unless their behavior is "out of the ordinary," and thereby coercive. *Aladdin Gaming, LLC*, 345

[34] As discussed more fully below, I conclude the July 22 demonstration constituted protected concerted activity.

[35] Although not part of the objective evaluation because it was not known to Bussiere or Nowakowska, this frustration was echoed by Melissa Maimon in her October 24 email to Dragone about questions from partners at Broad & Washington in which she commented, "It feels like the energy in the store is ramping up again with partners looking to add 'demands' to their work environment without wanting to have real conversations about them. I think it will get a little dicey over the next few weeks . . . ." (GC Exh. 32).

[36] Dragone discussed Bussiere's accusations about Vaughan on October 29, and found those claims were false, but the proscription he gave to Bussiere during the November 21 meeting was not limited to "false" complaints; it covered all complaints. As such, it is overbroad and unlawful.

NLRB 585, 585-586 (2005), petition for review denied 515 F.3d 942 (9th Cir. 2008); *Sands Hotel & Casino, San Juan*, 306 NLRB 172 (1992), enfd. sub nom. mem. *S.J.R.R., Inc. v. NLRB*, 993 F.2d 913 (D.C. Cir. 1993); *Arrow Automotive Industries*, 258 NLRB 860 (1981), enfd. 679 F.2d 875 (4th Cir. 1982). In determining whether an employer's surveillance is unlawful, the Board considers indicia of coerciveness, which include the duration of the observation, the employer's distance from its employees while observing them, and whether the employer engaged in other coercive behavior during its observation. *Aladdin Gaming*, supra at 586. Ultimately, the test is an objective one and involves a determination as to whether the employer's conduct, under the totality of the circumstances, would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their rights guaranteed under Section 7. *Sage Dining Services, Inc*., 312 NLRB 845, 856 (1993); *Brown Transportation Corp*., 294 NLRB 969, 971–972 (1989).

The Acting General Counsel argues Korman and Hippensteel acted out of the ordinary by sitting at the table with Nowakowska and Bussiere when the table in the back of the store where Hippensteel was sitting was available. I do not agree. Hippensteel credibly testified she and Korman regularly met at Broad & Washington to discuss civic projects they worked on together for the company, and they would, at times, sit at the large community table, which is open and available for anyone to use. Even though Hippensteel and Korman were not scheduled to meet on the day in question, Hippensteel was there to help Vaughan, and Korman came into the store. I do not find Korman's presence or sitting at the community table, or Hippensteel later sitting at that same table as Korman and having a conversation, to be out of the ordinary. I also find under these circumstances they had no obligation to avoid employees who *may* have been engaged in protected activity in public. See generally, *Gossen Co.*, 254 NLRB 339, 353 (1981); *Stokely Foods, Inc.*, 91 NLRB 1267, 1281 (1950); *Andrews Co.*, 87 NLRB 379 (1949).

The Acting General Counsel cites to *T-Mobile USA, Inc*., 369 NLRB No. 50 (2020) and *Hawthorn Co*., 166 NLRB 251 (1967), which I find inapposite. Those cases involved the presence of supervisors in employee lunch or break areas, not in the seating area of a public establishment. Those cases also involved coercive statements or conduct; neither of which exists here. Korman and Hippensteel sat at the opposite end of the table—approximately 6 feet away from Nowakowska and Bussiere—and they kept to themselves. There is no evidence Hippensteel or Korman engaged in any conduct toward Nowakowska or Bussiere suggesting they were listening to or monitoring their conversation or activities. For these reasons, I find no violation of Section 8(a)(1).

Paragraph 8 alleges Respondent violated Section 8(a)(1) on February 17 when Bissell prohibited employees from concertedly complaining with others about management and their terms and conditions of employment during work time while permitting employees to talk about other work and non-work subjects.[37] The Acting General Counsel argues the violation occurred when Bissell told Bussiere that he could not talk negatively about store managers or lawsuits while on the clock, and that he needed to be having positive conversations.[38] An employer violates the Act when it prohibits employees form discussing statutorily protected activities but allows them to discuss other subjects unrelated to work, particularly when the prohibition is enforced only in response to specific protected activity. *Orchids Paper Products Co*., 367 NLRB No. 33, slip op. at 3 (2018); *Jensen Enterprises, Inc*., 339 NLRB 877, 878 (2003). There is no dispute Starbucks allows partners to discuss non-work-related matters, including personal matters, life outside of work, cultural events, and the weather, while on the clock. Additionally, the only restriction Starbucks placed on these discussions appears to have been in this instance and another instance where a partner at a different store attempted to discuss issues with her co-workers about their wages, hours, and working conditions.[39] Based on the foregoing, I find Bissell violated Section 8(a)(1), as alleged.

Paragraph 9 alleges Respondent violated Section 8(a)(1) when on about February 19, Vaughan prohibited employees from concertedly discussing their terms and conditions of employment during work time while permitting employees to talk about other work and non-work subjects. The Acting General Counsel argues the violation occurred when Vaughan spoke

[37] The Acting General Counsel does not allege that Starbucks maintains any rule or policy restricting partners from negative conversations or speaking negatively about the company. Cf. *Wynn Las Vegas*, 369 NLRB No. 91 (2020).

[38] The Acting General Counsel alleges, and Starbucks denies, that Bissell is an agent within the meaning of Sec. 2(13) of the Act. The Board applies the common-law principles of agency to determine whether an employee's statements or conduct are binding on their employer. *Mastec North America, Inc*., 356 NLRB 809, 809-810 (2011); *Pan-Oston Co*., 336 NLRB 305, 306 (2001). Under common law, an agency relationship is established by vesting an agent with actual or apparent authority. *A.D. Conner Inc*., 357 NLRB 1770, 1790 (2011). In addition, an employer may be responsible for an employee's conduct if the employee is "held out as a conduit for transmitting information [from the employer] to the other employees." *D & F Industries Inc*., 339 NLRB 618, 619 (2003). The test for determining whether an individual is an agent of the employer is whether, under all the circumstances, employees would reasonably believe that the individual in question was reflecting company policy and speaking and acting for or on behalf of management. *Southern Bag Corp*., 315 NLRB 725 (1994). In this case, Bissell was acting as an agent of Starbucks when she told Bussiere he could not talk negatively about store managers or lawsuits while on the clock, and he needed to be having positive conversations. She made those statements as a shift supervisor, and shift supervisors regularly act as a conduit of information between management and employees, particularly regarding job performance. Also, Vaughan authorized Bissell to speak to Bussiere and told her exactly what to say to him. When Bussiere spoke to Vaughan two days later, Vaughan was aware of the situation and essentially adopted or ratified Bissell's statements. I, therefore, find Bissell was acting as a 2(13) agent when she spoke to Bussiere on this topic.

[39] Bissell testified that Bussiere and the other partner stopped working during their discussion. Bussiere denies this. The Act does not afford employees the right to engage in statutorily protected activities during work time that would interrupt or interfere with work anymore than their discussions during work time of other nonwork-related subjects. However, the restriction Bissell imposed on Bussiere was not limited to when the discussion interrupts or interferes with work, but rather applied to whenever he was on the clock.

with Bussiere and told him that whenever he was on the clock he needed to have "upbeat conversations that align with Starbucks's missions and values." When asked about conversations about the workplace, Vaughan said that if there was something specifically going on in the store, and the other partners wanted to talk about it, then that was fine, but he was not permitted to bring out "negativity, drama about other people and other managers [from other stores] . . ." There is no dispute that Bussiere was soliciting involvement and interest in collective action from partners at Broad & Washington, as well as partners at other stores. One of the collective concerns in the July 22 letter and July 25 email was alleged discrimination against partners, and there were social media posts on the group's Instagram account regarding possible discrimination. When Bussiere was speaking with this other partner, one of the topics was a discrimination lawsuit filed by a partner at another store against Starbucks, and Vaughan clearly alluded to that discussion as the type that could not occur while on the clock. When an employer permits talk about non-work subjects while on the clock, it cannot limit talk about protected subjects to only those subjects it finds acceptable to discuss. I conclude Vaughan did just that, in violation of Section 8(a)(1).

Paragraph 13(a) alleges Respondent violated Section 8(a)(1) when on about December 3, store manager Navy Ros violated Section 8(a)(1) by engaging in surveillance of employees at the 3400 Civic Center Blvd. store to discover their concerted activities. The Acting General Counsel argues this occurred when Ros secretly listened from the back room as Bussiere talked with the shift supervisor out on the sales floor about the implementation of the Philadelphia Fair Workweek Ordinance. As stated, an employer engages in unlawful surveillance when it monitors employees' protected activity in a manner that is "out of the ordinary," even if the activity is conducted openly. See, e.g., *Loudon Steel, Inc*., 340 NLRB 307, 313 (2003). The Acting General Counsel argues Ros acted out of the ordinary by deliberately and covertly eavesdropping on Bussiere' s conversation. I agree. After realizing who Bussiere was from the newspaper article, Ros waited around in the back area and listened in as he spoke with the shift supervisor, unbeknownst to either of them. Ros later talked to the shift supervisor and explained what she overheard from her discussion with Bussiere and inquired about what, if anything, else they had discussed. Ros made this inquiry to report back to Dragone about what was discussed. Under these circumstances, I find Ros's statement to the shift supervisor about what she overheard from her discussion with Bussiere, a known union activist, reasonably established that partners' activities were under surveillance, in violation of Section 8(a)(1).

Paragraph 13(b) alleges Respondent violated Section 8(a)(1) between December 3 and 13, when Ros interrogated employees about their protected concerted activities, specifically when she questioned the shift supervisor and barista at her store about their interactions with Bussiere during the shift he worked with them. In assessing the lawfulness of an interrogation, the Board applies the "totality of circumstances" test adopted in *Rossmore House*, 269 NLRB 1176, 1178 fn. 20 (1984), affd. sub nom. *HERE Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). This test involves a case-by-case analysis of various factors, including those set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964): (1) the background, i.e., whether the employer has a history of hostility toward or discrimination against union activity; (2) the nature of the information sought; (3) the identity of the interrogator, i.e., his or her placement in the employer's hierarchy; (4) the place and method of the interrogation; and (5) the truthfulness of the interrogated employee's reply. See, e.g., *Sproule Construction Co*., 350 NLRB 774, 774 fn. 2 (2007). The *Rossmore House* factors are not to be "mechanically applied" and it is not essential that each element be met. The core issue is whether the questioning would reasonably tend to interfere with, restrain, or coerce employees in the exercise of their statutory rights. This is an objective standard. *Multi-Aid Service*, 331 NLRB 1126 (2000), enfd. 255 F.3d 363 (7th Cir. 2001). The General Counsel bears the burden of proof.

In applying these factors, I find Ros unlawfully interrogated the shift supervisor and barista who worked with Bussiere. Ros, as store manager, is the highest-ranking official at the 3400 Civic Center Blvd. store. She questioned two subordinates about their conversations with Bussiere to report back to Dragone about what occurred. Although Ros initially was concerned by the posting of the newspaper article on the community board, she did not question either about it. According to Ros's email, these conversations focused solely on their interactions with Bussiere. During Ros's conversation with the shift supervisor, she stated she overheard part of her conversation with Bussiere from the back room and wanted to know what else the two discussed during the shift. As for the barista, Ros first asked whether Bussiere distracted her when they worked together, and then she asked what the two discussed. Under these circumstances, I conclude that Ros's direct questioning of these subordinates about their interactions with a known labor activist violated Section 8(a)(1).

Discriminatory Actions, Discipline, and Discharge

Paragraphs 10-12 of the amended consolidated complaint allege that Starbucks violated Section 8(a)(1) and (3) of the Act when it disciplined, took adverse action against, and ultimately discharged Nowakowska and Bussiere because they engaged in protected concerted and union activities.

As stated, Section 8(a)(1) prohibits an employer from taking adverse actions because the employee engaged in protected concerted activities. Section 8(a)(3) makes it an unfair labor practice to "discriminate in regarding to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization." The standard for evaluating whether an employer's adverse employment action violates Section 8(a)(1) and/or (3) is generally set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). The requisite elements to support a finding of discriminatory motivation are union or other protected concerted activity by the employee, employer knowledge of the activity, and animus on the part of the employer. *Electrolux Home Products*, 368 NLRB No. 34, slip op. at 2-3 (2019). To support its initial burden under *Wright Line*, the Acting General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employ-

ment action. *Consolidated Bus Transit, Inc*., 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009). Motivation is a question of fact that may be inferred from both direct and circumstantial evidence. *NLRB v. RELCO Locomotives, Inc*., 734 F.3d 764, 780 (8th Cir. 2013) (internal quotations omitted). Improper motivation may be inferred from several factors, including pretextual and shifting reasons given for the employee's discharge, the timing between an employee's protected activities and the discharge, inconsistent treatment of employees, and the failure to adequately investigate alleged misconduct. *Temp Masters, Inc*., 344 NLRB 1188, 1193 (2005); *Promedica Health Systems, Inc*., 343 NLRB 1351, 1361 (2004); *One Medic, Inc*., 331 NLRB 464, 475 (2000). The Board has held that to prove animus, the Acting General Counsel must establish a causal connection, or nexus, between the employee's protected activity and the employer's adverse action against the employee. See *Tschiggfrie Properties, Ltd*., 368 NLRB No. 120, slip op.at 1 (2019).

If the Acting General Counsel makes this initial showing, the burden shifts to the employer to demonstrate by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. See *Shamrock Foods Co.,* 366 NLRB No. 117, slip op. at 26-27 (2018), and cases cited therein. In this regard, it is not sufficient for the employer merely to produce a legitimate basis for the adverse employment action or to show that the legitimate reason factored into its decision. *T. Steele Construction, Inc*., 348 NLRB 1173, 1184 (2006). Instead, it "must persuade that the action would have taken place absent protected conduct by a preponderance of the evidence." *Weldun International*, 321 NLRB 733 (1996) (internal quotations omitted), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998). The Acting General Counsel may also offer proof that the employer's reasons for the personnel decision were false or pretextual. When the employer's stated reasons for its decision are found to be pretextual—that is, either false or not in fact relied upon—discriminatory motive may be inferred but such an inference is not compelled. *Electrolux*, supra slip op. at 3.

The Acting General Counsel asserts, and I agree, that it has met its burden of proof regarding each of the adverse actions at issue. Initially, there is ample evidence of Nowakowska and Bussiere's robust and continuous protected concerted and union activities, and that Starbucks was aware of or suspected all or most of those activities at the time of the adverse actions. The protected activities include: attending the One PA union meeting on around July 19; preparing and presenting the July 22 demand letter raising collective concerns about working conditions, including about supervision, scheduling, and possible discrimination; preparing and presenting the more detailed July 25 email "statement" on behalf of partners regarding these collective concerns; meeting with management on July 25 to discuss and advocate for action on these collective concerns; posting on public social media platforms from August 2019 through February 2020 to raise awareness among partners and to induce group action regarding these concerns and to generate support for organizing a union; attending the October 22 union organizing meeting; staging another in-store demonstration on November 25 to present management with a copy of the charge alleging retaliation; distributing flyers outside the store following the November 25 demonstration protesting unequal discipline, reduction in hours, and other retaliatory treatment; providing information and interviews for the December 2 *Philadelphia Inquirer* article regarding their protected activities and continued efforts at organizing a union; posting and distributing copies of the article at other area stores; taking shifts at other stores to discuss workplace concerns and to solicit interest in attending union organizing meetings; and attempting to advocate and support fellow employees, like Ayers, regarding their employment.[40] Most of this activity involved direct interaction with management or was observed or monitored by management.[41] The dispute is over establishing animus and a causal connection, and whether Starbucks would have taken the same actions in the absence of these protected activities.

Bussiere October 25 Denial of Training Opportunities

Paragraph 12(d) alleges that beginning on about October 25, Starbucks violated Section 8(a)(1) and (3) when it refused to assign Bussiere to train any of the four new baristas hired at Broad & Washington. On October 22, Bussiere asked Vaughan

[40] I find Nowakowska and Bussiere did not lose the Act's protection during the two brief, in-store demonstrations on July 22 and November 25. Both lasted five minutes or less and there is no evidence of any disruption in business or interference with partners ability to perform their jobs. See *Thalassa Restaurant*, 356 NLRB 1000, 1001 fn. 3 (2011) (employee who briefly entered restaurant with group of nonemployees to deliver a letter protesting alleged labor violations did not lose the protection of the Act where there was no evidence the group disturbed the handful of patrons present, blocked ingress or egress of any individual, was violent or caused damage, or prevented any employee from performing his work). See also *Goya Foods of Florida*, 347 NLRB 1118, 1119, and 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (finding peaceful letter delivery by employees, accompanied by nonemployees, protected). Cf. *Restaurant Horikawa*, 260 NLRB 197, 198 (1982) (a group of 30 initially engaged in a protected demonstration outside the restaurant, but then lost the Act's protection when they entered the restaurant and "paraded boisterously about" during the dinner hour for 10 to 15 minutes).

[41] Starbucks stipulated that from July 22, 2019 to February 26, 2020, it was aware of the social media activity of the Instagram accounts @phillybaristajustice and @phillydignity; the Twitter account @phillybarista; and posts on Instagram and Twitter using the hashtags #PhillyBaristaJustice, #JusticeforBroadandWashington, and/or #JusticeforStarbucks around the time each post was made. (Jt. Exh. 21).

Starbucks disputes knowledge of the October 22 union organizing meeting. However, store manager Stephanie Vernier, an admitted statutory supervisor, met and spoke to Nowakowska and Bussiere at this meeting. A supervisor's knowledge of protected concerted or union activities is imputed to the employer in the absence of credible evidence to the contrary. *State Plaza, Inc*., 347 NLRB 755, 757 (2006); *Dobbs International Services*, 335 NLRB 972, 973 (2001). Starbucks failed to present any evidence to the contrary. The Board has held that "when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge." *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Consequently, without Vernier's testimony or evidence to the contrary, I impute Vernier's knowledge of these union activities to Starbucks.

about training new hires, and Vaughan told him they could talk about it if any new baristas were hired. Three days later, Vaughan emailed Dragone that he would not use Bussiere to train because of his "negative behavior." The Acting General Counsel argues Vaughan's vague reference to "negative behavior" was code for Bussiere's protected activity based on the timing and unexplained nature of the remark, as well as the subsequent evidence of Vaughan's animus toward Bussiere's protected activities, particularly as shown in his January 25 "venting" emails. Starbucks contends Vaughan was referring to Bussiere's performance issues, specifically his repeated failure to wear his hat/apron, to properly stock the pastry case, and to remain in his planted position as assigned, despite coaching to address these issues. Vaughan testified that because Bussiere was unable to perform his job duties properly, he could not be entrusted to train others.

The Acting General Counsel argues that Bussiere's alleged performance issues are pretext because, up to this point, Vaughan had not disciplined Bussiere for any performance issues, and the only reference to any issue prior to October 25 was one instance where Bussiere failed to wear his hat and apron on the sales floor. The only other evidence of Bussiere's alleged issues about wearing a hat and apron when behind the counter , properly stocking the pastry case, and remining in his planted position is Vaughan's inconsistent, largely unsupported, and exaggerated testimony, which I have not credited.

Regardless, even if Bussiere had performance issues, the Acting General Counsel argues animus should be inferred based on the evidence of disparate treatment. I agree. At the same time Vaughan denied Bussiere training opportunities because of his alleged, *undocumented* performance issues, he assigned another barista, Eddie Heyward, to train two of the four new hires, despite his *documented* history of misconduct. On December 8, Vaughan issued Heyward a written warning for cash-handling errors on October 30 and November 3; the latter involved a never recovered deposit drop of $480.[42] (GC Exh. 13(h)). On January 6, Vaughn issued Heyward a final written warning for a series of offenses, including failing to properly clean and close the store, ignoring or causing customers to wait to be served, using his phone during work-time, and regularly being rude, dismissive, condescending, and unhelpful to his coworkers. (GC Exh. 13(i)).[43]

Based on the foregoing, I conclude Bussiere's protected concerted and union activities were a motivating factor in Starbucks' decision to deny him training opportunities, and that based on Vaughan's use of Heyward to train, Starbucks has not established it would have taken the same action against Bussiere in the absence of his statutorily protected activities. As a result, I find the violation, as alleged.

[42] The record does not reflect why Vaughan waited over a month to issue this discipline to Heyward.

[43] The December 8 warning lists errors on October 31 and November 3, but the January 6 warning states Heyward had "numerous" cash handling violations between October 15 and November 3, and he also failed to complete and record the safe counts on December 23, 24, and 30. It also states Vaughan had "a coaching conversation" with Heyward about his "unprofessional behavior" on December 30. (GC Exh. 13(i)).

Nowakowska's October 29 Written Warning

Paragraph 11(a) alleges that on October 29 Starbucks violated Section 8(a)(1) and (3) when it issued Nowakowska a written warning for her alleged failure to connect with customers on October 23 and 29. The Acting General Counsel argues animus should be inferred regarding this warning based on timing, pretext/shifting reasons, and disparate treatment. I agree. The warning was issued a week after Nowakowska attended the October 22 union meeting. *Corn Brothers*, Inc., 262 NLRB 320, 325 (1982). Two days later, Maimon sent her email to Dragone warning that energy at Broad & Washington was ramping up again with partners looking to add demands about their work environment, and Dragone commented to Henderson later that day that his "spidey-sense was already tingling." Four days later, Dragone and Vaughan issued Nowakowska the October 29 written warning. As discussed, there also were the inconsistencies between Vaughan's testimony and the warning he wrote about what occurred on October 23 and 29. On the warning, Vaughan noted two dates when Nowakowska was coached about drink presentation and customer connection, but he testified shift supervisors had approached him almost a dozen times prior. He also testified to issuing the warning because Nowakowska was "combative" about being coached on these issues, but that is not reflected in the warning. Finally, there is no evidence of comparable discipline. Despite Vaughan's statements in late September that customer connections were not where they needed to be for several of the partners, and that he was going to begin issuing discipline if those connections did not improve, Nowakowska was the only partner at Broad & Washington disciplined solely for customer connection issues. Several of the partners testified that management's practice is to coach partners, sometimes repeatedly, about these issues, not to issue them formal discipline.

The closest evidence of comparable discipline was a September 13 written warning issued to a partner, Felicia Dashlell, who worked at the 20th & Market store. The warning addressed Dashlell's various performance issues, including failing to connect with customers, as well as not "cleaning dishes, mopping floors in a timely & effective manner as well as overall food product dating." (GC Exh. 13(d)). The warning, however, was issued after six separate coaching conversations over a three-month period (June through August 2019). Nowakowska received her warning based on two shifts in one week, the same week she attended the union meeting.

Based on the foregoing, I conclude Nowakowska's protected activity was a motivating factor in Starbucks decision to issue the warning, and that Starbucks has failed to establish that it would have taken the same action in the absence of her protected activities. I, therefore, find the violation, as alleged.

Nowakowska's Reduction of Hours

Paragraph 11(b) alleges that Starbucks violated Section 8(a)(1) and (3) when it reduced Nowakowska's scheduled hours at Broad & Washington between November 18 and De-

cember 22.[44] It is unlawful to reduce an employee's hours because they engaged in protected concerted or union activities, or to discourage such activities. See *Sysco Grand Rapids, LLC*, 367 NLRB No. 111 (2019). Here, the Acting General Counsel has established a prima facie case of discrimination based on Vaughan's statements to Nowakowska during their November 20 conversation. Vaughan's unlawful statement that he was not going to schedule Nowakowska if she was coming into the store and causing a disruption is direct evidence that her previous protected activity on July 22 was a motivating factor in the decision to reduce her hours. During this same conversation, Vaughan told Nowakowska she needed to address the issues contained in the October 29 warning to improve her chances of increasing her hours. As previously stated, I find the October 29 discipline to be unlawful. An employer may not rely on prior unlawful discipline when taking subsequent adverse action unless it shows it would have taken the same action without reliance on the prior unlawful discipline. *Southern Bakeries*, LLC, 366 NLRB No. 78 (2018) enf. denied 937 F.3d 1154 (8th Cir. 2019); *Dynamics Corp*., 296 NLRB 1252, 1252-1255 (1989), enfd. 928 F.2d 609 (2d Cir. 1991); *Celotex Corp*., 259 NLRB 1186, 1186 fn. 2, 1190-1193 (1982). I find Starbucks has failed to meet its burden.

Starbucks contends it reduced the scheduled hours of Nowakowska and several other partners to better align the store's staffing levels with its actual sales. However, that does not explain why Nowakowska's reduction of between 30-40 percent was one of the largest reductions, and it occurred at the same time Starbucks increased the scheduled hours of two partners.

Considering this evidence, I find Nowakowska's protected activity was a motivating factor in Starbucks decision to reduce her hours, and Starbucks again failed to establish that it would have taken the same action in the absence of her protected activities. I, therefore, find the violation, as alleged.

Bussiere's November 21 Written Warning

Paragraph 12(a) alleges Starbucks violated Section 8(a)(1) and (3) on about November 21, when it issued Bussiere a written warning. As stated, during this disciplinary meeting, Dragone unlawfully told Bussiere that his repeated complaints about Vaughan were a distraction and an annoyance to other partners, and that they needed to stop. These complaints were highlighted, or starred, in the written warning. The Board has held an employer may not lawfully discipline an employee for making protected statements merely because they harass, annoy, or make other employees feel uncomfortable. *Chartwells, Compass Group, USA*, 342 NLRB 1155, 1157 (2004); *Alpine Log Homes*, 335 NLRB 885, 894 (2001). See also *Consolidated Diesel Co*., 332 NLRB at 1020 ("[l]egitimate managerial concerns to prevent harassment do not justify . . . discipline on the basis of the subjective reactions of others to protected activity"). There is no dispute that Starbucks disciplined Bussiere, in part, because of his activity of complaining to coworkers about Vaughan's performance as store manager. I, therefore, find the violation, as alleged.

Nowakowska's December 18 Discipline

Paragraph 11(c) alleges that Starbucks violated Section 8(a)(1) and (3) on about December 18, when it issued Nowakowska a warning. On November 27, Vaughan prepared but did not issue a final written warning to Nowakowska for allegedly not following the food warming sequence, ignoring coaching, and raising her voice. After speaking with Dragone, Vaughan opted instead to meet and present Nowakowska with the relevant policies to review and sign. At that December 18 meeting, Vaughan discussed with Nowakowska some of the issues detailed in the November 27 final written warning, but he reassured her that it was a non-disciplinary discussion.

Despite these statements, Starbucks admits in its answers that it issued Nowakowska a warning on December 18. It also relied upon (and included a copy of) the November 27 warning in its April 1, 2020 position statement, stating that given Nowakowska's recent "written warning [on October 29] for similar behaviors (not following procedures and being unresponsive to coaching), her behavior [on November 27] warranted a corrective action in the form of a final written warning." (GC Exh. 41, p. 7).[45] Starbucks offered no explanation for these contradictory statements.

The Acting General Counsel's argues that secretly placing the final warning in Nowakowska's personnel file, while assuring her that it was not disciplining her, but later relying upon that final warning, is evidence of pretext, and that Starbucks, therefore, cannot successfully argue it would have disciplined her absent its unlawful motive. Starbucks did not address this allegation in its briefs.

Under these circumstances presented, I conclude that requiring Nowakowska to sign and acknowledge the policies on December 18 constituted a disciplinary warning. The Board has held that a coaching or counseling constitutes "discipline" when it "lays a foundation" for future discipline. See generally, *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enfd. in relevant part 205 Fed.Appx. 405 (6th Cir. 2006). Here, Vaughan was impressing upon Nowakowska that further infractions would result in heightened discipline because there would be no claim that she was unaware of her expectations under the policies.

I further conclude this warning was motivated by Nowakowska's protected concerted and union activities based on timing.

[44] The amended consolidated complaint alleges Nowakowska's hours were unlawfully reduced from about November 18 to December 16, but the record reflects that Starbucks reduced Nowakowska's hours from November 18 through the workweek beginning December 16, which ended on December 22. (GC Exh. 5). The Acting General Counsel requests that I consider the allegation using the correct dates established on the record, as opposed to the pleading, citing to *Smurfit-Stone Container Enterprises*, 357 NLRB 1732, 1736 fn. 36 (2011) ("Scrupulous adherence to dates alleged in a complaint is not necessarily required," so long as any "violation found is closely related to the complaint's allegations and was fully litigated."), noting that Starbucks would not be prejudiced by the one-week difference because it was able to present evidence regarding the schedule changes. I agree.

[45] This position statement also addresses Nowakowska's discharge, but it does not indicate whether the November 27 final written warning played any role in that decision.

The discipline related to alleged conduct on November 27, which is two days after Nowakowska and Bussiere led a group of supporters into Broad & Washington to deliver a copy of the charge alleging retaliation to management. The Board has found two days between protected activity and adverse action sufficient to infer animus. *Ascent Lounge*, 366 NLRB No. 71, slip op. at 10 (2018), enfd. 790 Fed. Appx. 256 (2d Cir. 2019); *Conley Trucking,* 349 NLRB 308 (2007); *Diesel Truck Driver Training School*, 311 NLRB 963 (1993); and *Masland Industries*, 311 NLRB 184 (1993). Finally, as stated, Starbucks failed to present a defense or evidence that it would have taken the same action in the absence of her protected activities. I, therefore, find the violation, as alleged.

Nowakowska's Discharge

Paragraph 11(d) alleges Starbucks violated Section 8(a)(1) and (3) on about January 26 when it discharged Nowakowska. The notice of separation states the decision was based on Nowakowska's alleged statements to customers on January 16 and 22, her response when Bissell addressed the latter situation with her, and her prior discipline on October 29.[46] The Acting General Counsel argues, and I agree, that the discharge was motivated by Nowakowska's protected activities. Direct evidence of animus is found in Vaughan's "venting" emails to Dragone the day before they discharged Nowakowska. He complains about how Bussiere and Nowakowska were "trying to turn [his] team against [him]." He also complained Bussiere and Nowakowska "interject themselves" whenever he tries to coach or give a corrective action to another partner, and partners report to Nowakowska and Bussiere whenever they receive a coaching or corrective action. (GC Exh. 37(j)). Vaughan also stated, "that neither one of them respect the missions and values of Starbucks" and "think they can do whatever they want & just threaten to call NLRB if anybody says anything to them." He concluded that "[i]t doesn't matter if we terminate now or 1 year from now they will still call NLRB & spew vicious lies just like they do now while we pay them & give them benefits these two people obviously hate the brand and do everything they can to tarnish the name STARBUCKS." (GC Exhs. 37(j)-(k)).[47]

There also is circumstantial evidence that unlawful animus motivated the discharge. First, Starbucks failed to ask Nowakowska for her version about what happened on January 16 or 22 before terminating her. The Board has held the "failure to investigate the alleged misconduct of its employees fully and fairly, or even to provide them with an opportunity to rebut the accusations made against them, suggests the presence of discriminatory motivation." *Denholme & Mohr, Inc*., 292 NLRB 61, 67 (1988). See also *Embassy Vacation Resorts*, 340 NLRB 846, 849 (2003); *Washington Nursing Home, Inc*., 321 NLRB 366, 375 (1996); *Fairfax Hospital*, 310 NLRB 299, 301 (1993), enfd. mem. 14 F.3d 594 (4th Cir. 1993) (per curium), cert. denied 512 U.S. 1205 (1994). Dragone confirmed that in investigations of misconduct that could affect employment, the company gathers input from everyone that was involved, and the record supports that. However, in this situation, the company did not interview Nowakowska or any other partner who may have been present, other than Siburt (about January 16) and Bissell (about January 22). As stated, I do not credit Siburt. Overall, I find the company's deviation from its established practice of conducting a thorough investigation, including speaking with the alleged wrongdoer, supports finding animus influenced the decision to discharge.

Further evidence of animus can be inferred from the disparate treatment of Nowakowska as compared to other partners. First, there is Eddie Heyward. Vaughan issued him a January 6 final warning after receiving complaints about him mistreating customers. (GC Exh. 13(i)). One customer complained Heyward initially ignored them while they were waiting to order, then "rushed to end the interaction." Another complained that Heyward was distracted by his phone while working at the bar, "had an unfavorable demeanor and failed to interact with [the customer]," and then "failed to make the customer's beverage to standards." The final written warning also reported that Heyward had been subject to "numerous partner complaints," "is consistently on his phone on the café floor," "is consistently in the back area for the majority of his shift watching tv on his phone," and refused to assist co-workers, treating them in a "dismissive and condescending manner." There also were Heyward's multiple cash handling issues and failure to properly close the store. Despite this myriad of issues, Heyward was not discharged. In its April 1, 2020 position statement, Starbucks claimed that Vaughan issued Heyward a final written warning, rather than terminating him, because Heyward "took ownership of his actions" and offered to step down from his shift supervisor position and contact the employee assistance program. (GC Exh. 41). Vaughan similarly testified that Heyward was "receptive to the coaching" about his misconduct. However, on the final warning form, Vaughan described Heyward's response as follows:

> I had a coaching conversation in-regards to his work performance and customer/partner experience. He became combative and stated, "He does not care what the partners/customer think of him. This is not my career. I am here because I have bills to pay. If this doesn't work out, I can go somewhere else and get a job. Do what you have to do."

(GC Exh. 13(i)).

Next, there is Madeline Jarvis. Vaughan discharged Jarvis on December 4, 2019, after she got into a heated argument with a disabled customer who accused her of ignoring him. (GC Exh. 13(f)). Vaughan intervened, and, after the customer left, Jarvis objected to how Vaughan had handled the situation. She asked Vaughan "well what the fuck do you want me to do?" After Vaughan asked her not to swear, Jarvis said "this is bullshit." She then started waving her hands around "in a threatening manner." Vaughan pleaded with her to stop yelling and swearing, but she refused. He sent her home and later discharged her

[46] As previously addressed, I find Starbucks unlawfully issued the October 29 written warning to Nowakowska in response to her protected activities and, therefore, may not rely upon it when issuing subsequent discipline. See *Southern Bakeries, LLC,* 366 NLRB No. 78*,* slip. op. at 2 (2018).

[47] There are no Sec. 8(a)(4) allegations in the amended consolidated complaint.

because of her unprofessional and aggressive behavior and vulgar language. Vaughan had previously coached Jarvis about her professionalism after she used vulgar language on the sales floor weeks earlier.

There also is Ayda Hartnett, who worked at another Philadelphia store. Starbucks issued her a final written warning in December 2019, after a customer complained that she initially told him the store did not have decaf coffee, then "appeared unhappy" when he asked her to brew him some, and while the customer was waiting Hartnett was on her phone. (GC Exh. 13(g)). The notice also stated that Hartnett was not wearing her nametag during the interaction. Manager Jean Hippensteel testified that she issued Hartnett a final written warning "because of the severity of the complaint," explaining, "we make coffee and we take care of customers, and Hartnett failed to do that in entirety in the situation and was disrespectful to the customer as well." (Tr. 1254–1255).

Finally, there is Uniqua Williams who was discharged based, in part, on a customer complaint. (GC Exh. 13(p)). Williams twice made a customer's drink incorrectly and responded rudely when the customer informed her of the mistakes, giving the customer "a dirty look" and "acting like she couldn't have cared less" The complaint noted that another employee ultimately had to remake the drink a second time. Separately, the notice of separation stated "feedback from [Williams'] shift [supervisor]" that Williams had repeatedly said that she wanted to get fired rather than quitting so that she could collect unemployment insurance. After noting that Williams had also previously received a written warning for "dress code and time and attendance issues," Starbucks separated her based on the supervisor's feedback.

As stated, I find Nowakowska made the "now you want free butter?" comment, but not the other alleged comments. While the comment was intemperate and rude, it was isolated, in contrast to Heyward, whose behavior was objectively far worse. I also find Jarvis's yelling and swearing at the store manager, and acting in a threatening manner, after arguing with a disabled customer, was worse. And unlike Williams, Nowakowska had not received repeated warnings and was not attempting to get fired so she could collect unemployment insurance. Nowakowska's interaction with the customer was closest to Hartnett's situation, which Starbucks addressed with a final written warning, not discharge.

As for Nowakowska arguing (without yelling or swearing) with Bissell about wanting to discuss the exchange with the customer, the record establishes Starbucks managers have addressed those with a warning. For example, when a shift supervisor attempted to coach Oak Killmon at the register, he got upset and argumentative and refused the supervisor's assistance and pushed her out of the way. (GC Exh. 13(k)). Four months later, store manager Graves issued Killmon a final written warning for refusing a request that he go on break, physically inserting himself into her space, and thereby "caus[ing] a disruptive scene in front of . . . customers waiting in line" (GC Exh. 13(l)). Graves likewise issued a final written warning to employee Liz Ellis for allegedly "becom[ing] extremely upset and condescending toward [Graves] on the floor within hearing of partners and customers, replying she knew what she was doing and didn't need to be told how to properly utilize the routine. When pulled to the back room to discuss in private in further detail, Liz stormed away from [Graves] . . . and refused to continue the conversation . . ." (GC-13(c)).

Respondent has failed to meet its burden of establishing that it would have discharged Nowakowska in the absence of her protected activities. It has not demonstrated a pattern of discharging partners for comparable conduct. The pattern overwhelmingly has been to issue written warnings for rude and unprofessional conduct toward a customer or manager. I, therefore, find the violation, as alleged.

Bussiere's February 5 Warning

Paragraph 12(b) alleges Respondent violated Section 8(a)(1) and (3) when it issued Bussiere a warning for attempting to go to the back area on January 18 while Vaughan and Hippensteel were meeting with Ayers to inform them of their discharge.[48] The Acting General Counsel argues Vaughan knew or, at least, had reason to doubt that it was not Bussiere who had attempted to go into the back during the meeting. Vaughan's testimony confirmed he had doubts as to whether Bussiere tried to enter the back area during the meeting. Vaughan's willingness to issue Bussiere the warning over this alleged infraction when he was uncertain as to its accuracy, without conducting any additional investigation, strongly indicates an unlawful motive. Additionally, a week after the January 18 incident, and about two weeks before issuing the warning, Vaughan sent his January 25 venting emails that, as stated, included complaints about Bussiere's protected activities of assisting co-workers regarding employment matters. Starbucks has presented no argument to establish it would have taken the same action in the absence of his protected activities. I, therefore, find the violation, as alleged.

Bussiere February 26 Discharge

Paragraph 12(c) alleges that Respondent violated Section 8(a)(1) and (3) on about February 26, 2020 when it discharged Bussiere for telling Simon Allen the rumor he heard allegedly originating from Cora Siburt that he (Allen) was next to be discharged. The Board has held that an employee's warning to another employee that the latter's job is at risk constitutes protected and inherently concerted activity. *Hoodview Vending Co*., 362 NLRB 690 fn. 1 (2015) (speaking of job security is inherently concerted). See also *Component Bar Products, Inc*, 364 NLRB No. 140, slip. op. at 1 fn. 1 (2016) (employee engaged in protected and concerted activity under *Meyers* II, supra, when he warned a coworker his job was in jeopardy, as well because he sought to join together with coworker to help avoid adverse employment action). As stated, Bussiere told Allen the rumor to give Allen the opportunity to take action to ensure he would be financially stable, if the rumor was true. He also asked Allen if he needed anything. Starbucks defends the discharge decision, stating he knowingly spread a false rumor that Allen was going to be terminated, an act it claims tarnished partner morale and impacted the overall store envi-

[48] The Acting General Counsel does not allege a violation regarding the portion of the warning issued to Bussiere for photographing the logbook.

ronment because Siburt, Allen, and Bussiere all regularly worked together. Starbucks repeatedly contends in its briefs that Bussiere knew the rumor to be false, and that he was lying when he said it to Allen.[49] But it fails to articulate, aside from quoting Siburt's denial that she made the alleged statements, how Bussiere *knew* the rumor he heard from Nowakowska, who heard it from another partner, was false. Without any evidence on that point, there is no support for Respondent's defense that Bussiere acted intentionally or maliciously.

Even if I concluded that Bussiere had not engaged in protected concerted activity when he warned Allen about the rumor he heard regarding Allen's continued employment, I conclude the decision to discharge Bussiere was motivated by animus for his other protected concerted activity in the weeks and months prior to his discharge. As stated, there is direct and circumstantial evidence establishing animus for Bussiere's protected activities, including, but not limited to, Vaughan's January 25 venting email. Additionally, according to the separation notice, Starbucks unlawfully relied, in part, on the prior unlawful discipline it issued to Bussiere on November 21 for disrupting fellow partners when making the discharge decision. Finally, Starbucks has failed to establish that it would have discharged Bussiere in the absence of his ongoing protected concerted and union activities. I, therefore, find the violation, as alleged.

REMEDY

Starbucks' After-Acquired Evidence Defense

Starbucks contends that even if it is found to have discharged Nowakowska and Bussiere in violation of the Act, the traditional remedies of reinstatement and backpay are barred by the "after-acquired evidence" doctrine. Under that doctrine, evidence acquired by an employer after terminating an employee can serve to limit the remedy if the employer establishes that the employee's "wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of discharge." *McKennon v. Nashville Banner Publishing Co.*, 513 U.S. 352, 362-363 (1995) (age discrimination claim).[50] To invoke this doctrine, the employer must demonstrate: (1) that it was unaware of the alleged misconduct at the time of the employee's discharge; (2) misconduct was of such severity to justify discharge; and (3) the employer in fact would have discharged a similarly situated employee for that misconduct alone. Id. See also *Somerset Valley Rehabilitation & Nursing Center*, 362 NLRB 961, 962 (2015), enfd. 825 F.3d 128 (3rd Cir. 2016); *Marshall Durbin Poultry Co.*, 310 NLRB 68, 69–70 (1993), enfd. in pertinent part 39 F.3d 1312 (5th Cir. 1994); *Berkshire Farm Center and Servs. for Youth*, 333 NLRB 367, 367 (2001); and *John Cuneo, Inc.*, 298 NLRB 856, 857 fn. 7 (1990). If an employer satisfies its burden, reinstatement is not ordered and backpay is terminated on the date the employer first acquired knowledge of the misconduct. *McKennon*, 513 U.S. at 362. See also *Tel Data Corp.*, 315 NLRB 364, 367 (1994), reversed in part on other grounds, 90 F.3d 1195 (6th Cir. 1996); *John Cuneo, Inc.*, 298 NLRB at 856–857.

Starbucks contends that after it discharged Nowakowska and Bussiere it discovered they each made audio recordings in violation of the company's established policies and the laws of the Commonwealth of Pennsylvania.[51] The no-recording policy in the Partner Resource Manual states: "Personal video recording, photographing or audio recording of customers or other partners in the store without their consent is not allowed except as protected under federal labor laws." (Jt. Exh. 3(a), p. 50 and Jt. Exh. 3(b), p. 50).[52] The no-recording policy in the version of the Partner Guide in effect at the time of the discharged states: "Personal video recording, audio recording or photography of other partners or customers in the store without their consent is not allowed unless authorized by law." (Jt. Exh. 2(a), p. 36).[53] Starbucks asserts that had it discovered this recording activity prior to their discharges, it would have terminated their employment, like it did with two other area partners found to have secretly recorded conversations.[54]

There is no dispute Nowakowska made recordings of four conversations: her July 25 meeting with Bussiere, Nathalie Cioffi, and Marcus Eckensberger; her July 29 meeting with

[49] Granted Bussiere did himself no favors by refusing to cooperate in the company's investigation. However, it is reasonable for him to conclude based on the investigation into the January 18 back room incident that it would do little to provide the company with his version of events.

[50] In *McKennon*, 513 U.S. at 363, the Supreme Court recognized the risk was not insubstantial that employers might as a routine matter undertake extensive discovery into an employee's background or performance on the job following discharge to limit its liability, but that a court's authority to award attorney's fees and to invoke the appropriate provisions of the Federal Rules of Civil Procedure would be sufficient to deter most abuses. However, those same deterrents do not exist under the Board's Rules & Regulations.

[51] In Pennsylvania, it is a crime to record an oral communication, unless all parties to the conversation consent. See 18 PA. CONS. STAT. § 5702. The statutory definition of "oral communication" requires a justifiable "expectation that such communication is not subject to interception." Id. § 5702. The Pennsylvania Supreme Court has interpreted the term "oral communications" to include only communications where "the speaker possessed a reasonable expectation of privacy in the conversation." *Agnew v. Dupler*, 553 Pa. 33, 717 A.2d 519, 523 (1998).

[52] The parties cite to *ADT, LLC*, 369 NLRB No. 23 (2020), which involved an employer rule prohibiting recording of coworkers or managers without explicit permission from all parties in states with laws prohibiting nonconsensual recording. The Board adopted the judge's finding that Washington state law did not apply to the discriminatee's recording of captive-audience meetings because they were not private communications. Starbucks' policies, however, only refer to federal law, not state law. As such, I need not consider Pennsylvania law.

[53] The version of the Partner Guide implemented in April 2020 modified the policy to match the policy in the Partner Resource Manual. (Jt. Exh. 2(b), p. 37). There are no allegations challenging the creation, existence, or application of Starbucks' no-recording policies. I, therefore, make no findings on those matters.

[54] On July 27, 2018, Starbucks discharged Aniya Rosado, after she left a recording device in the back area of her store to capture a conversation between two non-consenting partners in violation of Starbucks's no recording policy. (GC Exh. 13(q)). On September 20, 2018, Starbucks discharged Brian Soy, after he admitted to his shift supervisor and store manager that he had recorded a conversation between himself and another shift supervisor, in violation of Starbucks' no recording policy. (GC Exh.13(r)).

Bussiere, Cioffi, and Eckensberger; her September 22 conversation with David Vaughan concerning customer connections at Broad & Washington; and her October 29 disciplinary meeting with Vaughan and Brian Dragone. The first two conversations were in the café, and the latter two were in the back. Nowakowska did not disclose that she was recording these conversations to anyone present besides Bussiere, who was present during the July meetings. (Tr. 235, 295–96). Nowakowska testified she made the recordings because she feared that Starbucks would retaliate against her for her protected activities and wanted to preserve "a neutral . . . source of what was said" in each conversation. (Tr. 240, 291–92).

There is no dispute Bussiere engaged in more extensive recording activity. He first began using his phone to record conversations with management on July 23, when he and Nowakowska met with Gerald Henderson and Nathalie Cioffi. Initially, he recorded only his meetings with management. (Tr. 464). But after Vaughan accused Bussiere of pushing him without explanation on October 29, Bussiere became concerned that Vaughan might be intentionally "trying to set up scenarios that he could use as material for a corrective action or termination form" against him. After that, Bussiere regularly set his phone to record whenever he worked with Vaughan. (Tr.464–465). At the hearing, Bussiere estimated making around 30 recordings total, but deleted most because they contained nothing to support his claims of retaliation. Bussiere testified he made his recordings because he hoped that having proof would prevent Starbucks from "try[ing] to write [him] up for something that wasn't factual." (Tr. 466). He also decided to make recordings based on advice from an organizer that recordings could be used as evidence of what was said in meetings with management. Starbucks contends that while it had suspicions Bussiere and Nowakowska had attempted to record other Starbucks partners without their knowledge or consent, it had no evidence until they produced recordings pursuant to the trial subpoena.

As stated, to meet its burden Starbucks must establish it was unaware that Nowakowska and Bussiere were recording partners in the store without their consent prior to discharging them. *Somerset Valley Rehabilitation and Nursing Center*, 362 NLRB at 962. The Third Circuit Court of Appeals, which covers Pennsylvania, has held the after-acquired evidence of misconduct the employer later relies upon must have been "nonexistent at the time" of the discharge and "could not possibly have motivated the employer to the slightest degree." *Delli Santi v. CNA Ins. Co*., 88 F.3d 192, 205 (3d Cir.1996) (quoting *Mardell v. Harleysville Life Ins. Co.*, 31 F.3d 1221, 1228 (3d Cir.1994), abrogated by *McKennon*, 513 U.S. 352 (1995)).[55] See also *Moore v. Univ. of Notre Dame*, 22 F. Supp. 2d 896, 915 (N.D. Ind. 1998). Stated another way, when an employer has "reason to know" of the misconduct prior to the discharge, the alleged misconduct cannot be utilized as "after acquired" evidence. *Peterson v. National Sec. Techs., LLC,* No. 12–CV--5025–TOR, 2013 WL 1758857, at 10-11 (E.D.Wash. Apr. 24, 2013); *McLaughlin v. Innovative Logistics Grp., Inc.,* No. 05-72305, 2007 WL 313531, at 12 (E.D. Mich. Jan. 30, 2007). See also *Scott v. City of Sioux City, Iowa*, 23 F. Supp. 3d 1017, 1024 (N.D. Iowa 2014). The issue, therefore, is whether Starbucks knew or had reason to know Nowakowska and Bussiere were recording partners without their consent prior to their discharges. If so, Starbucks' after-acquired evidence defense fails.

Vaughan testified that within the first few weeks of becoming store manager he personally saw Bussiere and Nowakowska each attempt to record a conversation with him using their cell phones. On one occasion, Bussiere approached him with a question about the schedules. As Vaughan began to answer, Bussiere pulled out his phone and held it by his side. Vaughan told Bussiere he did not have permission to record him or anybody else at work. Bussiere denied recording Vaughan. (Tr. 785-787). No further action was taken. There was another instance where Nowakowska and Bussiere both approached Vaughan and asked what he would do if someone disrespected a transgender partner in the store. As Vaughan answered, Nowakowska pulled out her phone and held it in her hand. Vaughan saw this and told her she could not record him, and he then attempted to end the conversation. Nowakowska told him she did not like his answers and maybe she would have to call the NLRB about it. Vaughan later reported this to Dragone. (Tr. 787–789). Dragone later reported to Henderson that attempts were made to record Vaughan, via phone, and "to our knowledge no further attempts have been made." (GC Exh. 37(t)).

In her October 24 email, Melissa Maimon gave Dragone a "heads up at what [she was] seeing" at Broad & Washington. One of the items she listed, which is the only shaded and bolded item in her email, states "[p]artners videoing conversations between [Vaughan] & themselves." (GC Exh. 32). Maimon's email was forwarded to Henderson, Cioffi, and Eckensberger by October 26. Although Maimon did not identify Bussiere or Nowakowska by name, the only partners ever identified in the record as recording conversations with Vaughan were Nowakowska and Bussiere. No further action was taken in response to Maimon's email.

On November 19, Bussiere was working with Vaughan and supervisors Gigi Hernandez and Leanne Bissell. He secretly audio recorded his conversations that morning, including a dispute with Vaughan about correctly stocking and placing signage in the pastry case. Bussiere later transcribed the recording he made out of concern he might be disciplined, and he

[55] In *Delli Santi*, the employee complained to her employer of sex and age discrimination. After she submitted her complaints, her employer discovered she had misrepresented gas expenses for her company car, and it terminated her employment. Delli Santi then filed suit claiming retaliation. A jury found the employer discharged her in retaliation for her complaints and that the employer failed to prove it would have discharged her because of the inflated expense reports. However, the district court then granted employer's motion for judgment as a matter of law, holding the employer proved as an affirmative defense that, despite retaliatory intent, it would have discharged the employee in any event. The Third Circuit reversed, finding there was no "after-acquired" evidence because the alleged wrongdoing was discovered prior to the discharge decision, and the employer suddenly launched its investigation only after the employee engaged in protected activity, despite years of her submitting suspicious expense reports without the company taking any action.

texted the transcripts to Vaughan because he wanted to show he had proof of what was said. Bussiere sent Vaughan a text that stated, "Here are some transcripts:" (GC Exh. 7). He then texted Vaughan several transcripts of conversations from that morning. To illustrate, the following is a portion of a transcript Bussiere texted to Vaughan:

> David: "Um TJ I'm gonna take over so you can do the pastry case to completion?"
> TJ: "Yeah, Gigi just told me."
> David: "Ok"
> TJ: "no worries"
> [David picks up tongs and clicks them together a few times]
> TJ: "I'm gonna have to borrow those tongs though …"
> David: "No, I got you over here, TJ! I'm asking you to do the pastry case! I'm gonna do these things over here I need you to do the pastry case."
> TJ: "This what I'm doing – I'm doing the pastry case! [gestures to the egg bites they are unpacking for the case]
> David: "Ok so then you can - you can communicate that."
> TJ: "I just said that I was doing it. That was me communicating."
> David: [no reply]

(GC Exh. 7, pp. 4-5) (R Exh. 21).[56]

About a week or so after Bussiere sent these transcripts, Vaughan met with Nowakowska in the back area. Vaughan began by telling Nowakowska she did not have permission to record him. (Tr. 212-213). Nowakowska responded she was not recording him and offered to show him her phone. Vaughan then gave her Dragone's business card and told her she should write a statement about what happened on November 27 when she allegedly failed to follow food warming protocols and then raised her voice to Vaughan. (Tr. 212-213).

On December 20, Bussiere sent Dragone a lengthy email memorializing several recent events that Bussiere believed to be retaliatory. (Jt. Exh. 16). One of the events Bussiere described was the December 18 meeting where Vaughan and Hippensteel presented him with the community board policy to review and sign. Bussiere included in the email a typed transcript, like the above, of the conversation between he and Vaughan about why he was being presented with the policy. (Jt. Exh. 16, pp 7-8). Dragone sent a reply, thanking Bussiere for raising his concerns and that he would investigate them. (Jt. Exh. 16, p. 1). No further action was taken in response to Bussiere providing the transcriptions.

Based on this evidence, I conclude Starbucks knew or had reason to know that Bussiere and Nowakowska were recording partners in the store without their consent prior to their respective discharges, and it failed to take any meaningful action in response. Starbucks neither disciplined nor attempted to investigate them for recording in violation of company policy, even after receiving multiple reports of suspected recording and verbatim transcripts of conversations which it believed were created with the use of an unauthorized recording device.

This lack of *any* action beyond Vaughan's initial admonishment is telling considering the company's immediate and arguably premature responses when they suspected Bussiere or Nowakowska of other wrongdoing. For example, when Dragone suspected Bussiere posted the December 2 article on the community board, he had Vaughan and Hippensteel meet with Bussiere and provide him with a copy of the community board policy to review and sign, without confirming that Bussiere had, in fact, posted the article. Vaughan later issued Bussiere the February 5 written warning because he suspected, but admittedly was uncertain, that Bussiere had attempted to enter the back area during the January 18 Ayers discharge meeting. Vaughan also relied on incomplete and uncorroborated, information when he and Dragone terminated Nowakowska for her alleged interactions with customers on January 16 and 22. Starbucks suggests the scale of the recording at issue was unknown and certainly would have resulted in discharge, but I find its failure to take *any* action in response to the evidence it had at the time hollows that argument.

Overall, I conclude Starbucks has not established its after-acquired evidence defense because it failed prove it was unaware of the misconduct prior to discharging Nowakowska and Bussiere. Nowakowska and Bussiere, therefore, are entitled to reinstatement and full backpay.[57]

CONCLUSIONS OF LAW

1. Starbucks Coffee Company ("Respondent") is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.
2. Respondent violated Section 8(a)(1) when he told employees that they should not concertedly make demands to Respondent's management.
3. Respondent violated Section 8(a)(1) when he informed an employee that he reduced an employee's work hours because the employee engaged in protected concerted activities.
4. Respondent violated Section 8(a)(1) when he required an employee to cease making concerted complaints about the employee's store manager.
5. Respondent violated Section 8(a)(1) prohibited employees from concertedly complaining about Respondent's management and employees' terms and conditions of employment during work time while permitting employees to talk about other work and non-work subjects.
6. Respondent violated Section 8(a)(1) when it prohibited employees from concertedly discussing their terms and conditions of employment during work time while permitting employees to talk about other work and non-work subjects.
7. Respondent violated Section 8(a)(1) and (3) when it is-

[56] Starbucks subpoenaed Bussiere and Nowakowska to produce at the hearing any recordings they made while employed. The Acting General Counsel filed petitions to revoke. On page 10 of its January 19, 2021 opposition to those petitions to revoke, Starbucks states it received "detailed transcriptions of conversations" from Bussiere which it believed were "created with the use of an unauthorized recording device." This document was not made part of the record because the parties resolved these subpoena issues prior to hearing, following a prehearing conference call, obviating the need for any ruling on the record. I hereby add Starbucks' January 19 opposition to the petitions to revoke to the record as ALJ Exhibit 1.

[57] Based on my conclusion, I need not reach the other *McKennon* factors. Nor do I need to address the public policy considerations raised by the parties for allowing/prohibiting recording in the workplace.

sued warnings to its employee Echo Nowakowska on October 29, 2019 and December 18, 2019, because she engaged in union activities and protected concerted activities, and to discourage employees from engaging in these or other concerted activities.

8. Respondent violated Section 8(a)(1) and (3) when it reduced Echo Nowakowska's scheduled work hours from November 18, 2019 to December 22, 2019, because she engaged in union activities and protected concerted activities, and to discourage employees from engaging in these or other concerted activities.

9. Respondent violated Section 8(a)(1) and (3) when it discharged Echo Nowakowska on about January 26, 2020, because she engaged in union activities and protected concerted activities, and to discourage employees from engaging in these or other concerted activities.

10. Respondent violated Section 8(a)(1) and (3) when it issued warnings to its employee Tristan Bussiere on November 19, 2019 and February 5, 2020, because he engaged in union activities and protected concerted activities, and to discourage employees from engaging in these or other concerted activities.

11. Respondent violated Section 8(a)(1) and (3) when it discharged Tristan Bussiere on about February 26, 2020, because he engaged in union activities and protected concerted activities, and to discourage employees from engaging in these or other concerted activities.

12. Respondent violated Section 8(a)(1) and (3) when it refused to assign Tristan Bussiere barista trainer opportunities, because he engaged in union activities and protected concerted activities, and to discourage employees from engaging in these or other concerted activities.

13. Respondent violated Section 8(a)(1) when it engaged in surveillance of employees to discover their concerted activities.

14. Respondent violated Section 8(a)(1) when it interrogated employees about their protected concerted activity.

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

16. Consistent with this decision, I dismiss the remaining 8(a)(1) surveillance allegation.

REMEDY

Having found that the Respondent 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. Respondent, having discriminatorily disciplined and discharged Echo Nowakowska and Tristan J. Bussiere, shall be ordered to offer them reinstatement to their former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to their seniority or any other rights or privileges previously enjoyed, and to make them whole for any loss of earnings and other benefits they may have suffered as a result of the discrimination against them. As this violation involves a cessation of employment, the make whole remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance *with Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate them for the adverse tax consequences, if any, of receiving a lump-sum backpay award. In addition, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, submit and file with the Regional Director for Region 4 a report allocating the backpay award to the appropriate calendar year for each said employee, and pursuant to *Cascades Container Board*, 370 NLRB No. 76 (2021), provide a copy of the corresponding W-2 form(s) for Nowakowska and Bussiere reflecting their backpay awards. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), the Respondent shall also compensate Nowakowska and Bussiere for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall also be ordered to expunge from its files any and all references to the discriminatory and unlawful discipline and discharge of Nowakowska and Bussiere, and notify each in writing that this has been done and that evidence of the discriminatory and unlawful action will not be used against them in any way.

Further, having found that the Respondent violated Section 8(a)(3) and (1) by reducing the scheduled hours of Nowakowska, it shall make her whole for any losses in pay and benefits sustained as a result of the unlawful reductions in the manner prescribed in *Ogle Protection Service*, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest as set forth in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In addition, in accordance with *AdvoServ*, supra, we shall order the Respondent to compensate Nowakowska for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years and a copy of the corresponding W-2 form(s) reflecting the backpay award for Nowakowska.

On these Findings of Fact and Conclusions of Law and on the entire record, I issue the following recommended

ORDER[58]

Having found Respondent, Starbucks Coffee Company, at its 1002 South Broad Street, Philadelphia, Pennsylvania facility and its 3400 Civic Center Boulevard, Philadelphia, Pennsylva-

[58] If no exceptions are filed as provided by Section 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.

nia facility, has engaged in certain unfair labor practices, I find that it, through its officers, agents, successors, and assigns, must cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act:

1. Cease and desist from:

a. Telling employees that they may not make concerted demands concerning their terms and conditions of employment.

b. Telling employees that they may not talk negatively about or discuss complaints regarding management or their terms and conditions of employment during worktime in working areas, despite permitting discussions of other nonwork-related subjects during worktime in working areas.

c. Telling employees that their hours were reduced because they supported a union or engaged in other protected concerted activity.

d. Placing employees under surveillance while they engage in union or other protected concerted activities.

e. Coercively interrogating employees about their union or other protected concerted activities.

f. Reducing the hours of employees because they support any labor organization or engage in protected concerted activity.

g. Denying employees opportunities to work as a barista trainer because they support any labor organization or engage in protected concerted activity.

h. Discharging, disciplining, or otherwise discriminating against employees, including reducing their scheduled hours or deny them opportunities to act as a barista trainer, because they support any labor organization or engage in protected concerted activity.

i. In any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

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

a. Within 14 days, offer Tristan Bussiere and Echo Nowakowska immediate and full reinstatement to their former jobs, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

b. Make Tristan Bussiere whole for any loss of earnings and other benefits resulting from his discharge and denial of opportunities to work as a barista trainer.

c. Make Echo Nowakowska whole for any loss of earnings and other benefits resulting from her discharge and reduction in hours from November 18, 2019 to December 22, 2019.

d. Compensate Tristan Bussiere and Echo Nowakowska for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, and for adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year. File with the Regional Director a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

e. Within 14 days, remove from its files any reference to the unlawful disciplines and discharge of Tristan Bussiere and the unlawful disciplines and discharge of Echo Nowakowska, including the unissued November 27, 2019 final written warning, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

f. 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 back pay due under the terms of this Order.

g. Within 14 days after service by the Region, post at its 1002 South Broad Street, Philadelphia, Pennsylvania facility, copies of the attached notice marked "Appendix A."[59] Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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 Respondent customarily communicates with its members by such means. Reasonable steps shall be taken to ensure that the notices are not altered, defaced, or covered by any other material.

h. Within 14 days after service by the Region, post at its 3400 Civic Center Boulevard, Philadelphia, Pennsylvania facility, copies of the attached notice marked "Appendix B." Copies of the notice, on forms provided by the Regional Director for Region 4, after being signed by Respondent's authorized representative, shall be posted by Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to members 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 Respondent customarily communicates with its members by such means. Reasonable steps shall be taken by the Union to ensure that the notices are not altered, defaced, or covered by any other material.

i. Within 21 days after service by the Region, file with the Regional Director for Region 4 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., June 21, 2021.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[59] 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."

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 in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL NOT tell employees that they may not make concerted demands concerning their terms and conditions of employment.

WE WILL NOT tell employees that they may not talk negatively about or discuss complaints regarding management or their terms and conditions of employment during worktime in working areas, despite permitting discussions of other non-work-related subjects during worktime in working areas.

WE WILL NOT tell employees that their hours were reduced because they supported a union or engaged in other protected concerted activity.

WE WILL NOT reduce the hours of employees because they support any labor organization or engage in protected concerted activity.

WE WILL NOT deny employees opportunities to work as a barista trainer because they support any labor organization or engage in protected concerted activity.

WE WILL NOT discharge, discipline, or otherwise discriminate against employees, including reducing their scheduled hours or deny them opportunities to act as a barista trainer, because they support any labor organization or engage in protected concerted activity.

WE WILL offer Tristan Bussiere and Echo Nowakowska immediate and full reinstatement to their former jobs, or if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Tristan Bussiere whole for any loss of earnings and other benefits resulting from their discharge and denial of opportunities to work as a barista trainer.

WE WILL make Echo Nowakowska whole for any loss of earnings and other benefits resulting from her discharge and reduction in hours from November 18, 2019 to December 22, 2019.

WE WILL compensate Tristan Bussiere and Echo Nowakowska for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings, and for adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL file with the Regional Director for Region 4, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year, as well as a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL remove from its files any reference to the unlawful disciplines and discharge of Tristan Bussiere and the unlawful disciplines and discharge of Echo Nowakowska, including the unissued November 27, 2019 final written warning, and within 3 days thereafter, notify them in writing that this has been done and that the unlawful employment actions will not be used against them in any way.

STARBUCKS COFFEE COMPANY

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/04-CA-252338 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.

APPENDIX B

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 in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL NOT place employees under surveillance while they engage in union or other protected concerted activities.

WE WILL NOT interrogate employees about their union or

other protected concerted activities.

STARBUCKS COFFEE COMPANY

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/04-CA-252338 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.