BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STARBUCKS CORPORATION

and **Case No. 10-CA-305651**
10-CA-306100
WORKERS UNITED, SOUTHERN REGIONAL JOINT BOARD **10-CA-306118**

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DECISION

STATEMENT OF THE CASE

PAUL BOGAS, Administrative Law Judge. I heard this case on February 27, 28, 29, March 1, September 9,10 and 11, 2024, in Raleigh, North Carolina. Workers United, Southern Regional Joint Board, (the Union or the Charging Party) filed the charge in case 10-CA-305651 on October 21, 2022 (amended December 1, 2022, and April 12, 2023), in case 10-CA-306100 on October 27, 2022 (amended January 31 and September 27, 2023), and in case 10-CA-306118 on October 27, 2022 (amended September 27, 2023).[1] The Regional Director for Region 10 of the National Labor

[1] The General Counsel's unopposed motion to supplement the record with the first amended charge in Case 10-CA-306118 is granted. See Brief of General Counsel at Page 86, n. 85.

Relations Board (the Board) filed the original Complaint on June 14, 2023, the Consolidated Complaint on June 28, 2023, the Amended Consolidated Complaint on November 1, 2023, and a further amendment to the Amended Consolidated Complaint on February 8, 2024. The Amended Consolidated Complaint, as further amended, (the Complaint) alleges that Starbucks Corporation (the Respondent, the Employer, or Starbucks), violated Section 8(a)(1) of the National Labor Relations Act (the Act): on or about September 23, 2022, by interrogating employees about concerted and union activities, and on or about October 27, 2022, by telling employees that it would not hire them because of their protected concerted and union activities. The Complaint further alleges that the Respondent discriminated based on protected concerted and union activity in violation of Section 8(a)(3) and (1) of the Act: on September 20, 2022, when it issued two written warnings to Alyssa White; on October 21, 2022, when it discharged White; on October 11, 2022, when it discharged Mateo[2] Molina-Elizalde (Molina); on or about October 27, 2022, when it refused to consider for hire, or hire, Molina. The Respondent filed a timely answer in which it denied committing any of the violations alleged.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Washington corporation with its principal office in Seattle Washington, is engaged in the retail operation of coffeehouse restaurants at various locations throughout the United States, including locations at 2901 Sherman Oak Place, Raleigh, North Carolina (Raleigh Store),[3] and 4100 Humber Drive, Winterville, North Carolina (Winterville Store).[4] At the Raleigh store and at the Winterville store the Respondent annually derives gross revenues in excess of $500,000. At each of these two stores the Respondent also annually purchases and receives goods valued in excess of $5000 directly from points outside the State of North Carolina. The Respondent admits, and I find, that since January 21, 2021, it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that since January 21, 2021, the Union has been a labor organization within the meaning of Section 2(5) of the Act.

[2] This alleged discriminatee testified that his legal first name is Heudith, but that the first name he uses is Mateo. The name used in the Complaint, and throughout the trial, is Mateo. Molina stated at trial that his pronouns are he/him or they/them and that either are "fine." Transcript at Page(s) (Tr.) 29.

[3] This location is also sometimes referred to in the record as the Sherman Oaks store, the Wake Forest store, or the Six Forks store. Tr. 103-105

[4] This location is also sometimes referred to in the record as the Memorial store. Tr. 33.

II. BACKGROUND

The Respondent operates over 25,000 retail coffee shops worldwide,[5] including the shops in Raleigh and Winterville, North Carolina, that are involved in this case. The staff at those North Carolina locations include baristas, shift supervisors,[6] assistant store managers, and store managers. The Raleigh store and the Winterville store are in different Starbucks "districts." The store manager at each of those locations reports to the district manager for their respective districts.

At the time the Respondent allegedly discriminated against White and Molina, White was a shift supervisor at the Raleigh store and Molina was a barista and barista trainer at the Winterville store. Ashley Smart Clark,[7] was the store manager of the Raleigh store starting on February 1, 2022, and continuing at the time of the alleged violations there. This was Clark's first permanent store manager assignment after being hired by the Respondent in October of 2021. Tr. 497. As store manager, Clark initially reported to district manager Ed Harvey, but starting in October of 2022, she reported to district manager Raney Patton. Tr. 353, 676, 753. At the time of the hearing, Patton's authority extended to eleven stores. Tr. 677. At the Winterville location, Jennifer Bowen was acting store manager starting in April 2022. Tr. 38-39. Later, and at the time when Molina was discharged from that location, Elaine Beachler was the Winterville store's permanent store manager. Tr. 85-86, 626. In that position, Beachler reported first to district manager Tom DellaRatta and then, starting in October 2022, to district manager Laura Ward. Tr. 45, 626.

III. UNION ACTIVITY AND EMPLOYEE COMPLAINTS ABOUT WORKING CONDITIONS

Winterville Location: Molina heard about the Union in August 2021, Tr. 47-48, and in February, March and April 2022, while working at the Winterville location (where there has not been a representation petition), made social media posts supportive of union activity at other Starbucks locations. Tr. 53-56, 67-68, 140, 639.[8] Molina testified that one of the people who followed him on social media was Winterville store manager Autumn Clarke. Molina stated, however, that Clarke did not begin following him until June 2022, Tr. 49, 74, and this was after Clarke left the Respondent for an extended

[5] This figure is set forth in the Board's decision in *Starbucks Corp. d/b/a Starbucks Coffee Co.*, 372 NLRB No. 50, slip op. at 1 (2023).

[6] None of the parties contend that the individuals who hold the "shift supervisor" title are are statutory supervisors for purposes of Section 2(11) of the Act.

[7] There are two store managers who are referred to in this decision and whose names are similar enough to create some risk of confusion. Ashley Smart Clark was a store manager at the Raleigh store. Autumn Clark***e*** was a store manager at the Winterville store for a period of time. I generally use only their last names, distinguished from one another by the spelling, when referring to Clark and Clarke.

[8] The record shows that Molina shared information about the Union in August 2021, but it is not clear to me from the record which Starbucks store, of the multiple where he has worked, Molina was employed by at that time. Tr. 47-48; General Counsel Exhibit Number (GC Exh.) 4.

leave before resigning her position, Tr. 38-39, 626-627.[9] Beachler, who had taken over as the Winterville store manager at the time that Molina was discharged, stated that she never worked with Clarke or had discussions with Clarke about Molina. Tr. 626-627. Beachler also credibly testified that she had never discussed union-related issues with Molina or seen any of Molina's social media posts. Tr. 640.[10]

Raleigh Location: Employees at the Respondent's Raleigh location began a union campaign in February 2022 and, on February 15, they filed a petition for union representation. Tr. 224-225. In a letter to the Respondent's chief executive officer (CEO) – Kevin Johnson – a group of Raleigh store employees notified the Respondent about their union campaign. Alleged discriminatee White was one of the seven employees who signed the letter and she was also one of its drafters. General Counsel Exhibit Number (GC Exh.) 16; Tr. 226. Employees shared the letter with Ed Harvey – the district manager for the district that included the Raleigh store. Tr. 226. Harvey himself was singled out in the letter as a manager who had asked employees to work in unsafe conditions. GC Exh. 16. White's pro-union efforts also included making public pro-union speeches, giving media interviews about the union effort, and posting union information on the community chalkboard in the Raleigh store. Tr. 224-225. In addition, she posted messages supportive of the union campaign on a social media account that was accessible to members of the public during the union campaign. Tr. 229. In March and April 2022, video recordings of some of White's pro-union speeches were posted to social media. Tr. 231-233; GC Exh. 3, GC Exh.18, GC Exh 19, GC Exh. 20. One such posting, which White made on March 28, 2022, was viewed by members of the public 1.5 million times. Tr. 309. An article that appeared in a local newspaper on March 16, 2022, identified White by name, and stated that she was "busy visiting other Starbucks stores . . . and asking if employees want to unionize." GC Exh. 24. The district manager for the Raleigh store, Harvey, was aware of White's pro-union efforts. Harvey testified that White "was very clear with me up front that she was the partner that had organized, and it was something she was passionate about and proud of." Tr. 814.

The union election at the Raleigh store resulted in a tie vote. The Union filed objections to the Respondent's conduct leading up to that election and White testified in

[9] Molina testified that when he was working at the Winterville store, he had a conversation with Winterville store manager Autumn Clarke during which they discussed whether Molina "believed our store needed a union." Tr. 76-77. Molina did not testify that Clarke was the one who raised the subject of unionization, and the General has not alleged that this conversation violated the Act. Molina testified that, during the conversation, "[I] lied to Autumn and told her that I didn't think our store in particular needed a union, but that I did support and agree with other union efforts at other stores." Then Clarke told Molina that she had seen his social media posts and knew that he "was supporting the Union." Tr. 77.

[10] Molina testified that he became Facebook "friends" with the Raleigh store manager Ashley Smart Clark during the summer of 2022, and that, during the fall of 2022, Clark terminated the Facebook friendship. Tr. 74-76. However, regardless of whether Clark was aware of Molina's pro-union posts, it was not shown that Clark communicated any such information to Beachler, who worked at a store in a different city. To the contrary, Beachler credibly testified that she had never discussed union issues, much less any positions Molina had on the subject, with Clark. Tr. 637-639.

support of those objections at a Board hearing. Tr. 228; see also Tr. 808 (district manager Harvey "believes" he was aware that White testified in the hearing regarding the objections). The union objections were found meritorious, but the employees withdrew the representation petition before a re-run election was held. White credibly testified that the union organizing committee, of which she was a member, decided to withdraw the petition because the Respondent had threatened to withhold a pay raise if the union campaign remained active. Tr. 373-374. Text messages confirm that Clark told White that employees would receive the raise "once the[employees] processed withdrawal" of the representation petition, and that White responded by stating that the organizing committee would withdraw the petition in order to obtain the raise. See Respondent Exhibit Number (R Exh.) 43 (text exchanges on July 19 and July 25, 2022).[11]

As alluded to above, at the time Molina was terminated, he was employed at the Respondent's Winterville store. However, earlier that year – from late May until August 2022 – he worked at the Raleigh location. Tr. 135. In mid-June 2022, Molina made complaints to Raleigh store manager Clark about working conditions there. Tr. 88,137. During the conversation about Molina's complaints, Molina and Clark also discussed Molina's recent 1-day absence and Clark informed Molina that the Raleigh store offered employees free transportation to work. Tr. 89-90, 137-138.

IV. EMPLOYEE STRIKE AT RALEIGH STORE AND MOLINA'S SUPPORT FOR STRIKERS

On September 21, 2022, employees of the Raleigh store engaged in a strike. Jacky Hermenegildo was the "playcaller"[12] at the time of the strike. Tr. 257-258, 260-261, 318, 536. As the playcaller, Hermenegildo was responsible for "running the store while the manager [wa]sn't there." Tr. 216-217.[13] Her responsibilities included opening

[11] The General Counsel and the Respondent state that the petition was withdrawn in about July 2022. Brief of General Counsel at Page 9; Brief of Respondent at Page 3.

[12] The playcaller is also sometimes referred to in the record as the "keyholder." Tr. 217, 312, 446.

[13] White testified that she had not substituted for Hermenegildo as playcaller at any point on the morning of the strike, and that Hermenegildo was the only one functioning in that capacity. Tr. 219, 257-258, 261-262, 277. Moreover, counsel for the Respondent stipulated at the hearing that Hermenegildo was the only scheduled playcaller on that shift. Tr. 318. Nevertheless, Clark, who was not present at the store that morning, testified that White stepped in as playcaller at the time of the strike. Tr. 517-518. Similarly, district manager Harvey gave hearsay testimony that Hermenegildo told him White had taken over as playcaller on the morning of the strike. Tr. 767-768. I credit White regarding the question of whether she, as opposed to Hermenegildo, was the playcaller at the time of the strike. White's testimony was a firsthand account, was consistent, confident and facially credible, and was not contradicted by testimony from Hermenegildo, who at the time of trial was still employed by Respondent, Tr. 708, or from any other witness who was present at the store that morning. Similarly, I credit White's testimony that the strike was a collective decision of all five employees who were on duty at the store that morning. Clark claimed that the three baristas who exited the store along with shift supervisors Hermenegildo and White were forced to do so by the shift supervisors, but the Respondent presented no testimony from those baristas or anyone else with firsthand

and closing the store, giving assignments to the staff, and checking inventory. On the morning leading up to the strike, Hermenegildo became visibly upset. Hermenegildo told White that she had called store manager Clark about a staffing shortage and that Clark had reacted by screaming at her. Tr. 260. White testified that everyone present on the shift was upset by this. Tr. 261. White told her co-workers that the treatment that Hermenegildo described that morning was an example of a "toxic environment" at the store. White told the employees that they "had a federal right" "to strike," but that she "would only want to do it if everyone else did." Tr. 261. With the agreement of everyone working at the store that morning, the staff initiated a strike. Ibid. Upon ceasing work and exiting the store, employees emailed a letter to district manager Harvey notifying him that they had gone on strike and of their complaints about working conditions. Tr. 810-811; GC Exh. 25(a).

Before the striking employees left the store, Hermenegildo directed White to close the drive-thru portion of the store and lock the cash register. Hermenegildo herself set the store's alarm system. Tr. 262-263. White's understanding at the time was that the Respondent had discharged employees at other locations for going on strike without first securing the store's cash registers. Tr. 262. When Hermenegildo, White and the other baristas exited the store to begin the strike, they were required, pursuant to the Respondent's policies, to close the store. The Respondent's policies prohibit stores from remaining open without a shift supervisor or manager present even if the required total number of staff members is present. Tr. 535-536. In addition, even if a shift supervisor is present, a store cannot remain open unless at least one other staff member is on duty. Tr. 437-438.

After the striking employees exited the store, Hermenegildo told White that she was going to call district manager Ed Harvey to tell him that the employees were on strike. Tr. 263. Around this time, a striking employee received a call from store manager Clark and put the call on speaker so that White could hear their conversation. Hermenegildo was also nearby during the call. Tr. 264-265. The employee communicated employee grievances to Clark. Ibid. During the time the staff was on strike outside the store, Mateo Espinoza – a shift supervisor who had not been working when the strike was initiated – arrived and reopened the store. Tr. 263. The strike closed the store for "at most an hour." Ibid.; see also Brief of Respondent at Page 12 (store was "closed for approximately forty minutes").

While on strike outside the store, White drafted, with input from other members of the store's organizing committee, a letter to district manager Harvey and store manager

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knowledge. I note, moreover, that Clark's version is contradicted by documentation showing that the strike letter was signed by Cody Labrecque, who Clark claimed did not support the strike, Tr. 518; GC Exh. 25(a) at Page 2, and by Hermenegildo's statement in a contemporaneous group chat that "[t]he whole team decided all together to do a strike this morning," GC Exh. 31(b). In addition to finding that White's firsthand testimony is more reliable than Clark's hearsay testimony on that score, I also note that Clark revealed herself to be a biased witness who strained to support the Respondent's case. See, infra, footnotes 19 and 28 (Clark a biased witness),

Clark about the strike. Tr. 266-267, GC Exh. 25(a), The letter, which was on Union letterhead, complained that Clark had "fostered a toxic work environment" and given "retaliatory write ups," and that employees had been punished for being sick and also required to work while sick. The letter stated that "our primary demand is a formal apology to each partner from [Clark]." White and three other employees signed the letter. Hermenegildo did not sign it. White sent the letter to Harvey from the email account for the store's organizing committee. White did not return to work that shift, but rather left the area and returned later that day and gave a speech outside the store during which she discussed the strike and issues at the store. Tr. 266. A video of the speech was posted to a social media site. GC Exh. 21.

Although at the time of the strike Molina was working at the Winterville, rather than the Raleigh location, he showed support for the strike at the Raleigh store by posting a video of the strike activity and by publicizing a strike support fund for the Raleigh employees. Tr. 56, 61-64. In a post publicizing the support fund, Molina stated that "working at [the Raleigh location] made me almost quit [Starbucks], lol." GC Exh. 2, Page 5; Tr. 62. Espinoza, the shift supervisor who did not participate in the strike and arrived to reopen the store, showed Clark one or more of Molina's social media posts expressing support for the strike. Tr. 533.

IV. MANAGEMENT QUESTIONS WHITE

As discussed above, on September 21, five employees of the Raleigh store, including alleged discriminatee White, engaged in a strike that briefly closed the store. District manager Raney Patton led an employer investigation regarding the strike.[14] Tr. 272, 698-700, 770. Patton knew on September 21 that the employees had been engaged in a strike when they closed the store, Tr. 712, and the record of her communications with Human Resources staff expressly recognize that the employees had been on strike, GC Exh. 52, First Page. On September 23, Patton interviewed White about the strike while the two sat at a table inside the Raleigh store during White's shift. Tr. 273-274, 697, 698-699. Patton testified that White was willing to meet with her, Tr. 699, but Patton also stated that she did not offer White assurances that her answers would not lead to discipline. Tr. 716-717. Patton asked White about, inter alia, who was in charge on the morning of the strike, whose "idea" the strike was, and whether the cash registers were secured and the alarm set before employees exited the store. Tr. 273-274. White informed Patton that it was "everyone's" decision to strike. Tr. 274. White also told Patton that Hermenegildo had been "in charge" of the shift and that the cash registers were secured and the alarm set before the employees left the store. Ibid.

During the conversation, Patton asked White for her view regarding problems in the store's work environment and also asked how she could "support" White. Tr. 353-

[14] Patton testified that although the Raleigh store was not yet part of her district, she conducted the investigation because the regular manager for that district, Harvey, was on vacation. Tr. 696.

354, 356.[15] White responded that employees were coming to her with their work-related concerns, rather than raising them with Clark. Patton responded by giving copies of her business card to White and told her she could distribute them to employees. At that time, White and the rest of the organizing committee had already begun the process of withdrawing their representation petition, and White told Patton that she "wasn't super gung-ho on having [a union] or not having one." Tr. 358. Nevertheless, the human resources department[16] report regarding Patton's communications about strike-related discipline for White states that Patton pointed out that "S[hift] S[upervisor] Alyssa[White] used to be the union organizer." GC Exh. 52 (last page of exhibit under "Details" heading); see also Tr. 808 (Harvey was aware that White was the union organizer for the Raleigh store). During her conversations with human resources staff, Patton asked what should be done about the fact "[t]hat two supervisors had made a decision to close the store for a strike without approval from the district manager, store manager, or the regional director." Tr. 722. Harvey was on vacation on the day of the strike, but some time that afternoon he spoke to Hermenegildo by phone about what had happened. Tr. 762, 770.

V. WHITE

A. Background

White began working for the Respondent in January 2018. She was promoted to shift supervisor in January 2019. Starting in August 2021 she worked at the Respondent's Raleigh store. At times, there was more than one shift supervisor present at the Raleigh store on a given shift, but only one would be responsible for supervising the shift as the "playcaller." Tr. 216-217, 714-715. During her time with the Respondent, White had a variety of health problems and, on that basis, filed a disability form with the Respondent and took health-related leave. Tr. 303, 359. White's health emergencies sometimes led her to have absences from scheduled shifts. Nevertheless, prior to September 19, 2022, the Respondent had never issued documented discipline to White for attendance or anything else.[17] Tr. 279-280.

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[15] White testified that "I believe" Patton asked about her position regarding the Union, but White could not recall the wording of the question. Tr. 358. Patton unambiguously denied that she asked White about her position regarding the Union. Tr. 701. Given Patton's denial, which was clear and certain, and the fact that White's testimony on the subject was somewhat vague and uncertain, I find that the record does not establish that Patton asked White about the Union.

[16] The Respondent calls its human resources staff the "partner connection center" or "PCC," Tr. 104, and that it is how it is often referenced in the record.

[17] In July 2022, White and store manager Clark exchanged text messages about White's health and attendance challenges, and about the possibility that White would take a medical leave of absence. GC Exh 28; R Exh. 43 (July 13, 2022). In that exchange, Clark stated that White's attendance warranted documentation, but that she did not want to enforce that and would "do anything I can to support you." Clark did not state that this exchange was an informal warning or that it would be documented, and White was not asked to sign anything about it. Tr. 286-287. The record does not show that this exchange was a disciplinary action of any kind.

Text exchanges between White and Clark in July and August 2022 include friendly communications between the two. R Exh. 43. For example: on July 31, White called Clark her "bestie" and offered to socialize so that Clark could "vent" about work; on August 19 the two joked about drink preferences and Clark told White, "Go to bed Mamma said so." In a July 19 exchange with Clark, White stated that she did not have any further interest in forming a union. She stated that Clark had made the store "way better." White told Clark that she was "voting no" and did not "see lot of p[eople] thinking they need a union at our store anymore." White opined to Clark that the positive change in morale was something "YOU did."

B. Attendance Warnings for White

On September 20, 2022, store manager Clark issued two separate corrective actions to White regarding her attendance. GC Exh. 27, GC Exh. 30. One written warning reports that it was "created on" September 1, but it was not issued until September 20, and states that, during the past calendar quarter, White had been late or absent for "32 of 44 scheduled shifts" – "more than 75 percent."[18] GC Exh. 27. The warning states, further, that the Respondent "requires that you are not late or missing more than 25 percent of scheduled shifts."[19] White testified that the Respondent did not tell her which dates it believed she had been late or absent, but she did not deny that she was late or absent with the frequency stated in the warning. Tr. 283. Clark issued the discipline, but also told White that she was hesitant to do so given White's "personal health and things that were happening in [White's] personal life." Tr. 284.

The second corrective action is a final written warning, which reports that it was created on September 14 and issued on September 20. It states: "On September 14th Alyssa[White] No Call, No Showed[20] to her opening shift, causing the store [to] open late as she was the opening Supervisor that morning." GC Exh. 30. It states that White "also No called, No Showed on Monday Sept 4th,"[21] but explains that White "didn't know she had to work outside of her availability." Regarding this latter absence, the corrective action form states that when employees tell the Respondent which shifts they are available to work, as White did, the employees are only stating "a preference" and

[18] In fact, 32 is 72.7 percent of 44.

[19] Clark testified that she had "seen" the "25 percent" rule in writing in the company's handbook or intra-net partner hub, Tr. 394-395, but later she admitted she was not sure it existed in writing and that she could not find it, Tr. 479. I find that Clark demonstrated pliability as a witness and an inclination to strain to support the Respondent's position to an extent that detracts significantly from her credibility regarding disputed matters. See *Lexus of Concord, Inc.*, 330 NLRB 1409, 1412 n. 9 (2000) and *Carruthers Ready Mix, Inc.*, 262 NLRB 739 (1982); see also, infra, footnote 28. On the question of Clark's claimed percentage-per-calendar-quarter rule for attendance, I note that district manager Harvey testified that he was not aware of any attendance guideline based on calendar quarters. Tr. 809-810.

[20] A "no call, no show" is when an employee does not appear for a scheduled shift and does not call to notify the store that her or she will be absent. Tr. 509.

[21] In fact, September 4, 2022, was a Sunday. Tr. 296. A text exchange between White and Clark indicates that the actual date of this attendance issue was September 5. See R Exh. 43 (exchange on September 5).

this "does not mean that" managers will not schedule those employees for times when the employees have indicated they are unavailable.

In a text exchange between White and Clark on September 22, White told Clark that she was "very aware" that the attendance written warnings were not "retaliatory in any way," Tr. 300, and that getting written up was "on me; not on you," Tr. 302. At trial, White testified that by this she meant that she did not believe Clark was retaliating against her by issuing the attendance warnings. White testified that she did, however, believe that district manager Harvey was retaliating against her and was responsible for the decision to issue the two warnings. Tr. 301, 307-308.[22]

C. Discharge of White

On October 21, 2022, Clark, Harvey and Patton met with White on the patio outside the Raleigh store. Tr. 275. White testified that Harvey stated that it "was not personal" but that she was discharged because she made the decision to close the store on the day of the strike and that she did so "without asking for permission from management prior to the store closure." Tr. 276. At trial, Patton testified that the Respondent's policy is that employees must obtain management approval before closing a store even when they are doing so in order to go on strike. Tr. 679-681. Harvey read the notice of separation to White. GC Exh. 26.[23] It stated:

> This document is Alyssa White's notice of separation for closing the store without notifying or obtaining approval from her manager prior to the store's closure on 9/21/22.
>
> On 9/13/22,[24] Alyssa received a Final Written Warning for two no call, no shows, within a 10 day period.
>
> On Wednesday, 9/21, Alyssa made the decision to cease operations and close the store without first communicating and partnering with the store manager or district manager prior to the store's closing at that location. Nor did Alyssa obtain managerial approval for the store's closure.
>
> Based on her prior corrective action history, and the 9/21/22 incident, Alyssa's employment from Starbucks is separated.

Although in the separation notice Clark refers to White "closing the store" on September 21, rather than to White engaging in a strike on that date, the evidence

[22] Clark testified that prior to issuing discipline, even at the level of a warning, she would always obtain the approval of her district manager. Tr. 483-484. However, Clark stated that district manager Harvey had not directed her to discipline White. Tr. 508.

[23] The notice of separation reports a delivery date of October 12, although it was not actually signed or delivered until October 21. It was signed by Harvey as "manager" and by Clark as "witness."

[24] The final written warning was actually issued to White on September 20.

shows that at the time of the store closure, both Clark and Harvey knew that White and other employees were engaged in a strike over working conditions. Tr. 541, 810-811. Indeed, on that morning, Clark informed the Respondent's human resources staff that "[m]y store decided to go on strike this morning" and then added "or shall I say that two [shift supervisors] decided to shut the store down." GC Exh. 38. The human resources officials responded to Clark by sending links to, inter alia, three documents that provided legal guidance to managers on how to respond when employees went on strike. Ibid. White refused to sign the separation notice. Tr. 811.

VI. MOLINA-ELIZALDE

A. Background

Alleged discriminatee Molina began working as a barista for the Respondent in July 2018. In 2019, the Respondent certified Molina as a barista trainer, who was qualified to train new employees. Tr. 37. The Respondent also awarded Molina its "coffee master" certification. Tr. 132. Molina had worked at five or more of the Respondent's locations prior to when Beachler discharged him from the Winterville location on October 11, 2022. During some of the recent period of his employment with the Respondent, Molina transferred between the Winterville Store (near a school he was attending) and the Raleigh store (near family members and about a 1 ½ hour drive from the Winterville area). Tr. 113, 120, 129-130.

B. Attendance History and Discharge

Molina does not drive motor vehicles and is usually transported to work by a co-worker/friend. Tr. 90, 132-133,148. This was true both when Molina was working at the Winterville store and when he was working at the Raleigh store. In June 2022, while working for the summer at the Raleigh store, Molina missed a shift because his usual means of transportation was unavailable. Tr. 88-90, 138. Store manager Clark informed Molina that the Respondent offered staff members free transportation to the store using a ridesharing service. Molina did not receive a corrective action about this absence, or about anything else, during his tenure at the Raleigh store. Tr. 88-89.

Molina had, however, received prior discipline for attendance at other Starbucks locations. In December 2020, when working at the Respondent's "ECU" (East Carolina University) location, Molina received two written warnings for attendance. Joint Exhibit Number (J Exh.) 1 and J Exh. 2. In addition, on May 19, 2022, when Molina was working at the Winterville store, the acting store manager, Jennifer Bowen, issued a corrective action to him for an attendance issue. R Exh. 8. The corrective action form stated: that, on May 14, Molina had "called out" for his shift; that, on May 9, he did not clock in for his 5 am shift until 5:12 am; and that, on May 13, he did not clock in for his 6:15 am shift until 6:22 am.[25] The discipline level Bowen chose for the May 19

[25] Later in May, Molina transferred to the Raleigh store for the summer. Tr. 135. He worked at that location until August 2022, when he transferred back to the Winterville location, from which he was subsequently discharged.

corrective action was "documented coaching" – the lowest severity level choice set forth on the disciplinary form,[26] and a lower-level than the two disciplinary actions that the Respondent had issued in 2020 for Molina's tardiness at the ECU location.

On September 22, 2022, store manager Beachler issued a final written warning to Molina at the Winterville store. R Exh. 11. The form stated that, on September 16, Molina did not appear for his scheduled opening shift at 5 am and did not respond to multiple attempts to contact him until well over an hour after his scheduled start time. The write-up states that discipline at the "final written warning" level was appropriate for this infraction given that Bowen had disciplined Molina for an attendance violation in May, less than 6 months earlier. On October 10, Molina arrived late for his 5 am, opening, shift. Molina testified that he was only 3 minutes late, but time clock records indicate that Molina punched in at 5:06 am – 6 minutes late. Tr. 95, 161-163.[27]

On October 11, store manager Beachler and district manager Ward spoke with Molina at the store about his late arrival the previous day. Molina told them that he was late because the co-worker who provided Molina with transportation (but was not scheduled to work on the shift in question) was not ready to leave on time. Molina also stated that he was only 3 minutes late. Tr. 95-96, 643.[28] Ward responded that "late was late, and it was unacceptable." Ibid. Beachler testified that there was no grace period at the Winterville store and that she had never been informed that there was such a period at the other locations of the Respondent where she had worked. Tr. 668.[29]

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[26] The other choices are "written warning" and "final written warning." See, e.g., GC Exh. 27 and R Exh. 8.

[27] I credit the documentary evidence indicating that Molina was 6 minutes late on October 10. Molina testified that he arrived 3 minutes late, but went to work without punching in. However, he did not explain on what clock or other basis he determined that he was 3 minutes late if he did not visit the time clock before starting work. Nor did he explain why he would work 3 minutes before stopping to punch in. Indeed, when presented with the document showing that he had punched in 6 minutes late, he said he did not remember punching in at all. Tr. 162, 183-186.

[28] While testifying, Clark first agreed with the suggestion of Respondent's counsel that it did not matter whether an employee was 1 minute late or six minutes late, because "late is late." Tr. 393. However, during questioning by the General Counsel, Clark stated that there is a 5-minute grace period after the start of a shift and that employees who arrive during that grace period are not considered late. Tr. 478. Indeed, during a meeting with Raleigh shift supervisors in the summer of 2022, Clark stated that there was a grace period and reference to a grace period appears in the paperwork for a March 2022 corrective action. Tr. 280; GC Exh. 41 ("exceptions" attachment to correction action form). I find that Clark's testimony on this point, like her previously discussed testimony about the "25 percent" rule, demonstrates a willingness to conform her testimony to the interests of the Respondent. This detracts significantly from her credibility as a witness. See, supra, footnote 19. I note, in addition, that district manager Harvey stated that he had heard about the 5-minute grace period, and was aware of it being acknowledged in the Respondent's timecard system. Tr. 775.

[29] The record shows that, in May 2023, Beachler disciplined another employee for tardiness, and informed the employee in the corrective notice that "even 2 to 3 minutes late is late." R Exh. 36; Tr. 668-669. This was after the filing of the initial charge challenging Molina's discharge.

Beachler told Molina that he was being separated for being late on October 10. Beachler and Ward issued a notice of separation to Molina, which stated:

> This document is Mateo Molina's notice of Separation for violating Starbucks Time and Attendance Policy.
>
> Mateo was given a final warning on 9/16 after coming in more than an hour and half late for an opening shift. There was also written warning for attendance on 5/22, as well as coaching f[rom] the manager at the transfer store they worked at over the Summer in Raleigh.
>
> On October 10th, Mateo was late for their opening shift at 5 am.

GC Exh. 5. Beachler, Ward,[30] and Molina signed the notice of separation document.[31]

C. Refusal to Rehire Molina

The same day that the Respondent discharged Molina from the Winterville store, Molina sent a text to Raleigh store manager Clark, with whom he had worked at the Raleigh store, and asked whether, after being fired from the Winterville store, he could be re-hired at the Raleigh store. GC Exh. 12. The two had the following text exchange that day.

> Molina: [S]oo, I just got fired for being late three whole minutes. [A]m I able to be rehired?
>
> Clark: Yes, technically you could be rehired. Your current S[tore] M[anager] does put comments in your separation stating why. And I'm sure it would [s]tate involuntary separation due to time and attendance.

[30] The General Counsel asks that I draw an adverse inference from the fact that the Respondent did not call Ward to testify about the discharge decision. Brief of General Counsel at Page 31, n. 66. The record does not show, however, that Ward was still working for the Respondent at the time of the hearing, or otherwise provide a basis for assuming that Ward would have been favorably disposed towards the Respondent. Nor does it show that Ward, rather than Beachler (who did testify), was responsible for the discharge decision. Indeed, Ward did not become a manager for the district that included the Winterville store until days before the discharge, Tr. 46 (Ward became district manager in October 2022), and was not in that position a month prior when Molina received the final warning. Based on these factors, and the record as a whole, I decline the General Counsel's invitation to draw an adverse inference from the fact that Ward was not called to testify by the Respondent. See *DPI New England*, 354 NLRB 849, 858 (2009), *Reno Hilton*, 326 NLRB 1421, 1421 n. 1 (1998), enfd. 196 F.3d 1275 (D.C. Cir. 1999), and *Goldsmith Motors Corp.*, 310 NLRB 1279, 1279 n. 1 (1993).

[31] Previously, on August 16, 2022, the Respondent issued a corrective action form – this one a written warning – to Molina for allegedly engaging in intimacies with a co-worker while on duty at the Winterville store. R Exh. 10, Tr. 91-92. That corrective action is not challenged here, and is not referenced by the Respondent in any of the attendance-based corrective actions that are being challenged. Nor was it mentioned to Molina at the time she was denied re-employment at the Raleigh store. The co-worker involved in the alleged incident was also disciplined.

> So you would have to explain the situation to a new manager. Because anytime we rehire someone we have to call [human resources staff] to see status. Were you already on documentation for time and attendance?
>
> Molina: [D]o you think there would be space for me back at [Raleigh store]? And yes, I was late once in [S]eptember and then I got written up back in [M]ay for the same thing.
>
> Clark: I would definitely need time and attendance commitment. We talked about that a lot before when you were here. The company is really cracking down on it. But I'll know for sure by next week. We have some movement happening. But should have room. I need to see what she took you out of the system as.
>
> Molina: [Y]es, I can do a time and attendance commitment.

Molina stated her schedule availability and Clark responded:

> Clark: Ok let's connect next week to discuss. I'll need to call the [human resources staff] after she separates you.

GC Exh. 12. On October 14, Clark told Molina that he could apply, and provided him with the store number for the Raleigh store so that Molina would identify the store correctly in his application. Ibid. The next day, Molina applied through the Respondent's on-line application system. GC Exh. 13. Clark testified that she "can't say for sure" whether she was hiring for the Raleigh store at that time. Tr. 530-531.[32] District Manager Harvey testified that the Respondent collects applications for barista and shift supervisor positions regardless of whether it is actively hiring. Tr. 797. Molina characterized his October 15 on-line applications as being for "positions that were open" at the Raleigh store, but he did not explain what about the on-line system led him to conclude that the positions were "open," Tr. 106, or that his understanding was based on anything beyond the fact that the Respondent's system allowed him to submit the applications.[33] District manager Patton testified that the Respondent did not hire any "new" employees[34] for the Raleigh store from October 2022 to March 2023. Tr. 710.

On October 18 and October 20, Molina contacted Clark by text to check on his application for a position at the Raleigh store. GC Exh. 12. Clark responded that Molina's separation had not been processed yet, and so she would "call back tomorrow." Four days later, Molina asked Clark whether she had given him "a coaching"

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[32] As is discussed fully bellow, when Clark subsequently provided an explanation to Molina for the decision not to hire him at the Raleigh store, Clark did not mention a lack of active hiring. Indeed, as previously recounted, she had informed Molina in writing that the store "should have room" and that Molina could apply for a position. GC Exh. 12.

[33] The General Counsel submitted a print-out of the on-line posting for those positions, but that exhibit does not give dates for when the Respondent was hiring for them. GC Exh. 13.

[34] Patton did not state whether by "new" employees he meant to include only employees who were new to Starbucks, or also meant to include returning Starbucks employees, or employees who were transferring from other Starbucks stores.

at the Raleigh store when he was working there the prior summer. Clark responded that she had given Molina a coaching "[a]round time and attendance" at the Raleigh store, Tr. 88-89, although the record shows that this was not a formal, or documented, coaching.

Under the Respondent's hiring practices, when an employee who has been separated from one location applies for work at another location, the store manager cannot hire that individual without first contacting the human resources department. Tr. 796. In response to Clark's contact about Molina, Clark received a report from human resources that Molina had been discharged twice before, by two different store managers, for time and attendance violations. Tr. 528-529. Molina himself testified that four of the Respondent's store managers – Beachler, Bowen, Clark, and Laura Ward – had criticized his attendance performance. Tr. 170.

On October 26, 2022, in a text exchange, Clark told Molina that he would not be hired at the Raleigh store. Tr. 168-169. Clark was the manager who made the decision not to hire Molina. Tr. 530. Clark and Molina discussed this decision in the October 26 text exchange:

> Clark: I'm not going to be able to bring you back.
>
> Molina: [O]h no, is there a reason?
>
> Clark: You[r] time and attendance track record. Both S[tore] M[anagers] stated that in your separation notes. Couple that with yall trying to drive from Greenville to work here. We don't have the coverage to replace the call-outs going into holiday. We dealt with that during your time here too.

GC Exh. 12. Molina responded that he would be living with family in Raleigh, not commuting from Greenville, and that his attendance problems at the Raleigh store had ended after Clark coached him about them. Clark did not address Molina's effort to allay her concerns about attendance, but rather stated:

> *I'm also confused because of social media posts about our store from you on the day of our strike. I don't want to bring people back here that think it's toxic. We need a healthy environment.* And rehiring you with 2 other managers saying they both had the same issue with time and attendance is too much of a risk for me right now.

GC Exh. 12 (emphasis added).

At trial, Clark testified that she decided not to hire Molina based on his attendance record and the fact that he would be commuting an hour and half from Greenville to work at the Raleigh store. Tr. 530. Despite the fact that Clark mentioned Molina's pro-strike social media post when telling Molina why he was not being hired and noted that she did not want to employ people who shared the sentiments expressed therein, Clark testified at trial that the social media post did not have anything to do with

the decision. Tr. 531. I find that this denial is not credible given the text exchange between Clark and Molina the contents of which are not disputed and in which Clark offers Molina's pro-strike social media post as an explanation for not hiring him. It is also implausible that Clark relied on Molina's supposed commute from Greenville to the Raleigh store, given that the text exchange about re-hiring shows that Molina expressly told Clark that he would be living in Raleigh. Indeed, it is hard to believe that Clark thought that Molina's plan was to commute approximately 1 ½ hours each way to work at the Raleigh store.[35]

V. COMPARATOR EVIDENCE REGARDING TIME AND ATTENDANCE-BASED DISCIPLINE

Both the General Counsel and the Respondent presented evidence regarding the Respondent's treatment of putative comparator employees who had attendance shortcomings. I find that neither side's comparator evidence merits persuasive weight. The General Counsel's comparator evidence is voluminous, but relies almost exclusively on raw data in time clock and timecard records, e.g. GC Exhs. 33a, 33b, 42, 50(a), 50(b), 55, without supporting testimony about the specific circumstances under which the manager who disciplined White or Molina treated putative comparators more leniently. This approach has produced comparator evidence that provides unsatisfactory support for the General Counsel's case because, inter alia: testimony showed that the time clock records do not reliably show whether employees were actually late;[36] the comparator evidence was not supported with testimony, or other evidence, showing the surrounding circumstances that bear on decisions regarding attendance infractions;[37] and the General Counsel did not explore whether the

[35] I do not credit Clark's testimony that she had already made the decision not to hire Molina at the time she discovered Molina's social media posts expressing support for the strike. Tr. 533. There is no documentary evidence in the record showing that a decision on Molina's application had already been finalized prior to when Clark discussed it with Molina. Moreover, Clark did not explain how it came to pass that another employee shared Molina's pro-strike social media posts with her during the purported gap between when the decision to reject Molina was made and when Clark explained that decision to Molina by referencing the social media activity. Based upon this, as well as Clark's credibility problems and the record as a whole, I find that Clark's testimony in this point was self-serving and unworthy of credence.

[36] For example, there was uncontradicted testimony that the time "punch" records are frequently inaccurate for reasons that include: the time clock system was not operating due to technical difficulties; the employee arrived for their shift on-time but could not punch in until a supervisor unlocked the store; management switched the employee to a different shift than the one which appears on the printout; or, the employee had been directed to perform work by picking up supplies from another store before reporting to their own workplace and clocking in. Tr. 415-416, 418, 469-470, 664 ff. Moreover, it does not appear that those records distinguish between instances when an employee did not work a scheduled shift after providing the Respondent with the required notice, and the more serious circumstance in which an employee did not work a scheduled shift and did not give the Respondent prior notice of the absence (i.e., a no call/no show). Tr.458- 459.

[37] There was credible testimony that time and attendance infractions will be excused for extenuating circumstances such as a delay caused by an accident on an employee's travel

comparator employees were, or were not, known by the Respondent to have engaged in protected union and/or concerted activity.

The General Counsel also states that White was the only Raleigh store employee who the Respondent disciplined for time/attendance infractions in 2022. Brief of General Counsel at Pages 10 and 17 (citing Tr. 398-406, 449-460, 470-474,GC Exhs. 26, 27, 30, 33(a), 33(b), 36, 37 39, 42, 55.) It is not clear to me from the record citations provided by the General Counsel that this is the case,[38] but even assuming it is, that is not particularly telling given the severity of White's attendance deficiencies. As noted previously, White did not dispute that she had been late or absent for 32 of her 44 scheduled shifts during the calendar quarter preceding the first written warning. The evidence does not show that any other employee at the Raleigh store had attendance problems that were that serious, much less that any other Raleigh store employee had such serious problems and was, like White, a shift supervisor with responsibility for opening the store.[39] Furthermore, if one credits the same time clock records relied on by the General Counsel, those records show that during the union campaign White had committed multiple attendance infractions, but as with the putative comparators, the Respondent did not discipline her based on those initial infractions. Tr. 403, 404, 406. The Respondent only issued the discipline to White after her attendance problems persisted during the calendar quarter.

The General Counsel did show that two employees at the Respondent's New Bern, North Carolina, store were disciplined at the "documented coaching" level – lesser discipline than was issued to either White or Molina – in December of 2021, despite having extreme attendance shortcomings during a 3-week period. GC Exh. 56; Tr. 801-802. In neither case, however, was the discipline issued by one of the store managers whose actions are at-issue in the instant case (Clark and Beachler) or at either of the stores involved here (Raleigh and Winterville). It was not shown that the same district managers decided on the discipline for the two New Bern employees and on the discipline for White and Molina. Tr. 803-804. Nor was it shown that either of the two New Bern employees had playcaller responsibilities or had been disciplined or counseled about attendance prior to receiving the coaching level of discipline.

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route. Tr. 787.

[38] I note in particular, that while the General Counsel appears to rely largely on Clark's testimony for the proposition that no other Raleigh store employees received attendance discipline in 2022, Clark stated that she *did not know* if that was the case. Tr. 470-471. On the other hand, I note that the Respondent's own comparator evidence does not include any Raleigh store employees who Clark disciplined for attendance in 2022.

[39] There was evidence that Hermenegildo, who like White was a shift supervisor, was a no call/no show on one occasion. GC Exh. 39 (August 31, 2022). According to the General Counsel, Hermenegildo was not disciplined for that incident. Brief of General Counsel at Page 14 n.28. I find that the Respondent's treatment of a single infraction by Hermenegildo does not provide a reasonable comparator to the Respondent's treatment of White's incessant attendance violations.

As indicated above, the Respondent submitted its own comparator evidence in an effort to show that the treatment of White and Molina was consistent with the treatment of other employees with attendance problems. Specifically, it introduced corrective action forms that managers issued to employees other than White and Molina. The Respondent's comparator evidence regarding Clark's decisions to issue attendance discipline is extremely thin. Indeed, the corrective action forms submitted by the Respondent do not show that Clark issued attendance-based discipline to anyone other than White.

The Respondent's evidence regarding Beachler's history of enforcing time and attendance rules is considerably more substantial than that for Clark's history. The Respondent submitted 24 corrective actions that were issued by Beachler and referenced attendance infractions. See R Exhs. 9, 17, 18, 21-41. The Beachler-issued corrective actions were dated between August 11, 2022, and September 5, 2023, and ten of them were dated during the 2 months before Beachler separated Molina. All of the corrective action forms that Beachler issued prior to Molina's separation were for discipline less severe than separation. On September 19, 2022, Beachler issued a written warning to a playcaller who was over an hour late to open the store. R Exh. 23.[40] The majority of the Beachler-issued corrective actions were documented coachings and written warnings. The Respondent presented two notices of separation that Beachler issued for attendance infractions, but those were dated May 1, 2023, and July 31, 2023, R Exhs. 37 and 39 – after the Charging Party filed the charge regarding Beachler's separation of Molina.[41]

Regarding Clark's October 2022 decision not to rehire Molina at the Raleigh store, the Respondent's comparator evidence is vanishingly thin. Clark testified that in

[40] Four months earlier, that playcaller employee had received a written warning from another store manager based on being late to open the store on two occasions during a 4-week period. GC Exh. 49.

[41] The Respondent submitted additional corrective actions forms that were issued by managers other than Clark and Beachler and which were not shown to be the result of actions by any official responsible for the challenged attendance-based disciplines against White and Molina. (There was evidence that Patton was involved in the decision to separate an employee for attendance infractions, R Exh. 47, Tr. 689-690, but Patton was involved in the decision to discipline White for strike activity, not for attendance, and was not shown to have influenced the discipline of Molina). I find that the Respondent's putative comparator evidence regarding discipline by other managers at other stores is entitled to very little weight regarding the attendance-based disciplinary actions against White and Molina. I note that district manager Harvey, the Respondent's own witness, testified that the manner in which individual store managers address attendance infractions is a "gray area" and that different store managers approach such infractions differently. Tr. 786-787. A high level of store manager discretion is indicated not only by Harvey's statement, but also by the corrective action forms submitted by the Respondent itself, which indicate that some store managers issued discipline for attendance with great frequency (Beachler is an example), while Clark was not shown to have ever done so except when she issued such discipline to White. See *NP Red Rock LLC*, 373 NLRB No. 67, slip op. at 36 (2024) (employer did not meet its responsive *Wright Line* burden by, inter alia, showing that "a different supervisor in a different outlet" issued comparable discipline).

"numerous" instances she refused to hire individuals who previously had attendance problems. Tr. 530. However, when she was pressed to identify any such person, Clark was able to come up only with a possible first name, "Maria," for a single person. Tr. 530-531. The Respondent did not introduce documentary support for Clark's claim that any prior employee named Maria had applied to Clark, or been refused employment by her, much less that Maria had attendance issues comparable to Molina's. As noted previously, Clark showed herself to be a biased witness. I find that the evidence does not establish that Clark had ever refused to hire an applicant comparable to Molina.

DISCUSSION

I. PATTON'S QUESTIONING OF WHITE

The General Counsel alleges that Patton's questioning of White on September 23, 2022, was coercive in violation of Section 8(a)(1) of the Act. The Board has held that while an employer's questioning of an employee may be a lawful act, the questioning runs afoul of the Act if, in light of the totality of the circumstances, it reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Mathews Readymix, Inc.*, 324 NLRB 1005, 1007 (1997), enfd. in part 165 F.3d 74 (D.C. Cir. 1999); *Emery Worldwide*, 309 NLRB 185, 186 (1992); *Liquitane Corp.*, 298 NLRB 292, 292-293 (1990). Relevant factors to be considered in this inquiry include: whether the interrogated employee's union activity was open and active,[42] whether proper assurances were given concerning the questioning, the background and timing of the interrogation, the nature of the information sought (i.e., whether the interrogator appeared to be seeking information on which to take action against individual employees), the identity of the questioner, the place and method of the interrogation, and the truthfulness of the employee's reply. *Healthy Minds, Inc.*, 371 NLRB No. 6, slip op. 4 (2021); *North Memorial Health Care*, 364 NLRB 770, 799 (2016), enfd. in relevant part by 860 F.3d 639 (8th Cir. 2017); *Stoody Co.*, 320 NLRB 18, 18-19 (1995); *Rossmore House Hotel*, 269 NLRB 1176, 1177-1178 (1984), affd. sub nom. *Hotel & Restaurant Employees Local 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985); see also *Johnnie's Poultry*, 146 NLRB 770 (1964), enf. denied 344 F.2d 617 (8th Cir. 1965) (Board sets forth the conditions under which an employer may question an employee about protected activity). "Depending on the circumstances, a history of hostility toward protected concerted activity may also be a relevant factor." *Healthy Minds*, supra.

Although Patton's questioning of White concerned protected strike activity, I find that the questioning did not coerce White's exercise of her rights under the Act.[43] A number of the relevant factors weigh clearly in favor of this result. The questioning took

[42] The Board has affirmed the application of this factor to cases in which the question is whether the employee's protected concerted activity (rather than union activity) was open and active. See, e.g., *Salon/Spa at Boro*, 356 NLRB 444, 457-458 (2010)

[43] As discussed in the statement of facts, I find that the record does not establish that Patton asked White about the union sympathies of White or her co-workers. Therefore, I do not consider whether such questioning, under the circumstances present here, would have been a violation.

place during White's shift at a table at the store – a time and place where conversations between management and staff would not be unusual. Patton did not summon White to come to the store during non-working hours, did not hold the meeting in an isolated office or a location unfamiliar to White,[44] did not double-team White by including a second manager, and did not otherwise conduct the questioning in manner that would tend to heighten intimidation. Regarding her participation in both the strike activity and the past union campaign, White was unusually open and active. She did not attempt to conceal her actions on the day of the strike or during the questioning. Cf. *Spectrum Juvenile Justice Services*, 368 NLRB No. 102, slip op. at 10 (2019) (whether the employee attempted to conceal the protected activity is a factor in determining the lawfulness of the questioning). As for timing, the interrogation took place just a couple of days after the activity that it concerned – a time when appropriate inquiries would make sense. The identity of the questioner also favors finding the questioning non-coercive. Patton was not a high-level management official, but rather a manager only one level above the store manager. Moreover, having the store manager, Clark, perform the interrogation would have been problematic since the strike was expressly a protest of Clark's conduct. I also find that the nature of the information sought weighs in favor of finding Patton's questioning of White to be lawful. The Respondent was investigating whether the strike necessitated closing the store, or whether, to the contrary, White closed the store even though adequate non-striking personnel were present to operate the store during the strike.

Under circumstances other than those present here the fact that Patton was not shown to have provided White with proper assurances against retaliation would weigh in favor of finding the questioning coercive. *Johnnie's Poultry*, supra. However, the General Counsel does not make clear what form those assurances would have taken in this case given that lawful discipline was a possibility depending on what the investigation showed. For example, if the inquiry showed that White had forced non-strikers capable of operating the store to leave the store, discipline might have been appropriate. As found elsewhere in this decision, White did not do that, or anything else that forfeited the protected status of her strike activity. However, the Respondent was not shown to have been unjustified in making an inquiry into whether that was the case. The Respondent's mistake was not that it made the inquiry, but that it discounted the information gleaned from that inquiry when it decided to discharge White.

For these reasons, I find that the evidence does not show that on September 23, 2022, the Respondent coercively questioned White in violation of Section 8(a)(1) of the Act.

[44] According to White, there were more isolated areas at the store that were typically used for meetings. I see no reason, however, to assume that a reasonable employee would find a manager's questioning in the seating area of the store more intimidating than questioning that took place in an isolated location. The opposite effect seems just as likely. Moreover, at the time of the questioning, Patton was not yet the district manager for the Raleigh store and the record does not show that there was any history of Patton meeting with employees at that store or of doing so in a more isolated area of the store than where she questioned White.

II. CLARK'S STATEMENT WHEN DECLINING TO HIRE MOLINA AT THE RALEIGH STORE

On October 26, 2022, Clark, a supervisor and agent of the Respondent, informed Molina, by text message, of the decision not to hire him at the Raleigh location, a place he had worked in the past. First, Clark stated that the decision not to hire Molina was based on concerns about Molina's attendance reliability. Molina sought to address those concerns – noting that he would not, as Clark claimed to assume, be commuting from another city and also stating that he had corrected his attendance issues at the Raleigh store after Clark coached him about those issues. Then Clark responded to Molina's effort to obtain re-employment by making the statement that the General Counsel alleges was unlawfully coercive. Clark told Molina:

> I'm also confused because of social media posts about our store from you on the day of our strike. I don't want to bring people back here that think it's toxic. We need a healthy environment.

In the posts referenced by Clark, Molina had shared a video of White's strike activity,[45] publicized a strike support fund for the Raleigh staff, and stated that his own experience at the Raleigh store had "made me almost quit" Starbucks.

The Board has recognized that an employee's demonstration of support for the strike activity of others is itself concerted protected activity. *Triangle Elec. Co.*, 335 NLRB 1037 (2001), reversed on other grounds by 78 Fed.Appx. (6th Cir. 2003). An employer violates Section 8(a)(1) of the Act by stating that it will not hire applicants who engage in protected activity. See, e.g., *Cobb Mech. Contractors, Inc.*, 356 NLRB 686, 694 (2011), *Exterior Systems, Inc.*, 338 NLRB 677, 679 (2002), *Lin R. Rogers Electrical Contractors*, 328 NLRB 1165, 1167 (1993), *Plastilite Corp.*, 153 NLRB 180, 182-183 (1965), enfd. 375 F.2d 343 (8th Cir. 1967). Under this precedent, Clark's statement that she did not want to hire individuals who, like Molina, had expressed support for the strikers was coercive in violation of the Act.[46]

The Respondent violated Section 8(a)(1) of the Act on October 26, 2022, when Clark threatened Molina that she would not hire or rehire employees because of their protected activities.

III. DISCIPLINARY ACTIONS

A. LEGAL STANDARD

[45] The employees' stated reasons for the strike were that Clark had "fostered a toxic work environment," issued "retaliatory write ups," and forced employees to work while sick.

[46] I note that Molina, as an applicant seeking to be hired, was an employee for purposes of the Act and the protections of Section 7. *NLRB v. Town & Country Electric, Inc*., 516 U.S. 85, 87 (1995); *American Federal for Children*, 372 NLRB No. 137, slip op. at 6 (2023).

Allegations that an employer discriminatorily disciplined an employee based on union or protected concerted activity in violation of Section 8(a)(3) and/or Section 8(a)(1) of the Act, and which turn on motivation, are analyzed using the framework set forth in *Wright Line,* 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); see also *Davis Defense Group, Inc.*, 373 NLRB No. 132, slip op. at 1 (2024) (applying *Wright Line* analysis to allegation of discrimination based on protected concerted activity that turns on motivation). Under the *Wright Line* framework, the General Counsel bears the initial burden of showing that the Respondent's decision to take adverse action against an employee was motivated, at least in part, by the employee's union or protected concerted activity. *Mondelez Glob., LLC*, 369 NLRB No. 46, slip op. at 1-2. (2020) (evidence must show a causal relationship between the employee's protected activity and the adverse action). The General Counsel can meet its initial *Wright Line* burden by showing that: (1) the employee engaged in union and/or protected concerted activity, (2) the employer knew of such activities, and (3) the employer harbored animosity towards the union and/or protected concerted activity, and there was a causal connection between the discipline and the protected activity. *Camaco Lorain Mfg. Plant,* 356 NLRB 1182, 1184-1185 (2011); *ADB Utility Contractors,* 353 NLRB 166, 166-167 (2008), enf. denied on other grounds, 383 Fed. Appx. 594 (8th Cir. 2010); *Intermet Stevensville,* 350 NLRB 1270, 1274-1275 (2007); *Senior Citizens Coordinating Council,* 330 NLRB 1100, 1105 (2000). If the General Counsel establishes discriminatory motive, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity. *Camaco Lorain*, supra; *ADB Utility*, supra*; Intermet Stevensville*, supra; *Senior Citizens*, supra.

The Board has held that the analysis set forth in *Wright Line* is not appropriate when an employee discharges employees for "their act of 'going on strike,'" because motivation is not at issue in that instance since "'the very conduct for which employees are disciplined is itself protected concerted activity.'" *CGLM, Inc.*, 350 NLRB 974, 974 n.2 (2007) quoting *Burnup & Sims, Inc.*, 256 NLRB 965, 976 (1981)), enfd. mem. 280 Fed. Appx. 366 (5th Cir. 2008); accord *EYM King of Missouri*, 365 NLRB No. 16, slip op. at 1 fn. 4 (2017), enfd. 726 Fed. Appx. 524 (8th Cir. 2018). To determine whether an employee's conduct in the course of the strike, or other protected activity, caused him or her to forfeit the Act's protection, the Board uses the analysis set forth in *Atlantic Steel*. 245 NLRB 814 (1979); see *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (Board re-affirms *Atlantic Steel* standard), vacated and remanded by 108 F.4th 252 (5th Cir. 2024); see also *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (where an employee is discharged because of otherwise protected conduct, "the only issue is whether [the] conduct lost the protection of the Act because" the conduct "crossed over the line separating protected and unprotected activity"). If it is determined that the misconduct alleged by the employer did not cause the employee to forfeit the protection of the Act, the causal connection between the discipline and the employee's protected activity is established and "the inquiry ends." *Nor-Cal Beverage Co.*, 330 NLRB 610, 611-612 (2000).

B. WRITTEN WARNINGS TO WHITE

The General Counsel alleges that the Respondent discriminated in violation of Section 8(a)(3) and (1) of the Act on September 20, 2022, when store manager Clark issued disciplinary warnings to White because she supported the Union and engaged in concerted activities. The Respondent counters that Clark issued those warnings because of White's poor attendance, not because of her union or protected concerted activities. Since the parties have put the Respondent's motivation for the disciplinary actions at issue, the appropriate analysis is that set forth in *Wright Line*, supra.

I find that the General Counsel has clearly established the first two elements of its initial *Wright Line* burden. First the evidence shows that White engaged in union and concerted activity. White was the acknowledged leader of the union campaign at the Raleigh store and also a spokesperson who had been quoted, and identified by name, in multiple news reports and public media postings. This activity started in February 2022 and continued until the early part of July 2022. The Respondent does not dispute that it knew that White had engaged in these activities. District manager Harvey, whose district included the Raleigh store, testified that he knew White was very passionate and proud about being the employee who had organized the Raleigh store's workers, and district manager Patton's September 2022 communications with human resources reported that White had been the store's organizer. If store manager Clark had not already been aware of White's active role in the union organizing at her store (which is implausible), she could not have had any doubt about that role following the July 2022 text exchange during which White, speaking on behalf of the union organizing committee, stated that she would be withdrawing the representation petition.

The question of whether the record evidence shows the existence of animus towards protected concerted and/or union activity that was connected to the September 20 disciplinary write-ups is a close one, but on balance I find that a preponderance of the evidence does not support finding such animus. On the one hand, Clark's statements threatening to withhold a raise until employees withdrew their union petition does support finding animus towards those activities. The Board has held in multiple cases that withholding and/or threatening to withhold benefits unless employees choose not to unionize is a violation of the Act. See, e.g., *Starbucks Corp.*, 374 NLRB No. 10 (2024) and *Starbucks Corp.*, 374 NLRB No. 9 (2024).[47] I find, however, that the evidence that animus was connected to the September 20 disciplinary action against White is outweighed by evidence from the 2-month period between when the union campaign ended and when the discipline was issued. In a July 19, 2022, text exchange, White told Clark that she no longer supported unionizing the store and praised Clark for morale boosting management that had led employees to abandon of the union effort. In addition, subsequent to that exchange, White and Clark had very friendly, candid, text exchanges about their non-work social activities and drink preferences. In one such

[47] Clark also demonstrated animosity towards employees' strike activity, however, that strike activity occurred subsequent to the September 20 disciplinary write-ups and therefore animus towards the strike cannot have been a cause of the write-ups.

text White called Clark her "bestie"[48] and Clark gave advice to White and referred to herself as "mamma." Given the tenor of these communications and the record as a whole, including the fact that the union campaign was relatively short-lived, had ended over 2 months earlier, and had been expressly disavowed by White, I cannot conclude that Clark bore animus against White because of her earlier protected activities when she issued the September 20 disciplinary write-ups.[49] On balance, I find that the record does not support a finding that Clark bore any animus towards White's protected activities at the time she issued the disciplinary write-ups or, indeed, at any time during the period from late July 2022 until September 20, 2022. Nor does the evidence show that Clark issued the disciplinary write-ups at the direction of another company official who bore such animus.

In reaching the conclusion that the General Counsel has not shown the necessary animus with respect to the September 20 disciplinary write-ups, I considered the evidence about disciplinary actions the Respondent did, or did not, issue in circumstances claimed to be comparable to White's. For the reasons discussed in the statement of facts, I find that the comparator evidence, while substantial in volume, was not substantial in quality, and does not provide a reliable basis upon which to conclude that the September 20 discipline issued to White was discriminatory. In addition, I note that discipline in the form of a written warning and a final written warning was not, on its face, out of proportion to the severity of White's attendance shortcomings. This is especially true given that Clark had, the previous July, informally counseled White about her attendance problems and suggested that disciplinary action could be unavoidable in the future if White did not improve.[50]

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[48] The Merriam-Webster dictionary defines "bestie" as "best friend." Retrieved on March 4, 2025, from https://www.merriam-webster.com.

[49] I do not base this finding on any general assumption that hard feelings generated during a union campaign dissipate immediately upon the conclusion of that campaign. However, I find that, the evidence here, and in particular the text communications between White and Clark, shows that any such hard feelings had dissipated in the case of those two individuals.

[50] The General Counsel argues that the Respondent's history of anti-union violations at other locations across the country shows that the challenged actions in the instant case were "part of a well-planned and widely executed nationwide strategy to crush employees' organization efforts." Brief of the General Counsel at Page 44. The General Counsel does not point to any evidence that Clark was privy to, or had been directed to act in furtherance of, the strategy described. I find that the evidence does not support finding that Clark acted out of unlawful animus based on the Respondent's history. I nevertheless observe that the Respondent does have an unusually extensive record of recent unlawful anti-union misconduct, some of which had nation-wide implications, and which leaves little room for doubt that the Respondent is, in fact, engaged in a nationwide anti-union campaign. See e.g., *Starbucks Corp.*, 374 NLRB No. 14 (2024); *Starbucks Corp.*, 374 NLRB No. 10 (2024); *Starbucks Corporation*, 374 NLRB No. 9 (2024); *Starbucks Corp.*, 374 NLRB No. 8 (2024); *Starbucks*, 373 NLRB No. 135 (2024); *Starbucks Corp.*, 373 NLRB No. 123 (2024); *Starbucks Corp.*, 373 NLRB No. 115 (2024); *Starbucks Corp.*, 373 NLRB No. 111 (2024); *Starbucks Corp.*, 373 NLRB No. 105 (2024); *Starbucks Corp.*, 373 NLRB No. 90 (2024); *Starbucks Corp.*, 373 NLRB No. 83 (2024); *Starbucks Corp.*, 373 NLRB No. 53 (2024); *Starbucks Corp.*, 373 NLRB No. 48 (2024); *Starbucks Corp.*, 373 NLRB No. 44 (2024); *Starbucks Corp.*, 373 NLRB No. 45 (2024);

Since the record evidence does not support a finding that Clark bore animus towards White because of protected concerted or union activities as of September 20, 2022, when she issued the challenged disciplinary write-ups, the General Counsel has not satisfied its initial *Wright Line* burden and a violation has not been established with respect to those disciplinary actions. The allegations that the September 20, 2022, written warning and final written warning were discriminatory in violation of Section 8(a)(3) and (1) of the Act must be dismissed.

C. DISCHARGE OF WHITE

The right to strike to protest working conditions is the most fundamental of rights guaranteed to employees by the Act. *J. Librera Disposal Serv., Inc*., 247 NLRB 829, 832 (1980). The fundamental right to strike is not only encompassed within the guarantees set forth in Section 7 of the Act,[51] but is expressly recognized by Section 13 of the Act.[52] *Iron Workers Loc.783*, 316 NLRB 1306, 1309 (1995) (the right to strike is "a fundamental right guaranteed by Section 7 and 13 of the Act"). When "'employees are protesting working conditions, whether caused by a supervisor or by higher management action, those employees can protest by any legitimate means, including striking,'" even if "some lesser means of protest could have been used." *New York Presbyterian Hudson Valley Hospital*, 372 NLRB No. 15, slip op. at 5 (2022), quoting *Trompler*, 335 NLRB 478, 480 and n. 26 (2001).

The General Counsel alleges that the Respondent discharged White because of her participation in the protected strike on September 21, 2022, and her support for the Union. The Respondent defends by arguing that the discipline was justified because, when the staff went on strike, Hermenegildo (the playcaller) and White closed the store without management permission. Under precedent of the United States Supreme Court and the Board, the Respondent's attempt to distinguish the protected strike from the associated store closure fails. In *NLRB v. Washington Aluminum Co.*, the Court considered whether an employer could discipline employees for failing to obtain the employer's permission before leaving work in order to engage in a strike over working conditions. 370 U.S. 1099 (1962). The employer contended that the employees' violation of a company prohibition on leaving work without permission constituted a lawful reason that was "wholly separate and apart from any concerted activities they

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Starbucks Corp., 373 NLRB No. 33 (2024); *Starbucks Corp.*, 373 NLRB No. 21 (2024); *Starbucks Corp.*, 372 NLRB No. 122 (2023); and *Starbucks Corp.*, 372 NLRB No. 50 (2023).

[51] Section 7 of the Act, 29 U.S.C. Section 157, states relevant part: "Employees have the right to self-organization, 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 purposes of collective bargaining or other mutual aid or protection . . . ."

[52] Section 13 of the Act, 29 U.S.C. Section 163, states: "Nothing in this Act [sub-chapter], except as specifically provided for herein, shall be construed so as either to interfere with or impede or diminish in any way the right to strike or to affect the limitations or qualifications on that right."

engaged in." 370 U.S. at 1104. The Supreme Court rejected the employer's attempt to distinguish the right to engage in a strike without permission from the right to stop working without permission, explaining that holding otherwise would allow the employer to "prohibit even the most plainly protected kinds of concerted work stoppages until and unless the permission of the [employer] was obtained." Ibid. The Supreme Court held that the employer could not lawfully discipline employees for strike activity absent a showing that the strike was unlawful, violent, in breach of contract, or indefensibly disloyal – circumstances that did not pertain in *Washington Aluminum*, 370 U.S. at 1104 and do not pertain here.

I note that, as in *Washington Aluminum,* the Respondent's defense here that it did not terminate White for engaging in a protected strike but rather for closing the store is no more than semantic obfuscation. In order to exercise their fundamental right to withhold work to protest working conditions, White and her co-workers *had* to close the store. Since the entire staff present that morning participated in the strike, the strike left the store with insufficient staff and, under the Respondent's policies, required that it be closed. Indeed, even if one assumes, contrary to the evidence but consistent with the Respondent's position, that only the two shift supervisors present – Hermenegildo and White – had chosen to strike, the staff would still have had to close the store because the Respondent prohibits a store from remaining opening without at least one shift supervisor or manager on duty. Under the circumstances present here, if the employees had gone on strike, but *not* secured the store, White would have been violating policy. Indeed, in at least one recent case the Respondent argued that it lawfully disciplined strikers for *failing to secure* a store before going on strike. See *Starbucks Corp.*, JD(SF)-03-24, 2024 WL 466552 (February 6, 2024) (Section regarding Conklin Discipline and Discharge). The Respondent's arguments, if accepted, threaten to squeeze employees' right to strike without management permission out of existence: if employees go on strike and close the store, they are subject to discipline for closing the store without permission, but if they strike and do not close the store, they are subject to discipline for failing to secure the unattended store. The result would be that employees' statutory right to cease work to protest working conditions would be replaced with a right to request management's permission to do so. It is not surprising that both the United States Supreme Court and the Board have rejected that outcome by holding that an employer cannot discipline its employees for failing to obtain the employer's permission before leaving work to go on strike. See *NLRB v. Washington Aluminum Company*, supra, *Iowa Packing Co.*, 338 NLRB 1140, 1144 (2003), *Sunbeam Lighting Co.*, 136 NLRB 1248, 1251-1252 and 1256-1257 (1962), enf. denied 318 F.2d 661 (7th Cir. 1963) and *Marshall Car Wheel & Foundry Co.*, 105 NLRB 57, 66 (1953), reconsideration denied 107 NLRB 314 (1955), enf. denied 218 F.2d 409 (5th Cir. 1955); see also *CGLM, Inc.*, 350 NLRB at 974 n.2 and 979-980 (discharge of striking workers – purportedly for not calling in or appearing for work – amounted to an unlawful discharge for the act of going on strike); *Anderson Cabinets*, 241 NLRB 513, 518-519 (1979) ("Calling a strike a voluntary quit or an absence from work justifying discharge" would "write Section 13 out of the Act."), enfd. 611 F.2d 1225 (8th Cir. 1979).

Starbucks advanced a similar argument in a case I recently heard involving an employee's failure to appear for a scheduled shift in order to comply with a subpoena to attend a Board hearing involving Starbucks. See *Starbucks Corp.*, 373 NLRB No. 111 (2023). Even though the subpoenaed employee had informed management well in advance that he was required to attend the hearing pursuant to subpoena, and even though the employee had made efforts to find someone to fill-in on his scheduled shift, Starbucks argued that it could lawfully discipline him because management had not approved his absence to comply with the Board's subpoena. I found that the discipline was a violation of the Act and the Board adopted that part of the decision in the absence of exceptions. Slip op. at 1 n.2 and 12-13 .[53] In related circumstances, the Board held that Starbucks violated the Act by threatening to discipline employees if they missed work to testify in a Board proceeding without finding shift coverage. *Starbucks Corp.*, 372 NLRB No. 93, slip op. at 1, notes 4 and 5 (2023). Starbuck's attempt to whittle away at employees' rights under the Act by creating a requirement that the employees obtain management's approval before exercising those rights is incompatible with the protections created by the Act.

I do not believe that any further analysis is necessary to conclude that the Respondent violated Section 8(a)(1) of the Act by terminating White for her protected strike activity. To the extent that any question arguably remains as to whether White's strike activity itself retained the Act's protection, the appropriate analytic model is the one set forth in *Atlantic Steel*, supra, as recently reaffirmed in *Lion Elastomers*, 372 NLRB slip op. at 3 and 6. Under *Atlantic Steel*, if the protection for White's strike activity was not forfeited because of egregious misconduct during the strike, then the causal connection between the discharge decision and the protected strike activity is established and "the inquiry ends" with a finding of violation. Ibid.; see also *Nor-Cal*, 330 NLRB at 611-612. Here, the Respondent has not offered evidence that even begins to show that White's strike activity included egregious misconduct that deprived that activity of the Act's protection. The only reason that the Respondent gives for arguing that the strike activity forfeited protection is that Hermenegildo (playcaller) and White closed the store without permission. Under the precedent and facts previously discussed, that argument fails. Moreover, I note that the Respondent does not assert, and the record does not show, that White's strike activity included vandalism, damage of property, violence, threats, or other similar misconduct that might arguably have forfeited the Act's protection. The record shows that, to the contrary, Hermenegildo and White took precautions to safeguard the store, its inventory, and its cash during the strike. Cf. *Youth Consultation Service*, 205 NLRB 82, 85 (1973) (in certain instances, employees' right to engage in protected activity may be "limited by the duty to take reasonable precautions to protect the employer's physical plant from such imminent damage as foreseeably would result from their sudden cessation of work").[54] When

[53] The decision is not entitled to any precedential weight on this point, but I discuss it to show that the implications of allowing the Respondent to make employees' exercise of their rights under the Act contingent upon obtaining the Respondent's permission go well beyond the facts of the instant case.

[54] I note that although the separation paperwork references White's prior time and attendance incidents, the Respondent had already decided upon, and issued, the discipline for

replacement shift supervisor Espinoza arrived to re-open the store, he did so without any alleged improper interference from White.

Since White did not forfeit the Act's protection, the causal connection between her discharge and the protected strike activity is established and a violation of Section 8(a)(1) of the Act is established. *Lion Elastomers*, 372 NLRB slip op. at 6; *Nor-Cal Beverage Co.*, 330 NLRB at 611-612.[55] The Respondent violated Section 8(a)(1) of the Act on October 21, 2022, when it discharged White for engaging in protected strike activity.[56]

those incidents. Therefore, it is clear that the prior attendance issues would not have resulted in the Respondent imposing any additional discipline, much less the discharge, absent White's protected strike activity.

[55] The Respondent argues that the discharge allegation should be analyzed not under the precedent discussed above, but rather using the analytical framework set forth in *Wright Line*. As discussed previously, however, the *Wright Line* analysis is not appropriate when, as here, motivation is not at-issue because the Respondent defends the challenged decision based on the protected activity itself, or on conduct that occurred in the course of the protected activity. See *CGLM, Inc.*, 350 NLRB at 974 n. 2. At any rate, a violation is also shown in this case if the allegation is evaluated pursuant to *Wright Line.* The evidence easily establishes that the Respondent was aware of White's protected activity at the time it made the decision to terminate her. Patton testified that she knew on September 21 that White and the other store staff were engaging in a strike, and Patton's written communications with human resources staff regarding how to address White's strike conduct explicitly recognize the fact that White had been on strike and also that she had been "the union organizer" at the store. Animus towards the strike activity is demonstrated by the Respondent's decision to discharge White for that activity and also by Clark's October 26 text stating that she did not want to employ persons who expressed support for the strikers' protest. The Respondent attempts to meet its responsive burden by noting that White did not obtain prior management permission before going on strike and closing the store. For the reasons already discussed, under existing United States Supreme Court and Board precedent, and given the facts present here, White did not forfeit the Act's protection by exercising her fundamental right to strike without first obtaining management's permission to do so.

[56] I do not find it necessary to reach the question of whether hostility towards White's prior union activity, in addition to animus towards her protected strike activity, contributed to the discharge decision in violation of Section 8(a)(3). Such a finding would not affect the relief for White. *Phoenix Transit System*, 337 NLRB 510, 510 n.3 (2002), enfd. 63 Fed.Appx. 524 (D.C. Cir. 1003) ; *Dougherty Lumber Co.*, 299 NLRB 295, 295 n.1 (1990).

D. Discharge of Molina from the Winterville Store

The General alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating Molina from the Winterville store on October 11, 2022, because of his protected concerted and union activity. The Respondent denies that it terminated Molina because of his protected activity and contends that the termination was motivated by Molina's failure to meet its attendance standards. Since this claim turns on motivation, it is properly analyzed using the *Wright Line* framework. I find that the General Counsel has established the first of the three elements of its initial burden under that framework. Although Molina was working at a store where employees had not petitioned for union representation, he did, in 2022, make social media postings in support of the union activity at other Starbucks stores and in support of the protected strike activity at the Raleigh store.

The General Counsel's case stumbles, however, at the second *Wright Line* showing. The record does not show that Beachler, who made the decision to terminate Molina, had any knowledge of Molina's posts in support of union efforts or the strike at the Raleigh store. I note that the Winterville store managed by Beachler was in different district than the Raleigh store and was located in a different city approximately a 1 ½ hour drive away. One cannot simply assume that Beachler was following what was being posted on social media about events at the relatively distant Raleigh store. At any rate, Beachler testified that she had not seen those posts or discussed union-related matters with Molina at the time she decided to terminate him. I credit that testimony based both on my observation of Beachler's demeanor and on the fact that there was no union petition at the store she managed and, in fact, no evidence of employees attempting to unionize there. I am aware that a prior Winterville store manager, Autmn Clarke, was aware of Molina's pro-union sentiments. However, Beachler did not start as store manager until several months after Clarke left that position; the two never worked together and never had a conversation about Molina. Under these circumstances, I find that the record does not show that Beachler, contrary to her testimony, had seen Molina's social media posts, or was aware of Molina's support for the Union.

In reaching the conclusion that the General Counsel has not shown the requisite employer knowledge, I also considered the comparator evidence, but find that it does not provide a basis for inferring that Beachler had seen Molina's posts. To the contrary, the comparator evidence shows that Beachler, both before and after disciplining Molina, frequently disciplined other employees for attendance issues. Moreover, Molina conceded that four different store managers found it necessary to address his poor attendance. That history of Respondent disciplining Molina for attendance deficiencies had begun by 2020 – well before Molina, in August 2021, first heard about the Union.

I find that the General Counsel has failed to demonstrate the Respondent's decision to terminate Molina from the Winterville store on October 11, 2022, was discriminatory in violation of Section 8(a)(3) and (1) of the Act.

IV. REFUSAL TO HIRE MOLINA AT THE RALEIGH STORE

On October 11, 2022, Molina contacted store manager Clark, with whom he had worked before, and stated that he had been discharged from the Winterville store for tardiness and asked Clark to hire him for the Raleigh location. Clark indicated an openness to hiring Molina despite knowledge of his prior attendance issues. Clark stated that the Raleigh store "should have room" for Molina, but that further review would be required before a hiring decision could be made. On October 26, 2022, Clark informed Molina that he would not be hired at the Raleigh store. The General Counsel alleges that the Respondent violated Section 8(a)(3) and (1) of the Act by refusing to hire Molina, or consider him for hire, because he supported the Union and engaged in protected concerted activities. The Respondent counters that the decision was based on Molina's attendance deficiencies.

In the *FES* decision, the Board set forth the framework for analyzing refusal-to-hire allegations. In order to establish a refusal-to-hire violation under *FES*, the General Counsel must show: (1) that the Respondent was hiring, or had concrete plans to hire, at the time of the alleged unlawful conduct; (2) that the applicant had experience or training relevant to the announced or generally known requirements of the positions for hire, or in the alternative, that the employer had not adhered uniformly to such requirements, or that the requirements were themselves pretextual or were applied as a pretext for discrimination; and (3) that animus towards union activity or protected concerted activity contributed to the decision not to hire the applicant. *FES*, 331 NLRB 9, 12 (2000), enfd. 301 F.3d 83 (3d Cir. 2002); see also *MSHN Enterprises*, 373 NLRB No. 137, slip op. at 3, n.4 (2024) (*FES* also applies to "discrimination based on protected concerted, rather than union, activities"). If the General Counsel makes these showings, then the burden shifts to the Respondent to show that it would not have hired the applicant even in the absence of the applicant's protected activity. *FES*, 331 NLRB at 12.

I find that the General Counsel had made the three showings required of it under *FES* with respect to Clark's decision not to hire Molina at the Raleigh store. Regarding the first showing – that the Respondent was hiring – I find that that this is established by Clark's own statements and actions. When Molina asked to be hired at the Raleigh store, Clark responded that the store "should have room" for him. Then Clark moved the hiring process forward by asking Molina for information about his prior employment with the Respondent. Clark continued to help Molina advance his application by providing Molina with the "store code" to place on his submission. Clark subsequently contacted human resources, as required in order to hire a former employee, and obtained information about Molina's work history. Clark told Molina that, in order to be hired at the Raleigh store, he would have to sign an attendance commitment, which Molina agreed to do. Clark's conduct is inconsistent with any conclusion other than that Clark was hiring at the Raleigh store. In addition, when Clark ultimately informed Molina that she would not hire him, Clark did not claim, or even suggest, that the reason she rejected Molina's application was that the store was not hiring. To the contrary, Clark told Molina that he was not being hired because of concerns about his attendance and

because Clark did not want to hire people who expressed support for, and agreement with, the recent strike by Raleigh store employees. Surely, if Clark was not currently hiring employees for the Raleigh store, she would have mentioned that to Molina before going through the steps to hire him or, at the latest, when she explained the rejection to Molina. Similarly, at trial, Clark did not testify that the reason she rejected Molina's application was that she was not hiring at the Raleigh store.[57]

The other two elements of the General Counsel's *FES* burden are clearly shown by the record. Molina had extensive experience and training relevant to the barista position. She had worked as a barista with the Respondent for multiple years and had earned the Respondent's certification to train new baristas as well as its coffee "master" designation. Inasmuch as shift supervisors performed many of the same duties as baristas, and were sometimes drawn (as in White's case) from the barista ranks, Molina had experience relevant to the shift supervisor position as well.

Regarding whether the evidence establishes the third element – i.e., that animus towards Molina's protected strike support activity[58] contributed to the decision – one need look no further than the text exchange in which Clark gave explanations to Molina for the rejection. After Molina provided responses to Clark's stated concerns about commuting distance and prior attendance issues, Clark explicitly stated that she had seen Molina's posts regarding the recent strike and did not want to hire persons who supported the strikers. One can hardly imagine more powerful evidence of unlawful animus than the decisionmaker's own documented words to the applicant explaining her decision by stating that she did not want to hire individuals who had expressed support for a protected employee protest. Clark's animus is further demonstrated by her participation in the discharge of White, which as discussed above was unlawfully motivated by White's protected strike activity. That is enough to support a finding of unlawful animus, but I also observe that Clark herself was the express target of the striking employees' complaints and that this could reasonably intensify the ill-will Clark bore towards employees who agreed with the strikers' complaints.

Since the General Counsel has made the required *FES* showing, the burden shifts to the Respondent to show that Clark would have refused to hire Molina at the

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[57] In reaching the conclusion that Clark was hiring at the time she rejected Molina's application, I considered Patton's testimony that no employees were hired for the Raleigh store at that time. Patton has responsibility over approximately 11 stores and, without more explanation, I consider it implausible that she would remember whether one of those 11 stores had hired during a specific time period 2 years before her testimony. This is especially true given that Patton's testimony on the subject was conclusory and that Patton had not reviewed the relevant hiring records prior to testifying. Tr. 725. At any rate, I note that in *FES* the Board rejected the view that there can be no hiring discrimination in the absence of hiring. *FES*, 331 NLRB at 15; see also *Iowa Beef Packers, Inc.*, 144 NLRB 615, 621 n. 10 (1963) (discriminatory refusal to hire may be proven without establishing that vacancies existed), enfd. in part 331 F.2d 176 (8th Cir. 1964).

[58] An employee engages in protected concerted activity by taking action to support an employee strike. See, e.g., *Triangle Elec. Co.*, 335 NLRB at 1037, *Lin R. Rogers Electrical Contractors*, 328 NLRB at 1166-1167.

Raleigh store even if Molina had not engaged in protected concerted or union activity. The Respondent has not met that burden. As noted above, the evidence that Clark was motivated by her animus against Molina's protected activity is particularly strong and includes contemporaneous written statements to Molina in which Clark justifies the rejection by telling Molina that she did not want to "bring people back" who expressed support for the complaints of employees during the recent strike. The evidence that Clark would have refused to rehire Molina absent that unlawful motivation is weak. The Respondent failed to identify a single employee other than Molina who Clark had refused to hire because of attendance issues, much less any who were rejected based on attendance comparable to Molina's.

I note, in addition, that the evidence shows that by the end of their initial text exchange on October 11, Clark knew that Molina had a history of attendance issues and had just been fired by another store manager for those issues. Nevertheless, Clark continued with the steps in the selection process and did not inform Molina that he was being rejected until after she discovered Molina's support for the strikers. I also consider it significant that when Molina made representations to allay Clark's stated attendance-based concerns (by, for example, offering to sign an attendance commitment, clarifying that he would not be commuting from another city, stating that he had corrected the attendance problems at the Raleigh store), Clark did not question or respond to Molina's representations. Rather Clark pivoted to justifying the rejection by expressly stating that she did not want to "bring people back" who, like Molina, expressed agreement with the strikers and their complaints.

In reaching the conclusion that the Respondent has not met its responsive burden, I considered that Molina had a significant history of poor attendance. It would not be surprising if some managers declined to a hire an applicant based on such a history. The Respondent's problem is that it has not shown that Clark was one such manager. After the General Counsel showed that Clark's refusal to hire Molina was motivated at least in part by unlawful reasons, the Respondent could not meet its responsive burden by proving the existence of a lawful basis upon which Clark *could* have taken the action, but rather was required to show by a preponderance of the evidence that Clark *would* have taken the action on that lawful basis even absent her unlawful motivation. *Challenge Mfg. Co.*, 368 NLRB No. 35, slip op. at 12 (2019), enfd. 815 Fed. Appx. 22 (6th Cir. 2020); *Bruce Packing Co.,* 357 NLRB 1084, 1086-1087 (2011), enfd. in relevant part 795 F.3d 18 (D.C. Cir. 2015); *Monroe Manufacturing, Inc.,* 323 NLRB 24, 27 (1997); *T & J Trucking Co.*, 316 NLRB 771, 771 (1995), enfd. 86 F.3d 1146 (1st Cir. 1996). The Respondent has failed to meet that burden here.

I find that the Respondent discriminated on the basis of protected concerted activity in violation of Section 8(a)(1) of the Act on October 26, 2024, when it refused to hire Molina.[59]

[59] I do not find it necessary to reach the question of whether animus towards Molina's support for the Union, in addition to animus towards his protected concerted activity, contributed to the refusal to hire decision and violated Section 8(a)(3). Such a finding would not affect the relief for Molina. *Phoenix Transit System*, 337 NLRB at 510 fn.3; *Dougherty Lumber Co.*, 299 NLRB at 295 n.1. Nor is it necessary to decide whether the Respondent discriminatorily failed

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

2. Workers United, Southern Regional Joint Board is a labor organization within the meaning of Section 2(5) of the Act.

3. On October 21, 2022, the Respondent discriminated in violation of Section 8(a)(1) of the Act when it terminated the employment of Alyssa White because she engaged in protected concerted activity by participating in a strike to protest working conditions.

4. On October 26, 2022, the Respondent violated Section 8(a)(1) of the Act when store manager Ashley Smart Clark threatened Mateo Molina-Elizalde that she would not rehire employees because they engaged in protected concerted activities.

5. On October 26, 2022, the Respondent discriminated in violation of Section 8(a)(1) of the Act when it refused to hire Mateo Molina-Elizalde because of his protected concerted activities.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. In particular, the Respondent must make White and Molina (the discriminatees) whole for any loss of earnings and other benefits incurred as a result of the discrimination against them. Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), the Respondent shall also compensate the discriminatees for any other direct or foreseeable pecuniary harms incurred as a result of its unlawful conduct, including reasonable search-for-work and interim employment expenses, if any, regardless of whether those expenses exceed the individual's interim earnings. See also *King Soopers, Inc.*, 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). 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. Additionally the Respondent shall compensate the

to consider Molina for hire, since the finding that it discriminatorily failed to hire him for the same positions provides Molina with all the relief that a positive finding on the former would provide.

discriminatees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, in accordance with *Tortillas Don Chavas*, 361 NLRB 101 (2014), and file with the Regional Director for Region 10, 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 for each affected employee in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). 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 addition, pursuant to *Cascades Containerboard Packaging*, 370 NLRB No. 76 (2021), the Respondent will file with the Regional Director for Region 10 a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

The General Counsel argues that I should also order, as "standard remedies," additional measures that the Board has previously characterized as "extraordinary remedies" to be imposed only upon a showing that standard remedies will be insufficient. See, e.g., *Chinese Daily News*, 346 NLRB 906, 909 (2006) (read aloud remedy is not warranted except where the General Counsel shows that other remedies will be insufficient), enfd. 224 Fed.Appx.6 (D.C. Cir. 2007; see Brief of the General Counsel at Pages 87 to 92. The General Counsel's arguments to alter Board precedent are for the Board to consider, not me. *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("We emphasize that it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed. It is for the Board, not the judge, to determine whether precedent should be varied."); see also *Austin Fire Equipment, LLC*, 360 NLRB 1176 fn. 6 (2014). Although I decline to order the extraordinary relief requested, I find it is consistent with the Board's standard remedies to order the Respondent to distribute the Notice to Employees using all means by which it customarily communicates with its employees. This includes distribution by text, social media, an internal smartphone app, 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.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended Order.[60]

ORDER

The Respondent, Starbucks Corporation, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) threatening not to hire or rehire employees because they engaged in protected concerted activities.

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

(b) terminating the employment of any employee because he or she engaged in protected concerted activity.

(c) refusing to hire or rehire any employee because he or she engaged in protected concerted activity

(d) 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 actions necessary to effectuate the policies of the Act.

(a) Within 14 days of the date of this Order, offer Alyssa White reinstatement to her position at the Respondent's Raleigh location without prejudice to her seniority or other rights and privileges she would have enjoyed absent the unlawful discrimination against her.

(b) Within 14 days of the date of this Order, offer Mateo Molina-Elizalde instatement to the positions he was discriminatorily denied at the Respondent's Raleigh location without prejudice to his seniority or other rights and privileges he would have enjoyed absent the unlawful discrimination against him.

(c) Make Alyssa White and Mateo Molina-Elizalde whole for any loss of earnings and other benefits incurred as a result of discrimination against them, as set forth in the remedy section of this decision.

(d) Compensate Alyssa White and Mateo Molina-Elizalde for the adverse tax consequences, if any, of receiving a lump-sum backpay award and file with the Regional Director for Region 10, 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 quarters.

(e) Within 14 days from the date of this Order, expunge from its files all references to the unlawful firing of Alyssa White and the unlawful refusal to hire Mateo Molina-Elizalde and notify both of them in writing that this has been done and that the unlawful 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 backpay due under the terms of this Order.

(g) Within 14 days after service by the Region post at its Raleigh Store (located at 2901 Sherman Oak Place, Raleigh North Carolina) copies of the attached notice marked "Appendix."[61] Copies of the notice, on forms provided by the Regional Director for Region 10 of the National Labor Relations Board, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notice shall be distributed electronically, such as by text, social media, internal smartphone app, email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at that facility at any time since October 21, 2022.

(h) Within 21 days after service by the Region, file with the Director for Region 10 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., March 10, 2025

PAUL BOGAS
U.S. Administrative Law Judge

[61] 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."

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities.

WE WILL NOT interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT threaten to refuse to hire, or rehire, you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees or because you exercise your right to strike or otherwise support a strike.

WE WILL NOT refuse to hire, or rehire, you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees or because you exercise your right to strike or otherwise support a strike.

WE WILL NOT terminate your employment or otherwise discriminate against you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees or because you exercise your right to strike or otherwise support a strike.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL offer Alyssa White immediate and full reinstatement to her former job without prejudice to her seniority or any other rights and/or privileges previously enjoyed.

WE WILL offer Mateo Molina-Elizalde full instatement to the positions for which we discriminatorily refused to hire him in October 2022, and give him seniority and other benefits from the date when he should have been hired.

WE WILL make Alyssa White and Mateo Molina-Elizalde whole for any loss of earnings and other benefits, and for any other direct and foreseeable harms, suffered as a result of our discrimination against them.

WE WILL compensate Alyssa White and Mateo Molina-Elizalde for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL file with the Regional Director for Region 10, 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 years for each affected employee.

WE WILL file with the Regional Director for Region 10 a copy of each affected employee's corresponding W-2 form(s) reflecting the backpay award.

WE WILL remove from our files all references to our termination of the employment of Alyssa White and to our refusal to hire Mateo Molina-Elizalde and **WE WILL** notify them in writing that this has been done and that unlawful actions will not be used against them in any way.

STARBUCKS CORPORATION

(Employer)

Dated _____ By_____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

Harris Tower, 233 Peachtree Street, N.E., Suite 1000, Atlanta, GA 30303-1531
(404) 331-2896, Hours: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/**10-CA-305651** 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.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (470) 343-7498.