JD(SF)–06-25
Austin and Houston, Texas

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

STARBUCKS CORPORATION

and	**Cases**	**16–CA–304046**
		16–CA–304462
		16–CA–304213
WORKERS UNITED, affiliated with		**16–CA–305174**
SERVICE EMPLOYEES INTERNATIONAL UNION		**16–CA–310855**
		16–CA–315740

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DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. This hearing was held in Austin and Houston, Texas in June and August 2024. The complaint alleged that Starbucks Corporation (Starbucks or the Respondent) violated §8(a)(1), (3) and (5) of the National Labor Relations Act (the Act).[1] On the record, I make the following

FINDINGS OF FACT[2]

I. JURISDICTION

Starbucks engages in commerce under §2(2), (6) and (7) of the Act. It is headquartered in Seattle, Washington and operates cafés throughout the world, including cafés located at 516 West Oltorf Street, Austin, Texas (the Oltorf café), 504 W 24th Street, Austin, Texas (the 24th Street café) and 2801 South Shepherd Drive, Houston, Texas (the Shepherd café). Its annual revenues exceed $500,000, and it purchases and receives goods exceeding $50,000 directly from outside of Texas. The Workers United (the Union) is a §2(5) labor organization.

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[1] Respondent's *Motion to Amend its Answer* is granted. (R. Exh. 33).

[2] Unless otherwise stated, factual findings arise from joint exhibits, stipulations and undisputed evidence.

II. UNFAIR LABOR PRACTICES

A. BACKGROUND

This case involves Starbucks' response to the Union's organizing campaign at the Oltorf, 24th Street and Shepherd cafés. Cafés are run by baristas and shift supervisors (SSVs). Baristas are cashiers, bartenders, food preppers, cleaners and hosts. SSVs perform the same duties, but, also open and close cafés, access the safe and coach baristas. Cafés are led by assistant store managers and store managers, who report to district managers.

B. OLTORF CAFÉ

Oltorf was managed by store manager Christi Altman, assistant store manager Luis Oliman and district manager Susan Smith-Nixon. SSV Jackie Kirkman began organizing Oltorf in early-March 2022.[3] Kirkman, who was employed from May 2021 until her May 2022 firing, collected 11 signed authorization cards and was the café's chief Union organizer. Smith-Nixon said that she first learned of the Union's organizing drive on March 11, when the RC-petition was filed.

Altman was friendly with Kirkman. She described Kirkman as a good barista and positive person. Altman averred, however, that Kirkman's major shortcoming was attendance, which ultimately led to her firing.

Given that several allegations at Oltorf involved time and attendance (T&A), Starbucks provided personnel records to demonstrate its consistent handling of such infractions before and after the Union's campaign. This chart summarizes these records:

Date	Employee	Discipline	Summary
Dec. 20, 2019	M. Ward	Written Warning	Lateness
Nov. 11, 2021	M. Sowder	Doc. Coaching	Lateness
Nov. 11, 2021	E. Seikel	Doc. Coaching	Lateness
Jan. 13, 2022	M. Sowder	Written Warning	Lateness
Mar. 14, 2022	E. Seikel	Doc. Coaching	Lateness
Mar. 26, 2022	K. Anjos	Doc. Coaching	Lateness
Mar. 31, 2022	E. Seikel	Written Warning	Lateness
Mar. 31, 2022	E. Seikel	Written Warning	Lateness
Mar. 31, 2022	E. Seikel	Written Warning	Lateness
Apr. 9, 2022	M. Sweeney	Doc. Coaching	Lateness
Apr. 9, 2022	T. Arceneaux	Doc. Coaching	Lateness
Apr. 21, 2022	M. Sowder	Final Written Warning	Lateness

(R. Exhs. 51-56). Altman recalled that Sowder, Arceneaux and Sweeney did not support the Union, and denied that she knew about Seikel's or Anjos' Union sympathies.

[3] All dates are in 2022, unless otherwise stated.

1. January to March: T&A Reset[4]

a. Record Evidence

In January, Starbucks began implementing a district-wide "back to basics" campaign, which reset its T&A policy. Smith-Nixon and Altman explained that the initiative flowed from the recurrent T&A violations that had been tolerated during the pandemic to just keep its cafés open.[5] See (R Exhs. 36-37). Smith-Nixon announced the "back to basic" reset at all district cafés, irrespective of extant Union support. "Back to basics" consisted of explaining to partners that T&A infractions would no longer be overlooked and was relayed during one-on-one meetings. Oltorf reset its T&A policy in March.[6] On March 24, assistant store manager Oliman told Kirkman about the T&A reset and highlighted that lateness would no longer be tolerated. Kirkman was also reminded that there would no longer be a 5-minute grace period. Kirkman conceded that, at that point, she was consistently 15 minutes late once per week and an hour late once per month.

b. Analysis

The General Counsel (GC) alleged that Starbucks' zero-tolerance lateness policy, i.e., its T&A reset at Oltorf, violated §8(a)(1); this allegation lacks merit. The framework for analyzing whether an employment action violates §8(a)(1) is set out in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), which requires the GC to show, by a preponderance of the evidence, that protected concerted activity was a motivating factor for the employment action. In *Sec. Walls, LLC*, 371 NLRB No. 74 (2022), the Board held:

> Under *Wright Line*, the General Counsel bears the initial burden of establishing that an employee's … protected concerted activity was a motivating factor in the employer's adverse employment action. The General Counsel meets this burden by proving that (1) the employee engaged in Section 7 activity, (2) the employer knew of that activity, and (3) the employer had animus against the Section 7 activity, which must be proven with evidence sufficient to establish a causal relationship between the discipline and the Section 7 activity. Once the General Counsel sustains her initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action even in the absence of the protected activity.

Id at 11. (footnotes omitted). "[W]here an employer's purported reasons for taking an adverse action against an employee amount to a pretext--that is to say, they are false or not actually relied upon--the employer necessarily cannot meet its *Wright Line* rebuttal burden." *CSC Holdings, LLC*, 368 NLRB No. 106, slip op. at 3 (2019).[7] On the other hand, further analysis is

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[4] This was alleged to be unlawful under complaint ¶¶5(b) and 23.

[5] The staffing shortages connected to the pandemic ended in roughly December 2021. Smith-Nixon's and Altman's testimony on these points were unrebutted and plausible; they have, as a result, been credited.

[6] A dress code reset followed the T&A reset. (R. Exh. 39). The dress code reset had the same underlying rationale.

[7] The employer cannot meet its burden, however, merely by showing that it had a legitimate reason for its action; rather, it must show that it would have taken the same action in the absence of the protected conduct. *Bruce Packing*

required if the defense is one of "dual motivation," i.e., the employer avers that, even if an invalid reason played some part in its motivation, it would have still taken the same action for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

The GC failed to adduce a prima facie case. The T&A reset began in January, whereas Kirkman's Union activity began in early-March. The GC, as a result, failed to establish knowledge. Moreover, even assuming arguendo that the GC made out a prima facie *Wright Line* case, Starbucks persuasively proved a valid non-discriminatory basis for the reset. It adduced that the district-wide reset was warranted because post-pandemic operations had normalized and it no longer had to ignore the rampant T&A infractions associated with the pandemic and its connected staffing shortages. The operational change was implemented on a district-wide basis, irrespective of any given café's Union activities. On this basis, Starbucks adduced that it would have taken this action in the absence of any protected activity. Dismissal is, thus, recommended.

2. April 1: Kirkman's Meeting with Altman[8]

a. Record Evidence

Altman asked Kirkman if she was talking to partners at another café about unionizing. (Tr. 42). She replied, "no, but they've been talking to me." (Id.). She recalled Altman warning:

> [If] we … negotiate for anything, … that has to come from somewhere, and … if wages are going to go up, then the company has to take it from somewhere ….
>
> She … referenced the potentiality of losing the Arizona State … tuition benefits, and … the potential of losing the ability to transfer ….
>
> She said … that she would take it personally if this happened. She would not work at a Union store … and if we were to unionize, she would go ….
>
> She also asked me … what … grievances … [we were] looking to address…. I told her that … wages …. [and] safety was a huge concern ….

(Tr. 43-44). Kirkman recalled Altman adding that, "if a Union were to come in, we would not be able to … have conversations like these because … a third-party would be there." (Tr. 47).[9] Kirkman generally agreed that, as an SSV, she would regularly discuss store safety, scheduling, attendance and other workplace concerns with management. (Tr. 82-84).

b. Analysis

i. Interrogation

Co., 357 NLRB 1084, 1086–87 (2011). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), it fails, by definition, to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007).

[8] This was alleged to be unlawful under complaint ¶¶6(a)(i) to 6(a)(vii), and 23.

[9] Altman's testimony did not contradict Kirkman on these issues; Kirkman's account has, thus, been credited.

Starbucks did not violate §8(a)(1), when Altman asked Kirkman "if she had been talking to the Barton Springs café partners about unionizing." In *Westwood Healthcare Center*, 330 NLRB 935 (2000), the Board held that these factors determine an unlawful interrogation: (1) background (i.e., is there a history of employer hostility and discrimination?); (2) nature of the information sought (e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?); (3) identity of the questioner (i.e., how high was he in the company hierarchy?); (4) place and method of interrogation (e.g., was employee called from work to the boss' office? Was there an atmosphere of unnatural formality?); and (5) truthfulness of the reply. Id. at 939. In applying these factors, however, the Board concluded that:

> In the final analysis, our task is to determine whether under all the circumstances the questioning at issue would reasonably tend to coerce the employee at whom it is directed so that he or she would feel restrained from exercising rights protected by Section 7 of the Act.

Id. at 940.)

I find that the multi-factor test set forth under *Westwood Healthcare Center* weighs against finding an unlawful interrogation. Regarding factor 1 (background), there is admittedly a national history of some discrimination and hostility against unionizing at Starbucks. On this basis, and on the basis of some of the independent §8(a)(1) violations found in this Decision, I find that factor 1 weighs in favor of interrogation. Regarding factor 2 (nature of the information sought), the record does not suggest that Altman was seeking Barton Springs information with the intention of taking disciplinary action against Kirkman or other partners. Although Kirkman was ultimately disciplined and terminated, I have found that such discipline was lawful and Starbucks had a legitimate non-discriminatory reason for taking such action. I note that there is no evidence that Starbucks took any action against any Barton Springs partners. I note that Kirkman and Altman had a cordial relationship, and there is no evidence that Altman was seeking to take unwarranted disciplinary action against Kirkman. On these bases, I find that factor 2, particularly the benevolent relationship between Kirkman and Altman, weighs against interrogation. Factor 3 similarly gravitates against finding an interrogation. Altman was a store manager and relatively low in the Starbuck's hierarchy. Factor 4 runs against finding interrogation; the conversation took place on the café floor and was spontaneous and informal. Finally, factor 5, weighs against interrogation; Kirkman was open and fearless about conveying her Union activity, i.e., likely because they were friends. There was, as a result, no intention to intimidate or coerce, which is an important facet. In sum, 4 of the 5 factors weigh against interrogation; dismissal is, therefore, recommended.

ii. Impression of Surveillance

Altman likely unwittingly created an unlawful impression of surveillance that violated §8(a)(1), when she casually asked Kirkman, if she had been talking to the Barton Springs café partners about unionizing. The Board's test for an unlawful impression of surveillance is whether, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union ... activities had been placed under surveillance." *Frontier Telephone of Rochester, Inc.*, 344 NLRB 1270, 1276 (2005). The standard protects "employees [from] ...

participat[ing] in union organizing campaigns without the fear that ... management [is] ... taking note of who is involved in union activities." *Flexsteel Industries*, 311 NLRB 257 (1993). When an employer tells employees that it knows about their union activities but fails to specify how, it violates §8(a)(1) because they are left to speculate about management's source and could reasonably assume surveillance. Id. If an employer tells employees that a specific worker told them, such comments are generally lawful and do not lead one to assume surveillance. *Park 'N Fly Inc.*, 349 NLRB 132, 133 (2007).

Altman's commentary violated the Act. She failed to describe how she knew that Kirkman was discussing unionizing with the Barton Springs workers, which left Kirkman to reasonably speculate that her Union activities were under surveillance. *Stevens Creek Chrysler*, 353 NLRB 1294, 1295–1296 (2009).

iii. Threats

Some of Altman's comments to Kirkman were unlawful threats. Altman stated that:

> [If] we … negotiate for anything [in contract bargaining], … that has to come from somewhere, and … if wages are going to go up, then the company has to take it from somewhere …
>
> [T]he potentiality of losing the Arizona State University … tuition benefits, and … the potential of losing the ability to transfer ….
>
> [T]hat she would take it personally … [and] would not work at a Union store … and if we were to unionize, she would go ….
>
> [I]f a Union were to come in, we would not be able to … have conversations like these because … a third-party would be there.

A statement is an unlawful threat, when it coerces employees in the exercise of their §7 rights. 29 U.S.C. §158(a). The Board, "does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service*, 312 NLRB 845, 846 (1993).[10] The Board has held that, barring outright threats to refuse to bargain in good faith with an incoming union, the legality of any particular statement depends upon its context. See, e.g., *Somerset Welding & Steel, Inc.*, 314 NLRB 829, 832 (1994). Statements made in a coercive context are unlawful because they, "leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore." *Earthgrains Co.*, 336 NLRB 1119, 1119-1120 (2001); see, e.g., *Smithfield Foods*, 347 NLRB 1225, 1230 (2006) (statement that company was in complete control of future negotiations was unlawful); *Aqua Cool*, 332 NLRB 95, 95 (2000) (statement that employees were unlikely to win anything more at the bargaining table than other employees); see also *L'Eggs Products, Inc.*, 236 NLRB 354, 383 (1978)(threats of lost access to management are generally unlawful).

[10] *Double D Construction Group*, 339 NLRB 303 (2003)("test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction.").

I find that Altman unlawfully conveyed that, if employees unionized, bargaining would be a futile exercise where everything would be a zero sum gain, extant tuition and transfer benefits might be compromised or lost, and access to management would disappear. These comments reasonably conveyed that unionization would have significant repercussions and violated §8(a)(1). I do not find, however, that Altman's claim that she would resign if the café unionized was unlawful. The GC failed to prove that her departure would be significant to partners either pro or con.[11] I, therefore, recommend dismissal of this allegation.

iv. Solicitation of Grievances

Altman unlawfully solicited grievances. Solicitation of grievances during a union campaign is unlawful when it "carries with it an implicit or explicit promise to remedy the grievances and impress[es] upon employees that union representation [is] ... [un]necessary." *Albertson's, LLC*, 359 NLRB 1341, 1341 (2013). The Board has held that:

> Absent a previous practice ... solicitation of grievances during an organizational campaign accompanied by a promise, expressed or implied, to remedy such grievances violates the Act .... [Such] solicitation ... inherently constitutes an implied promise to remedy the grievances. Furthermore, the fact [that] an employer's representative does not make a commitment to specifically take corrective action does not abrogate the anticipation of improved conditions expectable for the employees involved. [T]he inference … is a rebuttable one.

Maple Grove Health Care Center, 330 NLRB 775, 775 (2000). "An employer may rebut the inference of an implied promise by ... establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by … [showing] that the statements ... were not promises." *Mandalay Bay Resort & Casino*, 355 NLRB 529, 529 (2010).

Given that there was no showing that Starbucks maintained a past practice at Oltorf of soliciting grievances beyond informal and inconsistent periodic discussion, Altman's request to specify what prompted the campaign was coercive. These comments, thus, violated §8(a)(1) and sought to highlight that unionization was unneeded.

3. April 6: Phone Call Between Kirkman and Altman[12]

a. Record Evidence

Altman phoned Kirkman and asked, "have you been harassing partners?" (Tr. 49). Kirkman was taken aback and denied the accusation. Altman replied that some partners wanted their cards back and insisted that, if anyone did, she had to comply. Altman also added that, "she did not want [Kirkman] … to talk about Unions in the store tomorrow." (Tr. 49-50).

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[11] If a supervisor were beloved, a resignation threat would deter unionizing. If they were disliked, the opposite would be true. If employees were indifferent, this threat would be neutral. The GC failed to proffer evidence on this front.

[12] This was alleged to be unlawful under complaint ¶¶6(b)(i) to 6(b)(iii), and 23.

b. Analysis

i. Interrogation

Altman's question (i.e., "have you been harassing partners?") was an interrogation. As noted, in *Westwood Healthcare*, supra, the Board held that these factors determine an unlawful interrogation: (1) background (i.e., history of employer hostility and discrimination?); (2) nature of the information sought (e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees?); (3) identity of the questioner (i.e. how high in the company hierarchy?); (4) place and method of interrogation (e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality?); and (5) truthfulness of the reply. Id. at 939.

Factor 1 (background) weighs in favor of interrogation. Factor 2 (nature of the information sought) also favors an interrogation finding, inasmuch as Altman was seeking harassment evidence, which could have been used against Kirkman. Factor 3 (identity of the questioner) weighs against interrogation. Regarding Factor 4 (place and method), the call took place outside of Kirkman's work hours, which favors interrogation. Lastly, regarding factor 5 (truthfulness), it is unclear if Kirkman potentially undersold her actions; given this ambiguity, this factor is neutral. On these bases, the *Westwood Healthcare* factors support an interrogation finding.

ii. Threat About Returning Union Cards

Starbucks violated §8(a)(1), when Altman told Kirkman that, if anyone wanted their card back, it had to be done. A reasonable employee could construe this statement to mean that, if they did not return the requested cards, there would be possible disciplinary consequences. This comment would likely deter a valid and protected effort to lobby a coworker to reconsider their stance on unionization and withdraw their request to get their card back. Or put another way, Altman's implicit threat reasonably suppressed Kirkman's ability to resell the Union to a dissenter, which is a key and significant §7 activity.

iii. Directive Not to Discuss Unions at the Café

Starbucks violated §8(a)(1), when Altman told Kirkman that, "she did not want [her] to talk about Unions in the store tomorrow." Altman did not restrict her ban to working areas or times, which violated the Act. *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987)("employer may not generally prohibit union solicitation . . . during nonworking times or in nonworking areas"); *Food Services of America, Inc.*, 360 NLRB 1012 (2014).

4. April 7: Discussion Between Kirkman, Altman and Smith-Nixon[13]

a. Record Evidence

Upon arriving for work, Kirkman observed Altman and Smith-Nixon seated at a café table. She understood that they were there to meet her about the harassment accusation. Kirkman said

[13] This was alleged to be unlawful under complaint ¶¶6(c)(i) to 6(c)(iii), and 23.

that, at around 12:59 p.m., she went behind the counter and made herself a beverage to avoid keeping them waiting. She never explained why she did not just opt to get her beverage later in the day. She recalled Smith-Nixon beginning by telling her that there was an open Partner Relations investigation regarding harassment. Smith-Nixon added that she was no longer allowed to discuss the Union at work. (Tr. 52). Kirkman pushed back; she stated that she had the right to discuss the Union, but, would return any authorization cards, if asked. Smith-Nixon said that she had received complaints from partners, who felt harassed by Kirkman's pressure to sign cards.[14]

b. Analysis

i. Comment About Partner Relations Investigation

Starbucks did not violate §8(a)(1), when Smith-Nixon told Kirkman that Partner Relations was investigating the harassment allegation. Its investigation flowed from independent employee complaints and it remained obligated to investigate harassment in any form. The announcement of the investigation was reasonable, given that it is likely that Kirkman would eventually be contacted by Partner Relations to provide a statement. Under these circumstances, this statement did not reasonably curtail Kirkman's protected activities.[15]

ii. Directive Not to Discuss Unions at the Café

Smith-Nixon's directive to not discuss the Union at the café violated the Act. Smith-Nixon did not restrict her ban to working areas and time. See, e.g., *Food Services of America, Inc.*, supra.

5. April 9: Meeting Between Kirkman and Altman[16]

a. Record Evidence

During a recorded conversation, Altman told Kirkman that, "I'll stay through the vote and see how it goes because I'm not going to abandon anyone. But if the store votes union, I will leave." (GC Exh. 8(a) at 14)). She also told her that she would not sign off on her transferring because she was not "in good standing" due to T&A deficiencies, which were beginning to mount. (Id. at 26-27). Altman added that, "my intent is to make sure that partners are not harassed at their job." (Id. at 58). Finally, Altman said that, "[when] things start getting posted … my job as manager [is] to bring that up to … [the] next level or to someone at corporate. (Id. at 58-59).

[14] Smith-Nixon said that Partner Resources ultimately told her to remain neutral about Kirkman.

[15] If the GC's stance were taken to its logical conclusion, Starbucks could not announce to an employee organizer its intent to investigate harassment allegations, irrespective of how serious the issue. This is unreasonable and could subject Starbucks to additional liability for ignoring potentially egregious instances of harassment. The Act requires no such Hobson's choice; employers have the right to investigate harassment and announce such investigations.

[16] This was alleged to be unlawful under complaint ¶¶6(d)(i) to 6(d)(vi), and 23.

b. Analysis

i. Resignation Threat

As previously noted above, Altman's resignation threat did not violate the Act.

ii. Transfer Discussion

This comment was valid. Altman solely told Kirkman that she would not sign off on her transferring because she was not "in good standing" due to her extant T&A issues. Starbucks maintained a neutral policy on transfers, which required "good standing" (i.e., discipline-free status for 6 months). Given that it is undisputed that Kirkman was not in "good standing" due to her T&A disciplines (i.e., the validity of her T&A discipline is discussed below), Altman was simply relaying the valid application of a facially neutral "good standing" policy to Kirkman.[17]

iii. Harassment Comment

Altman's comment that her "intent is to make sure that partners are not harassed at their job[s]" was lawful. *First*, she did not threaten discipline. *Second*, Partner Relations was simultaneously investigating Kirkman for harassment due to independent employee complaints. *Third*, the creation of a harassment-free workplace is a valid employer prerogative. Under these circumstances, a reasonable employee would simply construe this comment solely as a warning not to harass, as opposed to a restriction to engage in valid §7 activities, as the GC alleges. It bears repeating that is abundantly reasonable for an employer to be vigilant about workplace harassment and periodically reiterate its stance. Dismissal is, therefore, recommended.

iv. Union Literature Comment

Altman stated that, "[i]f things start getting posted, … I do not know the laws well enough … [and need] to bring that up to … next level or … corporate." This statement was not a threat. It was, at worst, a concession of labor law ignorance and her connected need to seek help. A reasonable employee would not construe this general comment to bar valid postings.

v. Promises of Increased Benefits

Although the GC alleged that Altman promised employees increased benefits and improved terms and conditions of employment at this meeting, there is no record evidence supporting this allegation. This allegation was similarly not addressed by the GC's post-hearing brief. Dismissal is, therefore, recommended.

[17] Notably, the GC offered no evidence that others, who were not in "good standing" and lacked known Union activity, were allowed to transfer (i.e., it failed to adduce any evidence of disparate treatment on this issue).

6. Kirkman Disciplines and Stricter Enforcement of the "Food and Beverage" Policy[18]

a. Record Evidence

i. Relevant Policies

The *Partner Guide* provides that:

> [**Attendance**] **[P]artner reliability in reporting to work when scheduled and on time is essential to a store's efficient operations** and in providing customers with the Starbucks experience [and] …. **[f]ailure to abide by this policy may result in corrective action up to and including separation of employment** ….
>
> [**Free Food Item and Beverages While Working**] A store partner may consume - free of charge - one food item and any coffee, tea or blended beverages, while on break during the partner's scheduled shift or during the 30 minutes prior to after the partner's scheduled shift ….
>
> **Additionally, partners are, required to wait in line with other customers to receive their partner food items or beverages, and another partner should ring out each partner's item(s)**.

(GC Exh. 2) (emphasis added).

ii. March 26: *Documented Coaching* – Attendance

Kirkman received a *Documented Coaching* for arriving late on March 17 and 19, and missing her full shift on March 25. (GC Exh. 3). Kirkman did not contest her lateness. On the contrary, she acknowledged a pattern of lateness and had also been disciplined for T&A deficiencies before her Union activity. See, e.g., (R. Exh. 44)(*Documented Coaching* for lateness issued on May 20, 2021); (R. Exh. 45)(T&A violations in January 2022).

iii. April 9: *Written Warning* – Stricter Enforcement of Beverage Policy

Kirkman received a *Written Warning* for violating Starbucks free beverage policy by, inter alia, failing to wait in line with customers on April 7, making her own beverage and effectively cutting the line. (GC Exh. 5). Kirkman said that she did not know that it was against the rules to make her own beverages, but, generally conceded the underlying facts.

iv. April 10: *Written Warning* – Attendance

Kirkman received a *Written Warning* for arriving late on April 2 and 10. (GC Exh. 4). She did not dispute that she was late.

[18] This was alleged to be unlawful under complaint ¶¶ 5, 7 and 24.

v. April 29: *Final Written Warning* – Attendance

Kirkman received a *Final Written Warning* for arriving 39 minutes late on April 23. (GC Exh. 6). Again, she did not dispute that she was late.

vi. May 6: *Notice of Separation* – Attendance

Kirkman received a *Notice of Separation* for missing a scheduled SSV meeting on May 2. (GC Exh. 7). She agreed that she missed the meeting.

vii. Kirkman's Testimony

Kirkman, as noted, did not dispute arriving late as charged, or her prior habit of arriving late. (Tr. 120-126).[19] She offered that her conduct was never an issue until the Union's organizing drive began. She conceded, however, that, "a lot of people were getting written up for attendance issues post the reset." (Tr. 126-127). Her affidavit stated that barista Evan Seickel was fired for "attendance just a couple of weeks prior to … [her] being separated for attendance." (Tr. 128). She agreed on recross that, although Seickel signed a Union card, she was unaware if management knew this. (Tr. 142). On cross, Kirkman agreed that, during the pandemic, partners often arrived late due to COVID issues.[20] She conceded that she was unaware how Altman or Smith-Nixon enforced the attendance policy prior to COVID because she was not employed at that time. She agreed that, once the store was fully operational, there was a T&A reset in March. (Tr. 90). She recalled a connected video presentation and discussion with assistant store manager Oliman, who warned her that, Starbucks "can no longer be lenient about attendance as we were during 2021 during the height of the epidemic." (Tr. 91). Regarding the missed SSV meeting, she reported that her fellow SSVs often missed meetings without issue, particularly if a meeting conflicted with university classes. Regarding the beverage policy, she contended that the policy says nothing about making your own drinks, even though it expressly requires partners to "wait in line with other customers." (R. Exh. 2). But, she still agreed that she was aware of the policy. (Tr. 85-86).

viii. Starbucks' Response

Regarding the beverage policy incident, Smith-Nixon recalled Kirkman arriving late for her shift and going behind the counter to make a beverage in violation of Starbucks' policy. She reiterated that this policy requires partners to order beverages at the register, once it's their turn. Regarding attendance, she said that Kirkman, despite repeated warnings and escalated discipline, never learned her lesson and kept arriving late. She said that Union activity had nothing to do with her disciplines and removal, and that she seemed indifferent to disciplinary consequences. Regarding the missed May 2 SSV meeting, Altman stated that partners have continuous access to

[19] Kirkman acknowledged that she was generally 5 to 15 minutes late once per week and usually overslept once every few months, which resulted in her being 1 hour late. She averred that this pattern was previously tolerated. She openly admitted that she had a serious attendance problem in 2021 and 2022, (tr. 93) and was generally "horrible with attendance." (Tr. 116).

[20] Kirkman agreed that partners' schedules changed continuously during the COVID pandemic due to unexpected illnesses and that many partners were regularly late at that time. (Tr. 87). She acknowledged that the pandemic was a difficult period and Altman had to be extremely flexible to keep the café operating. (Tr. 89). She related that the Oltorf café was fully operational by 2022, and experienced vastly fewer pandemic issues.

the schedule via a software application, and that Kirkman simply "blew off" the meeting. She said, even after she texted her a reminder text at 1:04 p.m. (R. Exh. 49), Kirkman ignored it and remained no-call, no-show.

b. Analysis

i. March 26: *Documented Coaching* – Attendance

Dismissal of this allegation is recommended. The GC adduced a prima facie *Wright Line* case; it established that Kirkman engaged in Union activity, when she played a central role in organizing her café. The GC adduced that Starbucks knew about her actions and held animus, as demonstrated by several comments and actions deemed in violation of §8(a)(1). On this basis, the GC proved a causal relationship between the *Documented Coaching* and her §7 activity.

Starbucks, however, adequately showed that it would have issued the *Documented Coaching* to Kirkman absent her protected activity. *First*, it maintains a facially neutral T&A policy in its Partner Guide, which expressly requires punctuality from all partners regardless of their Union sentiments, and warns that infractions can trigger discipline. *Second*, Kirkman, who was disciplined under the T&A policy, specifically admitted that she was late on the days cited by the *Documented Coaching* and expansively admitted that she was routinely late by habit. *Third*, no evidence of disparate treatment was presented by the GC. On the contrary, Kirkman admitted that Starbucks disciplined multiple partners for attendance after the reset, i.e., including several lacking known Union activities. Starbucks further substantiated this point by providing personnel records, which demonstrated that it disciplined no fewer than 4 partners at Oltorf following the T&A reset, whose Union activities were unknown. (R. Exhs. 53-56). It is also evident that Kirkman began receiving T&A disciplines before her Union activities were even known. *Fourth*, Starbucks announced the reset to Kirkman and other partners at the café, prior to commencing the instant disciplinary action. It adduced that the reset was based upon a valid business purpose, i.e., it neutrally exercised its valid right as a post-pandemic employer to warn employees that its then current crisis-level tolerance of attendance infractions would cease. In short, given that everyone was subject to the same reset, and there was no evidence that Kirkman was an isolated case, Starbucks was simply meting out discipline in furtherance of its valid goal of having employees show up on time. It, accordingly, adduced that it would have issued a *Documented Coaching* to Kirkman, irrespective of her Union activities.

ii. April 9: *Written Warning* – Beverage Policy

Dismissal of this allegation is also recommended. Starbucks amply rebutted the GC's prima facie case and showed that it validly disciplined Kirkman for violating its beverage policy (i.e., for cutting the line), regardless of her Union activities. *First*, it maintains a facially neutral "Free Food Item and Beverages While Working" policy in its Partner Guide, which expressly states, inter alia, that, "partners are, **required to wait in line with other customers** to receive their … beverages, and another partner should ring out … [the] item(s)." (R. Exh. 2)(emphasis added). This rule expressly requires partners to wait their turn, which implicitly means refraining from preparing their own beverages as Kirkman did (i.e., one cannot wait in line and simultaneously prepare a drink). *Second*, Kirkman admitted that she knew the policy and was guilty as charged. *Third*,

Kirkman agreed that she engaged in this breach in plain view. She could have easily chosen to arrive early to have sufficient time to wait in line, could have gotten her free drink later that day or could have asked management if she could skip the line and grab a coffee before meeting. Kirkman, instead, chose to conspicuously break the rules in front of management. By failing to take these seemingly rather obvious paths, Kirkman openly flouted the rules and basically invited discipline. *Fourth*, although Kirkman contended that others violated the beverage policy, the GC: wholly failed to establish such breaches via corroborating partner testimony or documentary evidence; failed to show that others openly did so with management's knowledge; and failed to show that Starbucks' handling of others created a disparate treatment scenario. On these bases, dismissal is recommended.

iii. April 10: *Written Warning* – Attendance

Dismissal of this allegation is recommended. Although the GC adduced a prima facie *Wright Line* case, Starbucks convincingly proved that it would have issued a *Written Warning* to Kirkman for attendance violations irrespective of her Union activities for the reasons set forth under the *Documented Coaching* section above. Notably, the GC conspicuously failed to prove disparate treatment. The record contrarily reveals that, following the T&A reset, Starbucks disciplined an array of employees, with and without known Union activity, for attendance. Kirkman also admitted the underlying conduct and remained in complete control over the escalation of her attendance disciplines, which she could have obviated by simply arriving on time. Also, if management were truly out to get Kirkman, it would have escalated her up the disciplinary ladder and handed her a *Final Written Warning* after this transgression (i.e., it gave her a second chance by issuing 2 *Written Warnings*; 1 for this attendance matter and 1 for the beverage violation). This demonstrates an employer, who seemed less than enthusiastic about disciplining Kirkman, which undercuts the GC's contention that animus was at play.

iv. April 29: *Final Written Warning* – Attendance

Dismissal of this allegation is recommended. Although the GC adduced a prima facie case, Starbucks established that it would have issued Kirkman a *Final Written Warning* in the absence of her Union activities for the reasons previously discussed. Notably, Kirkman admitted the underlying conduct, conceded that others without known Union activity were disciplined for the same conduct, and the GC failed to establish disparate treatment.

v. May 6: *Notice of Separation* – Attendance

Dismissal of this allegation is, unfortunately, recommended. Although the GC adduced a prima facie case, Starbucks adduced that it would have discharged Kirkman in the absence of her protected activity. She conceded that she missed the SSV meeting at issue. Although Kirkman claimed that others did the same thing without disciplinary consequences, the GC failed to credibly corroborate this point, i.e., the GC failed to adduce disparate treatment.

C. 24TH STREET CAFÉ

This café was led by store manager Jill Benton and district manager Smith-Nixon. It is

located near the University of Texas at Austin (UT) campus and employs several UT students.

1. February and March: Organizing Drive at the 24th Street Café Begins

Partners Lillian Allen and Julius Shieh contacted the Union in February. They then distributed Union materials, met with coworkers, and collected authorization cards. They held the Union's first organizing committee meeting on March 6, when Allen drafted a letter announcing the Union's drive that was later posted on Twitter on March 7. The letter listed partners Allen, Shieh, Amanda Garcia, Carolina Gonzalez, Kate Romero and Sydney Collins as the café's primary organizers and was sent to the extant CEO, Benton and Smith-Nixon. (GC Exhs. 11, 20). Benton first learned about the Union's campaign at this café on March 7 after the Twitter post.[21]

On March 7, several out-of-town Union organizers ordered drinks at the 24th Street café and used "union yes" and other pro-labor monikers as their order names. On March 11, the Union filed an RC-petition to represent its baristas and SSVs at the 24th Street café. (JT Exh. 4). Shieh and Allen wore Union pins on most workdays and distributed Union t-shirts to coworkers. On March 31, Allen testified at the Union's representation hearing before the Board. She posted Union materials at the 24th Street store in March and April. On April 30, Shieh gave a speech at the café supporting the Union. On June 10, the Union won the resulting election On June 21, Region 16 issued a *Certification of Representative*.

2. March: T&A Reset

Starbucks, as noted, implemented its "back to basics" campaign in early-March, which effectively reiterated the Partner Guide's T&A expectations and disciplinary penalties. Benton credibly denied that employees were told that they would be granted a 5-minute grace period for lateness. She insisted that Starbucks issued discipline for T&A infractions before and after the T&A reset, but, acknowledged that the reset was needed because many cafés failed to stringently address T&A violations, when faced with short-staffing and other pandemic operational issues. SSV Gonzalez contended that, prior to the Union's organizing drive, T&A infractions were not heavily enforced and that there was a lot of unchecked lateness during the pandemic.

3. Attendance Disciplines at 24th Street

Starbucks provided the following disciplinary records connected to this café:

Date	Employee	Discipline	Summary
Nov. 3, 2021	J. Long	Documented Coaching	Lateness
Nov. 2, 2021	M. Sulkani	Documented Coaching	Lateness
Nov. 3, 2021	K. Romero	Documented Coaching	lateness
Nov. 11, 2021	L. Allen	Documented Coaching	lateness
Apr. 7, 2022	J. Long	Written Warning	lateness
Apr. 7, 2022	K. Romero	Written Warning	lateness
May 9, 2022	J. Long	Final Written Warning	lateness
May 13, 2022	K. Romero	Final Written Warning	lateness

[21] Benton credibly said that her café hours remained constant and never changed during the Union's campaign.

Aug. 25, 2022	M. Sultani	Documented Coaching	lateness
Oct. 18, 2022	N. Rodriguez	Written Warning	lateness
Nov. 9, 2022	R. Cooksey	Documented Coaching	lateness
Dec. 11, 2022	M. Sultani	Written Warning	lateness
Nov. 29, 2022	R. Cooksley	Written Warning	lateness

(R. Exhs. 59-60). Benton testified that she had no knowledge of Long's, Sultani's, Rodriguez' or Cooksley's Union sympathies.

4. April 13: *Documented Coaching* to Shieh[22]

a. Record Evidence

Barista Shieh began working at 24th Street in April 2021 and received a Partner Guide describing the T&A policies. (R. Exhs. 10, 11). Following the T&A reset, he received a *Documented Coaching* for 6 instances of lateness. (GC Exh. 22). He did not dispute being late.

b. Analysis

The GC adduced a prima facie *Wright Line* case. It established general animus to Union activities (i.e., the various comments and actions found to violate the Act herein), Union activity (i.e., Shieh was one of the lead organizers at the 24th Street café), and knowledge.

Starbucks successfully rebutted the GC's case and established that it would have disciplined Shieh in the absence of his protected activities. *First,* Starbucks, as noted, maintains a neutral policy in its Partner Guide, which expressly requires punctuality and warns employees that attendance infractions will trigger discipline. The T&A reset re-affirmed this policy to everyone, regardless of their Union sympathies, and Shieh's discipline was only implemented after the T&A reset. *Second,* Shieh admitted that he was late on the 6 occasions cited. *Third*, no evidence of disparate treatment was presented by the GC. On the contrary, Starbucks provided personnel records, which demonstrated that it disciplined several partners at 24th Street for T&A violations, whose Union activities were unknown. See (R. Exh. 60). In sum, Starbucks demonstrated that, through the operation of Shieh's *Documented Coaching*, it was neutrally exercising its valid right as a post-pandemic employer to warn employees that its previous crisis-level tolerance of attendance infractions would no longer be applied and that all partners, irrespective of their Union activity, would now be subject to discipline.[23] Shieh was also told that there would be no 5-minute grace period regarding lateness. On these bases, Starbucks convincingly adduced that it would have issued a *Documented Coaching* to Shieh, irrespective of his Union activities.

[22] This was alleged to be unlawful under complaint ¶¶9,10 and 24.

[23] It is noteworthy that it would not have been unreasonable for an employer to divide up the 6 instance of lateness and to consecutively issue Shieh both a *Documented Coaching* and *Written Warning* for his consistent unwillingness to arrive on time. The fact that Starbucks opted to only issue a *Documented Coaching* and not handle Shieh's discipline in this manner, also suggests something less than invidious treatment.

5. April 16: Removal of Union Literature by Benton[24]

a. Record Evidence

Benton told Allen that the Union's materials posted in the break and stock area "were not Starbucks collateral" and had to be removed. Allen reported that other non-Starbucks materials were previously posted without interference, including grocery store flyers, concert announcements, Korean speaking class advertisements, and even a comical posting that the café remained "velociraptor free."[25] See, e.g., (GC Exh. 14). She added that management posted materials related to the Union's campaign, after the RC-petition was filed. (GC Exh. 15). Smith-Nixon confirmed Starbucks' stance against posting private materials in the "back of the house," and agreed that such postings were removed.

b. Analysis

Employees are generally permitted to distribute union literature during non-working time in non-working areas, absent a showing of "special circumstances" necessary for the employer to "maintain production or discipline." *Shamrock Foods Co.*, 366 NLRB No. 117 at p. 2, 23 (2018). The Board has found that, "interference with employee circulation of protected material in nonworking areas during off-duty periods is presumptively a violation … unless the employer can affirmatively demonstrate the restriction is necessary to protect its proper interest." *Waste Management of Arizona, Inc.*, 345 NLRB 1339 n. 2, 1346 (2005). An employer "must show a compelling and legitimate business reason necessitating" a restriction. Id. at 1346.[26]

As a threshold matter, the break area is a mixed-use area (i.e., a combined break and stock area), where employees can generally permissibly post and distribute Union materials. *Mercedes-Benz*, supra. Starbucks failed to adduce any special circumstances necessary for it to "maintain production or discipline," which warranted Benton's prohibition against Union postings in the break area. Starbucks similarly failed to show that the fridge in the back room was analogous to a bulletin board, where it might be able to lawfully restrict all non-business-related matters (e.g., the posting of Union materials), given that the GC established that Starbucks permitted a host of non-business postings to remain posted prior to the Union's campaign (e.g., the illustrious velociraptor sign and other postings). Starbucks similarly failed to show that housekeeping and cleanliness standards required removal. On these bases, Benton's removal of the Union's flyer was unlawful.

[24] This was alleged to be unlawful under complaint ¶¶8(a) and 23.

[25] Allen recollected that the "velociraptor free" posting appeared on the milk fridge from 2019 to 2021.

[26] See also *Mercedes-Benz U.S. International (MBUSI)*, 361 NLRB 1018, 1028 (2014) (employer bears the burden of establishing "special circumstances warranting an exception to the rule that employees not on working time have the right to distribute union literature to other such employees in a mixed use area"); *Superior Emerald Park Landfill, LLC*, 340 NLRB 449, 456 (2003) ("if an area is used for production during most of the day, but serves as a lunchroom during the lunch period, distribution of literature may not be prohibited.").

6. April 26: *Final Written Warning* to Gonzalez[27]

a. Record Evidence

SSV Gonzalez worked at the café from June 2021 to June 2022. She was an active Union organizer, who testified for the Union at its R-case hearing in front of Smith-Nixon and management. She also recounted Benton seeing her collect an authorization card. On April 26, Gonzalez received this *Final Written Warning*:

> March 25th, Caro was scheduled as the closing SSV. At 9:46 pm Caro set the alarm and exited with the team through the wireless patio door. Caro did not check the front doors to ensure front doors were locked. At 10:01, 2 customers entered through the farthest front door into the café.
>
> As stated in the Partner Guide, (page 50) "in cases of serious misconduct, immediate separation of employment may be warranted. Examples of serious misconduct include but are not limited to: violation of safety and security rules and the safety of company property and assets."

(GC Exh. 35).

Gonzalez averred that she asked barista Kiara to lock the café door, but, Kiara forgot.[28] She conceded that, as the sole SSV on duty, the final responsibility to assure that the café was locked and secure for the night rested with her. She did not dispute that the café door was left unlocked. She described the café's normal closing procedure:

> [A]s soon as … closing time hit, … the first thing that we did was lock the doors. There were three doors, two were exit and entry and then one was just exit …. [A]s a shift supervisor, I would lock the door, the front door and then the side door, and then we would continue … the closing shifts. Once we were done, I would set the alarm and then exit through the door that was only exit.

(Tr. 374).

Smith-Nixon stated that the *Final Written Warning* was appropriate because Gonzalez created a serious security issue, which warranted a higher level of discipline (i.e., moving 2 steps up the disciplinary ladder). She said that the security lapse could have resulted in a substantial property loss and/or physical harm to staff. Benton said that the investigation uncovered that Gonzalez set the alarm, but, forgot to lock a door. She denied that Union support played a role.

b. Analysis:

The GC made out a prima facie *Wright Line* showing regarding Gonzalez. She engaged in Union activity, management had knowledge and there is evidence of animus. Starbucks adduced,

[27] This was alleged to be unlawful under complaint ¶¶9, 11 and 24.

[28] Kiara was, without explanation, not called by the GC to testify about this important defense.

however, that it would have issued Gonzalez a *Final Written Warning* in the absence of her protected activities. *First,* she acknowledged that the door was left unlocked and that it was her responsibility as SSV to secure the store at closing. Starbucks' rule requiring SSVs to secure the café serves rational and obvious business purposes. *Second,* the GC failed to show that other SSVs engaged in this type of misconduct, but, did not suffer analogous consequences; i.e., it failed to prove disparate treatment. *Finally*, this was a serious transgression that could have caused a significant property loss or employee safety hazard. Deterrence of such misconduct, even if just negligent, was warranted. On this basis, the issuance of a *Final Written Warning* was reasonable.[29] Dismissal of this allegation is, thus, recommended.

7. May 13: *Written Warning* to Shieh[30]

a. Record Evidence

Shieh received a *Written Warning* for arriving late 3 times. (GC Exh. 25). He indicated that the laptop where he punched in and out for T&A purposes periodically lagged. He said that, when he was hired in 2021, the then store manager told him that there was a 5-minute grace period for lateness, but, agreed that Benton disavowed such a grace period.

b. Analysis

The GC made out a prima facie *Wright Line* case. Shieh had known Union activity and there is evidence of animus. Starbucks persuasively responded to the GC's prima facie case, and adduced that it would have issued Shieh a *Written Warning* in the absence of his protected activity. Simply put, he was late 3 times and, despite his claims that the laptop lagged, there was no objective evidence presented that Starbucks' timekeeping system was inaccurate. As discussed, Starbucks is entitled to maintain and apply a facially neutral T&A disciplinary policy, which discourages lateness. The GC also failed to demonstrate disparate treatment. To the contrary, as noted, Starbucks' disciplinary records showed that it disciplined multiple partners at the café who lacked known Union activities. In sum, Starbucks showed that it would have issued Shieh this *Written Warning* irrespective of his Union activities; dismissal is, thus, recommended.

8. May 16: Directive Not to Record a Disciplinary Meeting by Benton[31]

a. Record Evidence

When Gonzalez met with Benton, she was told to show her that her phone was not recording. She complied, but, retorted that it was legal in Texas to record. This exchange ensued:

> She kept saying that I was not allowed to record without authorization. I explained … in Texas, we have different … laws …. [W]e went back and forth …. And then

[29] It is noteworthy that it would not have been unreasonable, or unheard of, for an employer to fire an employee for this kind of serious transgression. The fact that Starbucks limited its response to a *Final Written Warning* and retained Gonzalez also suggests something less than invidious treatment (i.e., it arguably suggests leniency at this point).

[30] This was alleged to be unlawful under complaint ¶¶9, 11 and 24.

[31] This was alleged to be unlawful under complaint ¶¶8(b) and 23.

> … we got interrupted …. [W]hen I turned around … Jill had gotten my phone and stopped the recording and said we were done.

(Tr. 384). Judicial notice has been taken that Texas is a one-party consent state, which permits recordings, as long as one party consents.[32] Benton was effectively reiterating Starbucks' *Video Recording, Audio Recording and Photography Policy*, which is contained in the Partner Guide and provides that, "Personal audio recording … of other partners … without their consent is not allowed except as protected under federal labor laws." (GC Exh. 2 at 37). The GC did not allege in this litigation that the latter rule is unlawful;[33] it solely alleged that the rule's application is unlawful. Given that the application of the recording rule is inextricably intertwined with the rule itself in this case, it is necessary to consider the validity of the underlying rule.

b. Analysis

Benton's directive to Gonzalez to refrain from recording their meeting violated the Act. An employer violates the Act, when it maintains workplace rules that reasonably tend to chill employees' §7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). Regarding facially neutral work rules that may be reasonably interpreted to restrict §7 activity, the Board interprets such rules from an employee's perspective, who is economically dependent on the employer and considering whether to engage in protected concerted activity. *Stericycle, Inc*., 372 NLRB No. 113, slip op. at 9 (2023). If the GC carries the burden to show an employee could reasonably interpret the rule to have a coercive meaning, the rule is presumptively unlawful, even if it could also be reasonably interpreted not to restrict §7 rights and even if the employer did not intend for its rule to restrict §7 rights. Id. at 9-10. The employer may rebut this presumption by proving that the rule advances a legitimate and substantial business interest, and it is unable to advance that interest with a more narrowly tailored rule. Id. at 10. The Board must give the rule under consideration a reasonable reading and ambiguities are construed against the employer. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004).

In the instant case, Gonzalez could have reasonably interpreted Benton's recording prohibition as expansively covering protected activities, which employees might legitimately opt to record, including the recording at the café of a walkout, Union speech, work stoppage or some other rather obvious protected activity. Starbucks failed to show that its recording rule advanced a legitimate and substantial business interest, which it is unable to advance by a more narrowly tailored rule. In short, the rule violates *Stericycle*. On this basis, I find that Starbucks' application of its unlawful no recording rule by Benton violates §8(a)(1).

9. May 16: *Final Written Warning* to Gonzalez[34]

a. Record Evidence

Partners can take 7 mark-outs of free food and drink items weekly. On May 16, Gonzalez received a *Final Written Warning* for violating this policy:

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[32] Tex. Penal Code Ann. § 16.02; Tex. Code Crim. Proc. Ann. Art. 18.20.

[33] I note that the GC has alleged in another litigation that Starbucks' recording rule violates *Stericycle*.

[34] This was alleged to be unlawful under complaint ¶¶9, 11 and 24.

> Week ending 4/10/22 Caro exceeded the Food Mark out policy by marking out 8 food items. [On] April 11th Jill reviewed with Caro the tills activity report showing Caro exceeding the allotted food items. Week ending 4/24/22, Caro once again exceeded the allotted Food Mark out policy by marking out 8 food items ….

(GC Exh. 39). Gonzalez argued that there was a miscommunication on the mark-outs. (Tr. 384). She stated that she errantly believed that she had 2 mark-outs remaining and that a barista must have rung her up at 1 point for 2 mark-outs instead of 1 mark-out and 1 paid item. On April 22, Gonzalez had this text exchange with Benton regarding mark-outs:

> [Gonzalez] Hey Jill is there a way we can see what we have marked out? Cause I remember on Wednesday night I was at 6. But I got a sandwich today and it said I was at 8 ….
>
> [Benton] The markouts are now viewed on the register
>
> [Gonzalez] Yeah I know but I mean like the item was? Because I paid for one of the days! I have the receipt too!

(GC Exh. 41). The GC did not offer the exculpatory receipt and there was no testimony that Gonzalez ever followed up and presented it to Benton.

Benton contended that the *Final Written Warning* was a neutral and mechanical application of the markout rule. Smith-Nixon explained that, because she errantly told Gonzalez that she had to have similar violations to move up the disciplinary ladder, she erred on the side of caution, and simply issued her a second *Final Written Warning*, instead of moving her up to a *Notice of Separation* (i.e., on the basis of her prior *Final Written Warning* from April 26).

b. Analysis

Although the GC made out a prima facie case regarding Gonzalez, Starbucks adduced that it would have issued her a *Final Written Warning* in the absence of her protected activity. *First*, if Starbucks were attempting to use her mark-out transgressions as a way to rid itself of a Union advocate, it could have taken several more draconian steps to purge Gonzalez, e.g., it could have issued her a *Final Written Warning* after her first mark-out transgression and then issued a *Notice of Separation* for the second transgression, or Smith-Nixon could have backtracked from her incorrect stance regarding separate disciplinary buckets and just issued a *Notice of Separation* for these violations. Starbucks willingness to offer Gonzalez these substantial breaks undermine the GC's stance that invidious treatment was at play. *Second*, beyond Gonzalez's assertion that she paid for 1 mark-out and did not exceed 7 for the week ending April 24, it appears that she committed the underlying transgressions. Starbucks tracks purchases and mark-outs on its register system, and her failure to tender the allegedly exculpatory receipt suggests that she likely committed the underlying transgression (i.e., if she really had a receipt, she would have produced it under these serious circumstances). The GC left this key matter unexplained. *Third*, Starbucks' mark-out policy is clear and neutral. *Finally*, the GC failed to show that Gonzalez was subject to

disparate treatment (i.e., that Starbucks treated others without known Union activity more benevolently). Dismissal is, accordingly, recommended.

10. Late-May: Reduction of Gonzalez's Weekly Hours[35]

a. Record Evidence

Gonzalez indicated that her hours were decreased from roughly 22 hours per week to 6 hours per week in late-May/early June. Her partner availability form indicated that she was available 20 hours per week. (GC Exh. 44). Starbucks' personnel records showed that she was scheduled, on average, approximately 21 hours per week from January 9 to May 29. (GC Exh. 45). For the weeks ending June 12, 19, 26 and July 3, she was scheduled 23, 28.5, 15.5 and 5 hours respectively. (GC 46). This suggests a slight reduction at the end of her tenure. On cross, Gonzalez agreed that because, her store was busiest when students were in school, there was generally a decrease in work hours when students left for the summer break, and that these summer hours coincided with her reduction. Benton added that Gonzalez' hours of work changed over the summer because UT was less active and there were fewer hours to offer. She posited that all partners' hours were neutrally decreased over the summer.

b. Analysis

Although the GC adduced a prima facie case, Starbucks demonstrated that it would have reduced Gonzalez' hours in the absence of her protected activity. Her reduction logically flowed from the reduced customer demands associated with UT's summer schedule. This is an abundantly legitimate and non-discriminatory reason in support of her schedule change. Additionally, the GC failed to demonstrate via personnel records or other credible documentary evidence that other partners, who lacked known Union activities, were treated more benevolently than Gonzalez or were somehow permitted to work unreduced schedules.

11. Mid-June: Directive to Stop Writing Pro-Union Messages on Labels[36]

a. Record Evidence

Allen reported that employees periodically wrote "spooky espresso" or "spooky chai" during Halloween on coffee and tea storage bags. See, e.g., (GC Exh. 16). After the Union's organizing drive began, she began writing pro-Union slogans on product bags (e.g., "pro-union mocha" and "pro-union chai."). In June 2022, Benton told her to stop and explained that it would create a non-inclusive work environment for those partners, who did not support the Union. Allen agreed, on cross, that the purpose of the food marking policy was to promote food safety and that she was solely instructed to write expiration dates on products.

b. Analysis

Benton's directive was valid. Starbucks was simply trying to control what was written on

[35] This was alleged to be unlawful under complaint ¶¶11 and 24.
[36] This was alleged to be unlawful under complaint ¶¶8(c) and 23.

the bags of coffee and tea products that were openly displayed to the public in its cafés. It was not abridging partners' rights to wear Union insignia (e.g., pins) on their persons.[37] It, instead, solely sought to rationally limit writings on its products to expiration dates. There is no evidence that management was aware that employees previously and sporadically wrote "spooky espresso" or other unauthorized slogans on its products. Hence, there is no basis to conclude that Starbucks was disparately enforcing its policy. On these bases, it appears that the prohibition was valid.

12. June 23: Caro Gonzalez's Discharge[38]

a. Record Evidence

Starbucks issued Gonzalez a *Notice of Separation*. (GC Exh. 42). It indicated that she previously received 2 *Final Written Warnings*, and was now being separated for arriving 20 minutes late on May 27. Gonzalez explained that there was a miscommunication regarding another partner covering her shift. Specifically, although Shieh agreed to cover for her, her text message was sent after midnight and Shieh confused the coverage date. She said that, once she realized the confusion, Shieh hustled into work and was 20 minutes late. She said that Benton was notified about the coverage confusion in a subsequent text. See (GC Exh. 43).

b. Analysis

As a threshold matter, the GC made out a prima facie case. In this case, however, I find that Starbucks failed to rebut the GC's case and show that it would have terminated Gonzalez in the absence of her Union activity. In reaching this decision, I rely on the fact that Starbucks fired Gonzalez after just a ***single*** occasion of lateness, even though the record shows that it only acted against most other partners for T&A infractions after multiple instances. Its handling of Gonzalez, therefore, seems particularly harsh. I also note that Starbucks opted to fire Gonzalez, even though she presented extenuating circumstances to Benton regarding the undisputed mix-up with Shieh. Its unwillingness to factor these mitigating circumstances into its termination decision is suspect and unreasonable. Lastly, firing Gonzalez for 1 instance of lateness of only 20 minutes, when her other disciplinary transgressions were unconnected to lateness also appears to cross the bounds of fairness. On these bases, I find that Starbucks' harsh response against one of the primary Union organizers at the 24th Street café ***within fewer than 2 weeks of the Union winning the election at this cafe*** undermines its contention that it would have fired Gonzalez in the absence of her Union

[37] While employees have a presumptive right to wear union insignia on their persons while at work, an employer may nevertheless be able to demonstrate "special circumstances" sufficient to justify a prohibition of or limitation on this conduct. *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 801-804 (1945). Such special circumstances can include a need to maintain decorum or discipline, legitimate safety concerns, attacks on an employer's products or services, or unreasonable interference with a public image that the employer has established. See e.g., *Pathmark Stores*, 342 NLRB 378, 379 (2004) (t-shirt reading "Don't cheat about the Meat" potentially interfered with customer relationship and could thus be prohibited); *Noah's New York Bagels*, 324 NLRB 266, 275 (1997) (special circumstances justified ban on delivery drivers wearing, during working time, a t-shirt mocking the employer's Kosher policy); *W San Diego*, 348 NLRB 372, 373 (2006) (wearing union button in public areas would have interfered with employer's use of all-black server uniforms to create a special atmosphere in hotel); *Komatsu Am. Corp*., 342 NLRB 649 (2004) (lawful ban on offensive and provocative Pearl Harbor t-shirt); *Southwestern Bell Telephone Co*., 200 NLRB 667, 669-670 (1972) (permitting employer to ban sweatshirt criticizing employer in obscene manner).

[38] This was alleged under complaint ¶¶9, 11, 14 and 25.

activity and violates §8(a)(3), as alleged.[39]

13. August: Changing Partners' Availability Requirements[40]

The GC alleged that Starbucks' decision to change partners' availability requirements breached its duty to bargain in good faith, i.e. violated §8(a)(5).

a. Record Evidence

Benton testified that the café required increased availability for UT's fall semester. She said that this change was applied universally to all partners. Allen corroborated that, before the organizing drive, partners had to be available at least 1 day per week. She noted that, in August, Starbucks began requiring partners to be available 150% of the weekly hours that they sought to work. Starbucks stipulated that it "did not provide advance notice nor an opportunity to bargain with the Charging Party prior to any such change." (JT Exh. 1).

b. Analysis

Regarding the §8(a)(5) allegation, the GC adduced that Starbucks violated the Act by unilaterally changing partners' scheduling requirements at the 24th Street café. Under §§8(a)(5) and 8(d), the duty to bargain collectively requires an employer "to meet ... and confer in good faith with respect to wages, hours, and other terms and conditions of employment." *NLRB v. Katz*, 369 U.S. 736, 742-743 (1962). In order to trigger a bargaining obligation, a change must be material, substantial and significant. *Crittenton Hospital*, 342 NLRB 686 (2004). The GC can establish a prima facie unilateral change violation, if it shows that an employer made a material and substantial change in a term of employment without negotiating. The burden then shifts to the employer to show that the change was permissible (e.g., consistent with established past practice). See, e.g., *Fresno Bee*, 339 NLRB 1214 (2003). An employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment, even if those practices are not required by a collective-bargaining agreement. Id; see also *Palm Beach Metro Transportation, LLC*, 357 NLRB 180, 183 (2011) (noting that the party asserting the existence of a past practice bears the burden of proof on the issue, and that the evidence must show that the practice occurred with such regularity and frequency that employees could reasonably expect the practice to continue or reoccur on a regular and consistent basis), enfd. 459 Fed.Appx. 874 (11th Cir. 2012). Additionally, where parties are negotiating a collective-bargaining agreement, an employer's obligation to refrain from making unilateral changes extends beyond the mere duty to provide notice and an opportunity to bargain. *RBE Electronics of S.D.*, 320 NLRB 80, 81 (1995); *Mike O'Connor Chevrolet*, 209 NLRB 701 (1974). During collective bargaining, an

[39] The GC also contends that Starbucks violated §8(a)(5) by discharging Gonzalez without affording the Union pre-implementation notice and bargaining. The parties stipulated that, "[o]n or about June 23, 2022, Respondent discharged Caro Gonzalez …. [and] did not provide advance notice nor an opportunity to bargain with the Charging Party prior to this discharge." (JT Exh. 1). The Board has held, however, that upon commencement of a collective-bargaining relationship, employers do not have an obligation under §§8(d) and 8(a)(5) to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice. *Care One at New Milford*, 369 NLRB No. 109, slip op. at 7 (2020), enfd. 848 Fed.Appx. 443 (D.C. Cir. 2021). On this basis, I find that Starbucks' discharge of Gonzalez did not violate §8(a)(5).

[40] This was alleged under complaint ¶¶8(d), 14, 23 and 25.

employer must also refrain from implementing unilateral changes, absent overall impasse on bargaining for an agreement as a whole. *Id*.[41]

The GC demonstrated that Starbucks made a material and substantial change in the Unit's terms and conditions of employment, when it changed their work schedules. See, e.g., *Mi Pueblo Foods*, 260 NLRB 1096, 1097 (2014); *88 Transit Lines*, 300 NLRB 177, 184 (1990). This change occurred in the middle of first-contract negotiations, in the absence of notice, an overall impasse, or the Union's consent. Starbucks similarly failed to show that its unilateral scheduling change was based upon a permissible past practice (i.e., it simply failed to show that it previously changed unit availability requirements).[42] On the bases, Starbucks violated §8(a)(5), when it unilaterally changed partners' scheduling requirements at the 24th Street café.

14. August 9: *Final Written Warning* to Allen[43]

The GC alleged that Starbucks' decision to issue Allen a *Final Written Warning* violated §8(a)(3) and §8(a)(5). Dismissal of both allegations is recommended.

a. Record Evidence

On August 9, Allen received a *Final Written Warning* for violating Starbucks' T&A policy. She was disciplined for arriving 33 minutes late on July 18. (GC Exh. 17). She had previously received a *Written Warning* for T&A violations on March 25. She did acknowledge, however, that she received discipline for lateness prior to the Union's drive, i.e., she previously received a *Documented Coaching* and *Written Warning* for lateness. (R. Exh. 8). She asserted that Starbucks began enforcing its T&A policy more strictly after the Union's organizing drive began. Allen also received a *Documented Coaching* for lateness on November 11, 2021. (R. Exh. 9). The parties stipulated that Starbucks did not provide the Union notice or an opportunity to bargain prior to issuing Allen's *Final Written Warning*. (JT Exh. 1). Allen did not dispute that she was 33 minutes late, as charged.

b. Analysis

Although the GC made out a prima facie case regarding Allen (i.e., it adduced Union activity, knowledge and animus), Starbucks established that it would have issued her a *Final Written Warning* in the absence of her protected activity. *First*, it maintains a neutral policy in its Partner Guide, which expressly requires punctuality and warns that infractions trigger disciplinary consequences. The T&A reset re-affirmed this policy to everyone, regardless of their Union sympathies, and Allen's *Final Written Warning* was implemented after the reset. *Second*, Allen

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41 The Board recognizes limited exceptions to its general bar against piecemeal unilateral changes during contract bargaining. *Pleasantview Nursing Home*, 335 NLRB 961 (2001), enfd. 351 F.3d 747 (6th Cir. 2003)("Board recognized only two exceptions to that general rule: [1] when a union engages in bargaining delay tactics and [2] when economic exigencies compel prompt action ....."). Starbucks did not, however, assert any such exceptions.

42 An employer's practices, which are regular and long-standing, become terms and conditions of employment. *Sunoco, Inc.*, 340 NLRB 239, 240, 244 (2007); *DMI Distribution of Delaware*, 334 NLRB 409, 411 (2001). A past practice must, however, occur with such regularity and frequency that employees would reasonably expect it to reoccur on a regular and consistent basis. *Eugene Iovine, Inc.*, 328 NLRB 294, 297 (1999).

43 This was alleged under complaint ¶¶9, 12, 14, 23 and 25.

admitted to being 33 minutes late, as charged. *Third*, no evidence of disparate treatment was presented by the GC. On the contrary, Starbucks provided personnel records, which demonstrated that it disciplined several partners at the 24th Street café for T&A violations, whose Union activities were unknown. See (R. Exh. 60). Allen also conceded that she was disciplined for T&A infractions both before and after her organizing activities. On these bases, Starbucks convincingly adduced that it would have issued a *Final Written Warning* to Allen, irrespective of her Union activities.[44] Dismissal of the §8(a)(3) allegation is, accordingly, recommended.[45]

15. August 10 and 18: Benefit Loss, Discharge and Reprisal Threats by Benton[46]

The GC adduced no evidence in support of this allegation. Dismissal is, thus, warranted.

16. March–August: Stricter Enforcement of Attendance and Dress Code Policies[47]

a. Record Evidence

Benton reported that Starbucks implemented its "back to basics" campaign in early-March and warned partners of its intention to return to consistent enforcement of its extant T&A and dress code policies. She explained that "back to basics" was a district-wide program, which applied equally to everyone, flowed from a managerial decision that its cafés needed to return to consistently enforcing T&A and dress code policies after the pandemic, and was based on the business decision that operations would be enhanced by the evenhanded application of these policies. Allen conceded that the reset of the T&A and dress code policies was in response to policy enforcement becoming less stringent during COVID. (Tr. 220). She agreed that the policy reset was "district-wide" and not limited to Union cafés, and that she was given the chance to review these policies before the reset. (Tr. 220; R. Exhs. 6-7).

b. Analysis

Assuming arguendo that the GC made out a prima facie *Wright Line* case, Starbucks abundantly established a legitimate non-discriminatory basis for its action. As noted, when the same allegation was analyzed at Oltorf, it adduced that the T&A and dress code reset flowed from rational business reasons. This valid operational change was implemented on a district-wide basis and was blindly applied without knowledge of extant Union activity. Starbucks, as a result, adduced that it would have taken this action in the absence of any protected activity.

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[44] Unlike Gonzalez, Starbucks' decision to issue Allen a *Final Written Warning* for lateness after her single infraction was valid, inasmuch as Allen, unlike Gonzalez, was over 30 minutes late and had also been repeatedly warned via her prior T&A disciplines that lateness would not be tolerated. Additionally, Allen, unlike Gonzalez, never presented extenuating circumstances (i.e., the Shieh mix-up that has been discussed).

[45] The GC contends that Starbucks violated §8(a)(5), when it unilaterally issued Allen a *Final Written Warning*. Under current precedent, employers have no duty to bargain over discretionary discipline issued to employees not yet covered by a contract, where the discipline is "similar in kind and degree to what the employer did in the past within the structure of established policy or practice." *Care One at New Milford*, 369 NLRB No. 109, slip op. at 5 (2020). This allegation is, therefore, invalid.

[46] This was alleged under complaint ¶¶8(e)-(f), and 23.

[47] This was alleged under complaint ¶¶5(a),(d) and (e), and 23.

17. August 10: Changing Shieh's Weekly Availability Requirements[48]

a. Record Evidence

i. GC's Case

In June, Starbucks issued a weekly update for the café requiring partners to minimally work 12 hours weekly and be available 18 hours weekly. Shieh, a UT student, then submitted his fall availability to Benton, which met the 18-hour minimum availability requirement. Shieh then left Austin for the summer and returned in August. Upon returning and confirming his fall class schedule, Shieh revised his availability for the upcoming fall semester. His revision complied with the 18-hour minimum availability requirement.

On August 9, Shieh received a text from Benton which modified his availability for the schedule for the week of August 22, and had him working Monday, Wednesday and Thursday. (GC Exh. 27). Shieh replied to Benton that he was unavailable to work on Thursdays due to his UT class schedule. Benton then provided an updated schedule, which eliminated Thursday and listed him as available on Monday, Wednesday, Friday, Saturday and Sunday. Shieh then limited his availability to a Friday to Sunday schedule; this revision appeared to remain compliant with the 18-hour minimum availability requirement announced in June. Benton then requested a meeting to discuss their ongoing back and forth about availability.

In mid-August, Benton and Shieh met. Benton asked why he changed his availability. He replied that he changed his availability after reviewing his fall class schedule and other commitments, which included his job as a writer for the school newspaper. (Tr. 286-88). Benton then told him that his Friday to Sunday availability was too limited, and that the café now required 4 days of availability due to business needs. She added that, if he did not comply, he could be separated. Shieh attempted to accommodate Benton and added that he could also make himself available on Wednesdays. Benton said that she would try putting that update in the system. Shieh recalled this exchange, which he also recorded:

> I asked her about why this four-day policy was different from the 12 hours of working per week and 18 hours of availability per week that … had been communicated … [in] the weekly update …. She told me that this policy would only be in place for nonunionized stores and that since we were a unionized store, that it was different.[49] She also told me that … the actual requirement was that we were to work 18 hours a week and be available for one and a half times 18 hours …. She … told me that it was the store's business needs.

(Tr. 288-89). On August 18, Benton called Shieh and said that he might be able to transfer to another store, if it solved his availability issue. He indicated that she did not say whether his current availability remained inadequate.

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[48] This was alleged under complaint ¶¶9, 10 and 24.

[49] Shieh recorded this conversation; the recording confirmed that Benton expressly said that the 18-hour minimum availability is only for "non-Union stores." (GC Exh. 28(a) at 1).

ii. Starbucks' Response

Benton related that 24th Street, which was staffed with mostly students, was difficult to schedule. She stated that she previously liked Shieh's availability, who was available "for four days with full availability on Saturday and Sunday." (Tr. 1229). In July, Shieh submitted an availability form, which said that he was available on Wednesday, Friday, Saturday and Sunday. (R. Exh. 12). On August 9, Shieh texted a request to decrease his availability to Friday, Saturday and Sunday. (Id.). Benton said that his new availability was deficient and explained that "if I accept[ed] this availability, I would have to go and hire another partner." (Tr. 1235). She said that she consulted with Partner Resources about Shieh's issue. (Id.). She stated that the café's business needs required weekend and weekday availability. She offered to ask around if there was an area store that might be willing to accept Shieh's weekend preferences. She conceded that she warned him that, if they could not agree to his availability, Starbucks "could move to separation." (Tr. 1239). She said that Starbucks ultimately made this decision concerning Shieh:

> [I]t was concluded that, just don't rock the boat. Just let him stay. Let him work his availability, and … it wasn't worth it, because every time I had a conversation with him, he would get so … angry. And so, we decided just to keep him on … at 24.

(Tr. 1239-1240). She said that she thought that it was resolved and was surprised that he later resigned.

b. Analysis

Starbucks' unlawfully increased Shieh's availability requirements. The GC made out a prima facie *Wright Line* case; Shieh had extensive and known Union activities, and the GC successfully adduced animus. Although Starbucks averred that it would have required additional availability from Shieh absent his protected activities because of business needs, the GC successfully rebutted this defense by showing that Starbucks discriminatorily placed less onerous availability requirements on "non-Union stores." On this basis, the GC established that Starbucks violated §8(a)(3), when it required Shieh to increase his availability.

18. September 13: Constructive Discharge of Shieh[50]

a. Record Evidence

Shieh submitted this resignation letter to Benton and Smith-Nixon:

> This letter serves as my official notice of separation ….
>
> I am quitting Starbucks because the treatment I have received from Jill over the past few months has reached a level of disrespect and unpleasantness that I can no longer tolerate. Jill has caused working conditions at our store to deteriorate through poor scheduling, poor communication, and mistreatment of employees. She has directly threatened to fire me multiple times over rules regarding availability that

[50] This was alleged under complaint ¶¶9, 10 and 24.

> have never been communicated or enforced before, and she has scheduled me outside of my own availability on multiple occasions. She has also lied to me several times, and she has verbally insulted and accused me because I've asked her questions. These reflect poorly on her skills and characteristics as a leader ….
>
> I am also quitting due to Starbucks' treatment of myself and other Partners in response to our support for a union. Rather than listening to our concerns and supporting us as employees, management and corporate have elected to use a strategy of retaliating against workers. Starbucks has retaliated against us by firing pro-union employees over never-before-enforced rules, under-scheduling and mistreating us ….
>
> I am a student and a worker …. I have had to hold two or three jobs at a time to make enough money. I have worked for multiple weeks in a row, without any days off …. Workers are the union, and your refusal to support and listen to unions is a refusal to support and listen to workers.
>
> I hope this letter … will lead you to treat future employees with the dignity and respect that they deserve …. We deserve to have our schedules respected, to be communicated with truthfully …, to be paid adequately … and to be treated with the bare minimum of kindness and honesty ….

(GC Exh. 31). Shieh agreed that he added Wednesday to his availability, but, told Benton that it was not his preference. (Tr. 329). Shieh agreed that Benton suggested the possibility of transferring to another area store that might be able to better accommodate his availability needs during an August 18 call. (Tr. 331).[51] Shieh agreed that Benton came back to him and said that, "she accepted your availability." (Tr. 332). Although he said that Benton was still scheduling him outside his Wednesday, Friday, Saturday and Sunday availability, Shieh acknowledged that "having availability accepted doesn't automatically change your schedule in the system," and that schedules "are done a period of time in advance." (Tr. 333-334). Benton said that she thought that the issue was resolved, and was surprised by his resignation. (Tr. 1240-1242).

b. Analysis

The GC failed to adduce a constructive discharge. The GC is contending that Starbucks constructively discharged Shieh via a change in his working conditions.

i. Board Precedent

"Changed working condition" constructive discharges have 2 elements. *N.C. Prisoner Legal Services.*, 351 NLRB 464, 470 (2007). *First*, the burden imposed on an employee must cause, and be intended to cause, a change in working conditions so difficult or unpleasant that it forces resignation. *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004); *Intercon I (Zercom)*, 333 NLRB 223, 223 fn. 3 (2001). *Second*, this burden must be imposed because of their protected

[51] Shieh conceded that he never called Partner Relations to complain. (Tr. 335-36). He also never followed up with Benton about transferring to a café that could better accommodate his availability before resigning. (Tr. 339).

activities. *Id.*; *Union 76 Auto Truck Plaza*, 267 NLRB 754 (1983). Intent is satisfied, if the employer "reasonably should have foreseen" that its actions would prompt the employee to quit. *American Licorice Co.*, 299 NLRB 145, 148 (1990). "The mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge. If that were the case, then any discrimination violative of the Act followed by a quit by the discriminatee could be termed a constructive discharge." *Algreco Sportswear Co.*, 271 NLRB 499, 500 (1984).

ii. Synthesis

The GC failed to show that the burdens imposed upon Shieh by increasing his availability requirements caused a change in his working conditions that was so difficult that it compelled resignation. Shieh agreed to add Wednesdays to his availability. Benton, in turn, apologized and agreed to guard against scheduling miscues going forward. (Tr. 328-29). She also tried to accommodate Shieh by investigating whether he could work at another café, which Shieh never followed up on. This hardly paints the picture of an employee who could not work the increased hours; at best, it shows a worker who could work, but, found the change undesirable.[52] Benton also thought that the matter was closed and a managerial decision had even been made to work with Shieh and not initiate discipline. (Tr. 1239-1240). Lastly, in reviewing Shieh's resignation letter, it is apparent that he resigned for a multitude of reasons other than his own increased availability requirements, including poor communication, mistreatment of partners, the attendance reset and associated disciplines, reported lies from management, perceived insults, "under-scheduling," "poverty wages," harassment, and a host of other causes. This litany of grievances and causes makes it impossible to conclude that his increased availability requirements were the "but for" and proximate cause of his resignation. On these bases, the GC failed to show that Starbucks' increase in Shieh's availability requirements created an untenable employment condition, which necessarily prompted his resignation. *Algreco Sportswear Co.*, supra ("mere existence of discrimination is insufficient to warrant consideration of abandonment of employment as a constructive discharge.").

19. September 4: Benefit Loss, Discharge and Reprisal Threats by Benton[53]

Starbucks violated §8(a)(1), when Benton told Shieh that he could be separated if he did not agree to increased weekly availability. Given that Starbucks' unlawfully increased his availability requirements as discussed above, an underlying threat to fire him on the basis of this unlawful change is similarly unlawful.

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[52] No evidence was presented that Starbucks' increased availability requirements made Shieh's attendance at the café impossible due to other conflicting and unchangeable obligations (e.g., family or transportation issues). See, e.g., *North Carolina Prisoner Services*, 351 NLRB 464 (2007)(employer's failure to maintain a reduced workweek for an employee whose schedule had been structured around other obligations created an untenable working condition); *Yellow Ambulance Service*, 342 NLRB 804, 807 (2004)(requiring an employee to choose between work and family obligations is sufficiently burdensome to support a finding of constructive discharge); *Grand Canyon Mining Co.*, 318 NLRB 748, 760 (1995), enfd. 116 F.3d 1039 (4th Cir. 1997) (transferring employee to different shift caused transportation issues that made it impossible to attend work).

[53] This was alleged under complaint ¶¶8(g), and 23.

20. September 19: Removal of Union Literature from Break and Stockroom Area[54]

a. Record Evidence

Allen stated that, in mid-September, she posted a *Weingarten* notice on the refrigerator in the break area. (GC Exh. 19). She said that barista Jenson told her that Benton directed her to remove this poster. She said that, when she discussed this with Benton, she replied that she was frustrated with the many Union postings in the "back of house" because she had previously told her to not post those materials. Allen added that other Union notices in the break area had been removed. See, e.g., (GC Exh. 12)(various Union posters). Benton did not challenge her account.

b. Analysis

Benton's removal of Union literature from the break area violated the Act. The break area is a mixed-use area, where employees can generally post and distribute Union materials. *Mercedes-Benz*, supra. Starbucks failed to adduce any special circumstances necessary for it to "maintain production or discipline," which warranted Benton's ban.

21. September 26: Denial of Allen's Weingarten Request by Benton[55]

a. Record Evidence

As noted, Benton told Allen that she was frustrated with the Union's "back of house" postings because she had previously warned her not to post such materials. Allen responded by asking for a *Weingarten* representative. Allen said that, although Benton asked her who she wanted, she could not identify anyone because the café's original Union organizers were no longer employed. She said that, while Benton ended their discussion and told her to find someone by Friday, Benton later told her that the meeting was no longer needed.

b. Analysis

Starbucks did not violate her *Weingarten* rights. In *Weingarten*, the Supreme Court held that, in a unionized setting, §7 guarantees an employee's right to the presence of a union representative at an investigatory interview, which they reasonably believe could result in disciplinary action. *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 262 (1975). Under the Weingarten doctrine, an employee is entitled to a representative only when the meeting is investigatory. *Baton Rouge Water Works Co.*, 246 NLRB 995, 997 (1979). *Weingarten* rights do not apply, however, to a meeting held to inform an employee of and act upon a pre-determined disciplinary decision. Id. Additionally, the employee must have a reasonable fear that the interview could result in their own discipline or adversely affect their working conditions in order to trigger their *Weingarten* rights. *Weingarten*, 420 U.S. at 256 ("an interview which he reasonably fears may result in his discipline"; *Baton Rouge Water Works Co*., 246 NLRB at 997 ("Weingarten applied to any interview . . . which the employee reasonably believes may result in disciplinary action being taken against him."); *Mobil Oil Corp*., 196 NLRB 1052, 1052 (1972) ("an interview

[54] This was alleged under complaint ¶¶8(h), and 23.

[55] This was alleged under complaint ¶¶8(i), and 23.

which may put his job in jeopardy"), enf. den. 482 F.2d 842 (7th Cir. 1973).

The *Weingarten* right only attaches when an employee validly requests representation. *Weingarten*, 420 U.S. at 257; *Montgomery Ward & Co.*, 269 NLRB 904, 905 n.3 (1984) ("The Board does not require that the request be in a particular form, so long as it is sufficient to place the employer on notice that representation is desired."). Once a valid request is made, the employer is permitted only three courses of action: (1) grant the request, (2) end the interview, or (3) provide the employee the choice between continuing with no representative or having no meeting at all and forgoing any benefits that may be derived from having one. *Id*. "Under no circumstances may the employer continue the interview without granting the employee union representation, unless the employee voluntarily agrees to remain unrepresented after having been presented by the employer with the choices mentioned in option (3) above or if the employee is otherwise aware of those choices." *United States Postal Serv*., 241 NLRB 141, 141 (1979). A Weingarten request may validly be made at any point during an investigatory interview. *Montgomery Ward & Co*., 254 NLRB 826, 826, 828—829 (1981) (*Weingarten* violation when employee requested a representative mid-interview after being accused of stealing merchandise, denying the accusation, and the request was denied).

Starbucks' actions complied with the *Weingarten* doctrine. Benton ended the interview, when Allen asked for a representative. *Montgomery Ward & Co.,* supra.

22. October 18: Stricter Enforcement of Posting Policy[56]

It is unnecessary to further pass on this allegation. Starbucks, as stated above, violated §8(a)(1) by removing Union literature from the break area on April 16 and September 19. The instant allegation is duplicative in theme and additional "findings would be cumulative and would not affect the remedy." *Newburg Eggs, Inc.,* 357 NLRB 2191, n.6 (2011).

D. SHEPHERD CAFÉ

On July 18, the Union filed an RC-petition seeking to represent baristas and SSVs at the Shepherd café. (JT Exh. 4). The Union won the election and a *Certification of Representative* issued on September 30. (Id.). This Shepherd café was led, at various times, by store managers Tyler Hager, Dannett Dudley and Nick Downinger. They reported to district manager Bert Smith. Smith first learned of the campaign, after receiving the RC-petition on July 18. (R Exh. 16).

The main organizers at Shepherd were partners Josue Deleon and Madeline Gierkey. They signed the "Dear Howard" letter, which announced the Union's intention to organize the café and was posted on Twitter. (GC Exh. 49). They marketed the Union and obtained authorization cards from partners. DeLeon was quoted in a Houston Chronicle article discussing the Union's campaign and interviewed by a local TV station about the same. (GC Exh. 50).

1. T&A Reset at the Shepherd Café

Partner resources business partner Magnolia Lopez testified that, following the pandemic,

[56] This was alleged under complaint ¶¶8(j), and 23.

Starbucks determined that it needed to return to its prior T&A standards. It began this initiative with one-on-one meetings and by sending educational emails to its district managers. On March 14, Lopez sent this email to store managers:

> As we continue to connect with partners, call outs continue to be brought forward as a concern on many levels. Ensuring we have clear, consistent conversations regarding policies and expectations is critical. I am attaching a deck for you to review and please connect with me if you have any additional questions. I have also included the time and attendance video link for you to review ….

(R. Exh. 34).

2. Mid-July: Impression of Surveillance by District Manager Smith[57]

a. Record Evidence

DeLeon said that after the Union filed its RC-petition on July 18, he saw both store manager Hager and district manager Smith in the café with greater frequency. Gierkey related that, pre-petition, she saw Smith a total of 3 to 5 times, and that post-petition, she observed him a few times per week. Barista Jordyn Johnson corroborated their accounts. Smith claimed that he generally tried to visit his cafés at least weekly and that his frequency increased because Hager was a new store manager, who required his mentorship and increased visits.

b. Analysis

The GC failed to establish that Smith created an impression of surveillance. The Board's test is whether, "under all the relevant circumstances, reasonable employees would assume from the statement in question that their union ... activities had been placed under surveillance." *Frontier Telephone of Rochester*, supra. The standard protects "employees [from] ... participat[ing] in union organizing campaigns without the fear that ... management [is] ... taking note of who is involved in union activities." *Flexsteel Industries*, supra. Smith credibly explained why his visits increased. He was newly charged with mentoring a new manager, who needed increased supervision. Under these circumstances, employees should have reasonably concluded that Smith was there more frequently solely to train a new manager.

3. Late-July: Captive Audience Meetings Held by Smith[58]

Although Smith held captive audience meetings that communicated management's labor relations stance, dismissal is nevertheless warranted. While the Board recently reversed its longstanding position on captive audience meetings and newly held that "an employer … [violates] Section 8(a)(1) … when it compels employees to attend a captive-audience meeting on pain of discipline or discharge," it carefully guided the labor relations bar that its reversal was to be applied prospectively. A*mazon.com Services LLC*, 373 NLRB No. 136, slip op. at 2-3, 30 (2024). Thus, *Babcock & Wilcox*, 77 NLRB 577, 578 (1948), which held that captive audience meetings were

[57] This was alleged under complaint ¶¶15(a), and 23.

[58] This was alleged under complaint ¶¶15(b)(i), and 23.

lawful, validates these meetings, which preceded the new *Amazon* holding. *Starbucks Corp.*, 374 NLRB No. 14, n. 2 (2024).

4. Late-July: Solicitation of Grievances and Granting Benefits by Smith[59]

a. Record Evidence

Smith met with Johnson, asked her to identify the grievances that prompted her Union support. She replied that she was upset with staffing and scheduling. Smith then called over Hager and told him to give her more hours. She said that, thereafter, Smith and Hager continued to ask whether her schedule was sufficient. Smith did not admit any specifics, but, agreed that he told store manager Hager to give her additional hours.[60] Smith generally contended that he solicits feedback from all stores, but, his testimony lacked specifics.[61]

b. Analysis

i. Solicitation of Grievances

Smith violated §8(a)(1), when he unlawfully solicited grievances from Johnson. The solicitation of grievances during a union campaign is unlawful when it "'carries with it an implicit or explicit promise to remedy the grievances and "impress[es] upon employees that union representation [is] . . . [un]necessary."' *Albertson's,* supra. "An employer may rebut the inference of an implied promise by ... establishing that it had a past practice of soliciting grievances in a like manner prior to the critical period, or by clearly establishing that the statements ... were not promises." *Mandalay Bay Resort & Casino*, supra. Given that there is no record evidence that Starbucks maintained a practice at Shepherd of soliciting and adjusting grievances, Smith's request for Johnson to specify those grievances that prompted the Union's campaign was coercive.

ii. Granting Benefits

Smith violated §8(a)(1), when he adjusted Johnson's grievance and gave her additional hours. An allegation that an employer has unlawfully granted benefits in response to organizational activity is analyzed under *NLRB v. Exchange Parts,* 375 U.S. 405 (1964). In *Exchange Parts,* the Supreme Court held that, "the conferral of employee benefits while a representation election is pending, for the purpose of inducing employees to vote against the union," interferes with their protected right to organize. Moreover, "[a]lthough 8(a)(1) allegations are typically analyzed under an objective standard, and motive is irrelevant, see *American Freightways Co.*, 124 NLRB 146, 147 (1959), the 8(a)(1) analysis under *Exchange Parts* is motive based." *Network Dynamics Cabling*, 351 NLRB 1423, 1424 (2007), citing *Hampton Inn NY-JFK Airport,* 348 NLRB 16, 18 fn. 6 (2006). In other words, the motive for the conferral of benefits during an organizational

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[59] This was alleged under complaint ¶¶15(b)(ii)(iii), (d)(i)(ii), (e)(i-ii), and 23.

[60] Johnson's testimony has been credited. She was a believable and reliable witness, who possessed a strong demeanor. Additionally, Smith did not expressly deny her account.

[61] Smith's implication that his handling of Johnson's situation represented his normal approach has not been credited. I further find, on this basis, that Starbucks failed to show that Starbucks maintained a consistent and longstanding past practice of soliciting grievances from partners in the way Smith did, when he adjusted Johnson's work hours.

campaign must be designed to interfere with union organizing. Id. Under settled Board precedent, "[a]bsent a showing of a legitimate business reason for the timing of a grant of benefits during an organizing campaign, the Board will infer improper motive and interference with employee rights under the Act." *Yale New Haven Hospital*, 309 NLRB 363, 366 (1992); see also *Kanawha Stone Co.*, 334 NLRB 235 n. 2 (2001). Starbucks gave Johnson extra hours to dissuade her from supporting the Union and address her primary issue. It took this action alongside its unlawful solicitation described above. Starbucks failed to show that it had a legitimate business reason, which was unconnected to the Union's organizational campaign, for its actions.

5. July 28: Barring Employees from Speaking to the Media by Smith[62]

a. Record Evidence

DeLeon met with Smith; he recalled this exchange:

> [H]e began to ask me about the ABC interview that happened days prior, and … wanted to know … what sort of authorization I had gotten …. Who in management did I speak [with] to conduct the interview in the store ….
>
> I told him that I did not speak to any management …. I was not aware fully … of the media policy within the company, but I was not on the clock. Cameron Davis was also not on the clock, and we had both agreed that it would be okay to just film in the store. We asked the reporter to just, you know, not film people working …. It initially was going to be at the local news station, but Jade canceled last minute and asked if we could film at the store ….

(Tr. 468-469). DeLeon also recalled the following:

> [H]e did stress with me very seriously that … [we] cannot be doing interviews in the store, cameras coming in the store in that way, … he just basically explained to me … that [for] … any media inquiries, direct them to the company's Media Relations phone number.

(Tr. 471). The Partner Guide provides, under *Media Inquiries,* that, "only approved Starbucks Corporation spokespeople are authorized to talk to the media." (GC Exh. 2 at 41).

b. Analysis

Smith's recapitulation of Starbucks' extant *Media Inquiries* policy to DeLeon violated the Act, i.e., that DeLeon had to secure Starbucks' consent before speaking to the media. The "Board has consistently held employees have a right under Section 7 … to convey their complaints or grievances against their employers to representatives of the media as well as other third parties, in an effort to secure favorable coverage and/or aid and support." See, e.g., *Leather Center, Inc*., 312 NLRB 521, 528 (1993). As a result, work policies requiring pre-authorization before speaking to the media or that refer media inquiries to specified managers violate §8(a)(1). *Burndy, LLC*, 364

[62] This was alleged under complaint ¶¶15(c)(i), and 23.

NLRB 946, 976 (2016); *Trump Marina Casino Resort*, 354 NLRB 1027, 1029 (2009). Starbucks failed to show that the *Media Inquiries* rule "advances a legitimate and substantial business interest and that the" company was "unable to advance that interest with a more narrowly tailored rule." *Stericycle*, 372 NLRB No. 113, slip op. at 10 (2023).

6. Late-July: Barring Employees from Posting Materials by Smith[63]

Another finding regarding this issue is cumulative and would not affect the overall remedy. *In re Newburg Eggs, Inc.*, supra.

7. Late-July: Threatening Partners about Transferring by Smith[64]

Starbucks violated §8(a)(1), when Smith threatened partners about transferring. Johnson credibly stated that, when she asked Smith about transferring from Shepherd, Smith replied that it might not be possible if a Union was present. A statement is an unlawful threat, when it coerces employees in the exercise of their §7 rights. 29 U.S.C. § 158(a). The Board, "does not consider subjective reactions, but rather whether, under all the circumstances, a respondent's remarks reasonably tended to restrain, coerce, or interfere with employees' rights guaranteed under the Act." *Sage Dining Service*, supra, 312 NLRB at 846. In this case, Smith's threats conveyed to partners that, if they unionized, transfer rights might be lost.

8. August 3: Anti-Union Commentary by Smith[65]

Starbucks violated the Act, when Smith told Johnson that Starbucks was not for the Union. Although it is generally lawful for an employer to advance its opinion regarding unionization either pro or con, the volume of additional threats and unlawful comments made by Smith reasonably made this otherwise innocuous opinion an implicit threat regarding unionization.

9. August 8: Captive Audience Meeting by Hager and Dudley[66]

The Board's recent holding on captive audience meetings is applicable only prospectively. A*mazon.com Services LLC*, supra. Dismissal is, thus, warranted. *Starbucks Corp.*, supra.

10. August 8: Soliciting Grievances by Hager or Dudley[67]

Another finding regarding this issue would be cumulative, unwarranted and would not affect the overall remedy. *In re Newburg Eggs, Inc.*, supra.

63 This was alleged under complaint ¶¶15(c)(ii)(iv), and 23.
64 This was alleged under complaint ¶¶15(c)(iii), and 23.
65 This was alleged under complaint ¶¶15(e)(iv), and 23.
66 This was alleged under complaint ¶¶15(f)(i), and 23.
67 This was alleged under complaint ¶¶15(f)(ii), and 23.

11. Early August: Barring and Limiting Union Pins by Hager[68]

a. Record Evidence

Johnson credibly testified that Hager told her not to wear a Union pin. She noted that, at that time, others wore multiple pins while on duty (e.g., 5+ pins simultaneously depicting animals, fruits, etc.). Smith later told her that she could wear a single Union pin. Partner Pamela Vogel credibly testified that she encountered the same resistance; she credibly recalled that, on August 8, Hager told her that she could not wear a Union pin. She said that she complied, but, was later told that she could. See also (GC Exh. 67). Hager corroborated Vogel's account.

b. Analysis

Starbucks unlawfully limited partners' rights to wear Union pins. The Board has held:

> [E]mployees have a Section 7 right to wear union insignia on their employer's premises, which may not be infringed, absent a showing of "special circumstances." ... These protections ... have always extended to articles of clothing, including pro-union T-shirts. There is no basis in precedent for treating clothes displaying union insignia as categorically different from other union insignia, such as buttons ....
>
> An employer cannot avoid the "special circumstances" test simply by requiring its employees to wear uniforms or other designated clothing, thereby precluding the wearing of clothing bearing union insignia. The Board has consistently applied that test where employers have required employees to wear particular articles of clothing and have correspondingly prohibited them from wearing clothing displaying union insignia ....

Stabilus, Inc., 355 NLRB 836, 838 (2010)(citations omitted). Even if an employer's rule is facially lawful, the disparate enforcement of that rule against union or other protected concerted activity violates the Act. See, e.g., *Shelby Memorial Home*, 305 NLRB 910, 919 (1991), enfd. 1 F.3d 550, 565 (7th Cir. 1993) (nursing home's selective enforcement of its rule restricting pins or badges against union insignia, but, not other insignia was unlawful). In this case, Starbucks both wholly barred employees from wearing Union pins and selectively enforced its pin policy by limiting employees wearing Union pins to a single pin, while allowing others to wear multiple pins in other categories. Starbucks failed to adduce any special circumstances supporting its actions. Starbucks, therefore, violated §8(a)(1), when it barred employees from wearing pins and disparately enforced its pin policy.[69]

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[68] This was alleged under complaint ¶¶15(g)(i), (h)(iii), (i), (k), and 23.

[69] Hager failed to effectively disavow his unlawful comments. Under certain circumstances, an employer may relieve itself of liability for unlawful conduct, when it effectively repudiates such conduct. *Passavant Memorial Area Hospital*, 237 NLRB 138, 138-139 (1978). In order for a repudiation to be effective, it must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." *Douglas Division*, 228 NLRB 1016 (1977). Hager's repudiation was ineffective because it was not "free from other proscribed illegal conduct," as demonstrated by the multiple comments and actions found unlawful herein.

12. August 8 and 9: Barring and Removing Union Postings by Hager and Smith[70]

Another finding regarding this issue would be cumulative, unwarranted and would not affect the overall remedy. *In re Newburg Eggs, Inc.*, supra.

13. August 9: Statements of Futility by Smith[71]

The GC provided no evidence supporting this allegation. Dismissal is, thus, recommended.

14. August 9: Barring Group Chats by Smith[72]

Smith was recorded telling DeLeon, inter alia, that, "we shouldn't have group texts," and our "policy is [to] never have a group text." (GC Exh. 57 at 4-5). These admonitions infringed upon employees' rights to collectively discuss their terms and conditions of employment within a group text and breached their rights to engage in lawful §7 activity.

15. August 20: Threatening Partners with the Loss of Benefits by Hager[73]

The GC provided no evidence supporting this allegation. It also failed to address this matter in its closing brief. Dismissal is, accordingly, recommended.

16. Late-August: Threatening Lost Communication with Management by Hager[74]

The GC provided no evidence supporting this allegation. It similarly failed to address it in its closing brief. Dismissal is, accordingly, recommended.

17. Late-August: Captive Audience Meetings by Hager[75]

The Board's holding on captive audience meetings, as stated, is to be applied prospectively. A*mazon.com Services LLC*, supra. Dismissal is, thus, warranted. *Starbucks Corp.*, supra.

18. August 30: Statements of Futility by Hager[76]

The GC provided no evidence supporting this allegation. It also failed to address this issue in its closing brief. Dismissal is, accordingly, recommended.

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[70] This was alleged under complaint ¶¶15(g)(ii-iii), (h)(i), and 23.
[71] This was alleged under complaint ¶¶15(h)(ii), and 23.
[72] This was alleged under complaint ¶¶15(j), and 23.
[73] This was alleged under complaint ¶¶15(l), and 23.
[74] This was alleged under complaint ¶¶15(m), and 23.
[75] This was alleged under complaint ¶¶15(n), and 23.
[76] This was alleged under complaint ¶¶15(o), and 23.

19. September 2: Barring Union Postings by Smith[77]

Another finding regarding this issue would be cumulative, unwarranted and would not affect the overall remedy. *In re Newburg Eggs, Inc.*, supra.

20. September 17: Notice of Separation to Josue DeLeon[78]

a. Record Evidence

On September 2, SSV DeLeon met with Smith, who told him that he was investigating his store opening procedure. On September 13, DeLeon met with Smith, who asked him about entering the café on various dates. DeLeon did not recall his actions on these specific dates, but, Smith told him that the alarm codes did not match with his logbook entries on these dates. On September 17, DeLeon received the following:[79]

> This … Notice of Separation for Josue Deleon [is] for failing to … follow the Recording Time Worked Policy by entering false start times in the Time and Attendance Punch Communication Log ….
>
> On 7 /21/22, Josue was scheduled to start his work shift at 4:30 am. Josue started his work shift at 4:41 am [and] wrote 4:30 am on the … Communication Log.
>
> On 7 /30/22, Josue was scheduled to start his work shift at 5:30 am. Josue started his work shift at 5:38 am and wrote 5:30 am on the … Communication Log.
>
> On 8/7 /22, Josue was scheduled to start his work shift at 5:30 am. Josue started his work shift at 5:53 am and wrote 5:30 am on the … Communication Log.
>
> On 8/13/22, Josue was scheduled to start his work shift at 5:30 am. Josue started his work shift at 5:54 am and wrote 5:30 am on the … Communication Log.
>
> The Recording Time Worked policy requires accurate timekeeping to ensure proper payment of wages in accordance with federal and state wage and hour laws. On each of the above occasions, Josue inaccurately recorded his start times resulting in overpayment of wages. Josue was provided the opportunity to explain the time record discrepancies and he denied he had inaccurately recorded his time, even when advised of the difference between his scheduled start time, late arrival (which is a separate violation of the Attendance and Punctuality policy) and his entries in the Time and Attendance Punch Communication log,
>
> Previously, Josue Deleon received a Documented Coaching on 4/28/2022 for failing to … follow the Attendance & Punctuality Policy. While not a separate

[77] This was alleged under complaint ¶¶15(p), and 23.

[78] This was alleged under complaint ¶¶16, 17, and 24.

[79] DeLeon was fired on the last day for partners to mail their ballots; the Union won the vote on September 22.

> reason for separation of employment, it is noted that the above late arrivals, and an additional late arrival on 9/10/22 (arrival at 7:33am for a 5:30 am scheduled start, resulting in a late store opening), forms a separate basis for corrective action ….

(GC Exh. 58). DeLeon defended that the inaccuracy might be explained by someone sleeping outside the café or that the partner assigned to open with him was late. DeLeon denied, however, intentionally writing the wrong time in the logbook. He added that he might have also written his entries in the logbook at the close of his shift and misremembered.

Smith said that he considered the daily records book secondary to using the café's iPad to punch in. He said that, at some point, Hager observed that partners were writing inaccurate times in the daily logbook. He said that an investigation ensued and they determined that DeLeon was guilty of this offense. See (R. Exh. 17). Smith said that he interviewed Johnson and DeLeon to investigate. He added that he fired partner Jorge Colmenares at the Kirby café for this kind of transgression. (R. Exh. 18). Smith said, without further explanation, that he concluded that Gierkey and Johnson were waiting for DeLeon and not late. As noted, Gierkey had some Union activity at this time;[80] it is also unknown if Johnson had any known Union activity beyond telling Smith that she supported the Union when he unlawfully solicited her grievances.

On August 30, Johnson met with Smith and admitted that, if she was late, she would record her shift start and not arrival time. She offered as an example, August 13, where she reported to management via text that she was late (GC Exh. 68), but, recorded in the logbook her scheduled start time and was paid in accordance with this entry. See also (R. Exh. 14, GC Exh. 67). She added that she was never disciplined for this recording inaccuracy.

b. Analysis

The GC made out a prima facie *Wright Line* case, i.e., it adduced that DeLeon engaged in extensive Union activity, and that Starbucks had knowledge and animus. Starbucks failed, however, to show that it would have otherwise discharged him in the absence of his protected activity. Although Starbucks adduced that DeLeon's logbook entries were inconsistent with the alarm disarming entries (i.e., it provided a generally valid reason for disciplinary action), it failed to enforce the very same condemning evidence against either Gierkey or Johnson in an analogous way. Smith, instead, arbitrarily claimed without any explanation or supporting evidence, that he somehow determined that DeLeon was solely at fault and the others were blameless. This blatantly disparate treatment, without any obvious basis in fact, undermines Starbucks' contention that it was simply taking disciplinary action against DeLeon on a valid, non-discriminatory basis. If this were true, the same disciplinary action would have been meted out against Gierkey and Johnson, without hesitation.[81] This conspicuous failure to enforce a rather clear employment rule in a consistent and evenhanded manner is suspect. It is also noteworthy that DeLeon was likely perceived as the Union ringleader by Smith on the basis of his role in having a local TV station

[80] The lion's share of Gierkey's Union activities occurred after DeLeon's firing (i.e., after October 1), when she organized multiple ULP strikes at the café.

[81] It is also noteworthy that Johnson openly admitted to management her practice of arriving late and recording her shift start in the logbook, instead of her arrival time. This credible testimony was corroborated by documentary evidence. See, e.g., (R. Exh. 14, GC Exh. 67).

film his interview at the café, and that Gierkey's more substantial Union activities occurred later on, when she organized ULP strikes at the café. On these bases, the GC demonstrated the DeLeon's separation violated §8(a)(3).

21. January 4, 2023: *Final Written Warning* to Gierkey[82]

a. Record Evidence

On October 1, Gierkey emailed Smith that the Union was holding a ULP strike at the café on October 1 and 2 to protest DeLeon's firing and other ULPs. (GC Exh. 62). Another ULP strike occurred on November 17; Gierkey, once again, emailed this strike notice. (GC Exh. 63).

On January 4, 2023, Gierkey received a *Final Written Warning* for the following:

> On Monday 11/21/2022 - Madeline did not arrive for her scheduled shift of 5am-1045am. She did not contact myself, the Store Manager, or Assistant Store Manager Aaron …. She did not make attempts … for another partner to cover her shift ….

(GC Exh. 64). Gierkey agreed that she missed her November 22 shift, but, defended that she told SSV Kelly on November 21 that she would be absent and thought this would suffice. She said that management was not in the café on November 21, when she called. SSV Kelly documented Gierkey's call, which corroborated her account. (GC Exh. 65).

Johnson stated that she was absent in October during back to back weekends and never called in. She said that Hager called her the second weekend and she told him that she was hung over and could not come in. Hager stated that they would need to talk but never raised the issue again with her. She said that Gierkey's handling was suspect because Gierkey did things that others did without repercussion.

b. Analysis

The GC adduced a strong prima facie case that Gierkey's *Final Written Warning* was unlawful. She had extensive Union activity connected to organizing 2 ULP strikes, Starbucks had knowledge, and there is evidence of animus. Starbucks failed to show that it would have issued her a *Final Written Warning* in the absence of her Union activity. *First*, even though she was charged with failing to call in, she actually did so and an entry was recorded in the daily logbook to this effect. This complied with the Partner Guide, which states that, "if a manager is not in the store, the partner should notify the partner leading the shift." Starbucks, as a result, charged her with a workplace crime that she did not commit. This is clear and obvious pretext. *Second*, even if Gierkey committed the workplace crime at issue, which she did not, Starbucks elevated her to a *Final Written Warning*, even though there is no evidence she had a pre-existing discipline and should have rightfully been issued a lesser *Written Warning* or *Documented Coaching*. Under these circumstances, the GC demonstrated that Starbucks' approach was invalid. On this basis, Starbucks violated §8(a)(3) by issuing her discipline.

[82] This was alleged under complaint ¶¶16, 18 and 24.

22. March 2, 2023: Failure to Promote Madeline Gierkey[83]

a. Record Evidence

Starbucks' personnel records demonstrate that Gierkey applied for a SSV role on March 2, and was rejected because she "does not meet the basic requirements." (R. Exh. 22). Hager testified that she was denied because of the *Final Written Warning*. (Tr. 854-855).

b. Analysis

Given that the *Final Written Warning* was unlawful and Hager conceded that Gierkey was rejected for the SSV role because of it, it follows that her SSV rejection was unlawful. This action, accordingly, violated §8(a)(3).

23. April 4, 2023: *Notice of Separation* to Gierkey[84]

a. Record Evidence

Gierkey received a *Notice of Separation*, which provided as follows:

> Previously Madeline was issued a final written warning for time and attendance on 1/04/23.
>
> Since the final written warning was issued, Madeline has continued to violate the time and attendance policy and was late on the following scheduled shifts:
>
> - 2/20/23: 21 minutes late
> - 2/24/23: 25 minutes late
> - 3/2/23: 9 minutes late
> - 3/3/23: 6 minutes late
> - 3/7/23: 14 minutes late ….

(GC Exh. 66). Gierkey admitted that she was late on the occasions at issue.

Hager contended that Gierkey's firing was consistent with the disciplinary handling of other partners at the café. Starbucks offered the following records:

Date	Partner	Discipline	Summary
March 29, 2022	M. Collins	Documented Coaching	Late 5x in March
December 19, 2022	M Collins	Written Warning	Late 5x in November and December
January 18, 2023	M. Collins	Final Written Warning	Late 2x in January.
May 15, 2023	A. Saldana	Documented Coaching	Late 7x in April and May
Feb. 27, 2023	J. Rios	Documented Coaching	Late 2x in February

[83] This was alleged under complaint ¶¶16, 18 and 24.
[84] This was alleged under complaint ¶¶16, 18, and 24.

Jun. 21, 2023	J. Rios	Documented Coaching	Late 5x in May and June
June 21, 2023	S. Davila	Documented Coaching	Late 6x in May and June
August 2023	J. Rios	Written Warning	Late 4x in July and August
Feb. 8, 2023	C. Thomas	Final Written Warning	Late on January 13 and no call/no show on February 1
February 28, 2023	K. Conerly	Notice of Separation	3x no-call/no show and 2x dress code violations for food safety (e.g., nail polish and acrylic nails)

(R. Exhs. 23-31; GC Exh. 77).

b. Analysis

Although Starbucks advanced a valid reason for initiating a disciplinary action against Gierkey (i.e., on the basis of her lateness), its decision to issue her a *Notice of Separation* was premised upon her unlawful *Final Written Warning*. If the *Final Written Warning* were removed from the equation, Gierkey should have received a *Documented Coaching* under Starbucks progressive disciplinary system. Starbucks willingness to aggressively and unreasonably push forward under these circumstances is highly suspect and demonstrates an employer, who was retaliating against an employee, who led 2 ULP strikes. In furtherance of this point, one need look no further than the dichotomy of how Gierkey was treated pre-ULP strike, when she arrived late alongside DeLeon and was held harmless, versus post-ULP strike, when she was issued a *Final Written Warning* for a crime she did not commit, which was then used as a basis to fire her only a month later. On these bases, her discharge violated §8(a)(3).[85]

24. December 27: Failure to Bargain Over Safety and Related Information Requests[86]

a. Record Evidence

The Union emailed Starbucks a request to bargain over safety at Shepherd and requested, in writing, certain connected information. (JT Exh. 1). The Union sent the following request:

> [T]here are some workplace safety issues at the Shephard … store …. Specifically, at least one individual threatened and harassed workers this past fall and, on at least one occasion, threatened the store's physical integrity.
>
> The Union would like to bargain over Starbucks' response to these issues and respectfully requests that Starbucks take additional steps to make workers whole

[85] Under complaint ¶¶18, 22, and 25, the GC also contends that Starbucks violated §8(a)(5) by issuing Gierkey the *Final Written Warning* and *Notice of Separation* without affording the Union pre-implementation notice and bargaining. The parties stipulated that Starbucks engaged in these actions without affording the Union advance notice nor an opportunity to bargain. (JT Exh. 1). As noted previously, the Board has held that upon commencement of a collective-bargaining relationship, employers do not have an obligation under §8(d) and 8(a)(5) to bargain prior to disciplining unit employees in accordance with an established disciplinary policy or practice. *Care One at New Milford*, 369 NLRB No. 109, slip op. at 7 (2020), enfd. 848 Fed.Appx. 443 (D.C. Cir. 2021). On this basis, I find that Starbucks' actions did not violate §8(a)(5).

[86] This was alleged under complaint ¶¶19, 20, 21 and 25.

and protect workers' safety, including, but not limited to, the following:

1. Compensate partners who lost hours … [of work] because they were subject to threats of violence and/or the store had to close.
2. Install cameras that capture the parking lot, entrances, and exits.
3. Install additional lighting.
4. Ensure that alarm systems are updated.
5. Ensure that there are always two accessible means of egress ….
6. Install … mirrors to reveal concealed areas, including … the drive-through.
7. Allow partners additional paid shift time … [for] incident reports.
8. Allow partners to convert the store to drive-through-only service if they reasonably believe there are immediate safety threats in the cafe.
9. Update the store's … safety plan to ensure it includes:
    a. A workplace safety committee …. ;
    b. A … liaison … who can assist with mitigation and de-escalation;
    c. Regular … training about the store's workplace security program;
    d. … [A]pproaches to dealing with violence … and … threats;
    e. Requirements for recording and reporting incidents; and
    f. Assurances that Starbucks will not retaliate against anyone who reports … safety concerns … or participates in … safety planning.

In order to bargain over these issues … , the Union also requests that Starbucks provide copies of all policies, plans, and training materials currently in place that govern workplace safety and security.

The Union is available to meet and bargain over these issues on January 12 or 13. Please provide dates when you are available and kindly provide the requested information no later than January 5.

(JT Exh. 2). On January 11, 2023, the Union reiterated its information request. (JT Exhs. 1, 3). To date, Starbucks has not responded. (JT Exh. 1).

b. Analysis

i. Bargaining Allegation

Starbucks violated §8(a)(5) by refusing to meet and bargain with the Union regarding its safety concerns at Shepherd. Safety concerns are a mandatory subject of bargaining. See, e.g., *Tecnocap LLC*, 372 NLRB No. 136 (2023); *NLRB v. American Nat'l Can Co.*, 924 F.2d 518, 524 (4th Cir. 1991) (health and safety conditions are mandatory bargaining subjects), enfg. 293 NLRB 901 (1989); *Novotel New York*, 321 NLRB 624, 629 (1996) ("Unions have played a central role in efforts to improve workplace safety. Unions frequently negotiate collective-bargaining agreements that create programs for identifying and rectifying safety and health issues at the workplace.") (footnotes omitted). The Board has further held that employee health and safety is such a central issue that employers must bargain on request. See, e.g., *Holyoke Water Power Co*., 273 NLRB 1369, 1370 (1985), enfd. 778 F.2d 49 (1st Cir. 1985), cert. denied 477 U.S. 905

(1986)("health and safety conditions are a term and condition of employment about which an employer is required to bargain on request."). The Board's policy on this matter is rational, given that inaction on a central workplace safety issue could cause widespread employee harm. (Id.). On this basis, it appears that Starbucks' determination that it should just blindly ignore the Union's request to discuss and negotiate over its serious safety concerns at Shepherd violated the Act.

Although Starbucks contends that it validly ignored the Union's invitation to bargain over safety at the Shepherd in deference to the Board's policy under *E.I. Dupont*, 304 NLRB 792, n. 1 (1991), which discourages piecemeal bargaining, this argument is invalid. *First,* the Board, in fact, permits piecemeal bargaining, when exigent circumstances are present. See, e.g., *Pleasantview Nursing Home*, 335 NLRB 961 (2001), enfd. 351 F.3d 747 (6th Cir. 2003). I find that the potential safety consequences raised by the Union's request are of such a serious nature that they present an exigent circumstance, which would permit piecemeal bargaining. *Second*, Starbucks could have easily bargained with the Union over this issue in tandem with commencing collective bargaining for an entire contract at Shepherd. If it took such an approach, it could have obviated any concerns over piecemeal bargaining and dually commenced bargaining immediately. *Third*, nothing in the Board's piecemeal bargaining doctrine precludes parties from meeting over safety concerns and reaching bilateral agreements that might be implemented immediately. The piecemeal doctrine's underlying point is that it prevents employers from negotiating to an impasse on a specific issue and then unilaterally implementing the issue in a piecemeal matter, while collective bargaining for an entire agreement remains open and active. Meeting with the Union over safety would not require Starbucks to implement any impasse reached on this isolated issue prior to completing full contract bargaining. Starbucks held full control over implementation; it's somewhat ironic that Starbucks is citing the piecemeal doctrine, which is designed to maintain a level playing field for unions in bargaining as a defense to meeting to discuss a central safety matter at the café. In sum, Starbucks refusal to bargain over this issue violated the Act.

ii. Information Request

Starbucks similarly violated the Act, when it failed to fulfill the Union's December 27 information request. *Minnesota Mining Co.*, 261 NLRB 27 (1982) ("health and safety data is relevant to [a union's] representation obligation."). Starbucks should have fulfilled this request as either a mechanism to provide the Union with useful and relevant information for safety bargaining, or as a prelude to collective bargaining for an entire contract.[87]

Conclusions of Law

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

2. The Union is a labor organization within the meaning of §2(5) of the Act.

[87] A union is not limited to one single shot at requesting information and data to prepare for first contract bargaining, as Starbucks suggests. There's no "piecemeal" information request limitation. As a result, Starbucks should have viewed this information request as a component of bargaining for a first contract, with additional data requests on other subjects to follow.

3. Starbucks violated §8(a)(1) by:

a. Creating the impression that employees' Union and other protected activities were under surveillance.

b. Threatening employees that they would lose their tuition benefits, transfer rights and access to management because of their Union and other protected activities.

c. Threatening employees that collective bargaining would be an exercise in futility.

d. Soliciting grievances from employees and making implied promises to remedy their grievances in order to undermine their Union support.

e. Interrogating employees regarding their Union and other protected activities.

f. Implicitly threatening employees that they would be retaliated against, if they failed to return signed Union authorization cards to requesting employees.

g. Barring solicitations on behalf of the Union during non-working time in non-working areas.

h. Prohibiting and removing Union postings and related materials from non-work areas, while permitting other non-work publications to remain posted.

i. Directing employees to not record meetings to undermine their protected activities.

j. Telling employees that they could be fired if they did not agree to change their availability requirements to undermine their Union support.

k. Informing employees that they had to obtain management's consent before contacting media outlets to undermine their Union support.

l. Advising employees that it was staunchly against unionizing in tandem with the threats and other unlawful commentary described above to undermine their Union support.

m. Barring employees from wearing Union pins and other insignia to undermine their Union support.

n. Disparately enforcing its pin policy, by limiting Union pins and not limiting other non-work-related pins to undermine their Union support.

o. Barring employees' group texts and chats to undermine their Union support and protected activities.

p. Granting employees additional benefits to undermine their Union support and protected activities.

4. Starbucks violated §8(a)(3) by:

a. Issuing Caro Gonzalez a *Notice of Separation* because of her Union and other protected activities.

b. Issuing Josue DeLeon a *Notice of Separation* because of his Union and other protected activities.

c. Issuing Madeline Gierkey a *Final Written Warning* and *Notice of Separation* because of her Union and other protected activities.

d. Failing to award Madeline Gierkey a shift supervisor position because of her Union and other protected activities.

e. Modifying Julius Shieh's work availability requirements because of his Union and other protected activities.

5. The Union is a §2(5) labor organization and the designated exclusive collective bargaining representative of Starbucks' partners at its 24th Street café in the following appropriate collective bargaining unit (the 24th Street unit):

> **INCLUDED**: All full-time and regular part-time barista and shift supervisors employed by the Employer at its 504 W. 24th Street, Austin, Texas facility.
>
> **EXCLUDED**:All office clericals, store managers, professional employees, guards and supervisors as defined in the Act.

6. The Union is a §2(5) labor organization and the designated exclusive collective bargaining representative of Starbucks' partners at its Shepherd Street café in the following appropriate collective bargaining unit (the Shepherd unit):

> **INCLUDED**: All full-time and regular part-time barista and shift supervisors employed by the Employer at its Store 6371 located at 2801 S. Shepherd Drive, Houston, Texas 77098.
>
> **EXCLUDED**:Store managers, assistant store managers, office clerical employees professional employees, guards and supervisors as defined in the Act.

7. Starbucks violated §8(a)(5) by:

a. Unilaterally modifying scheduling practices for the 24th Street unit.

b. Failing and refusing to bargain over safety issues concerning the Shepherd

unit.

c. Failing and refusing to provide requested information related to safety issues concerning the Shepherd unit, which was relevant and necessary to the Union's representational duties.

8. These unfair labor practices affect commerce within the meaning of §2(6) and (7).

9. Starbucks has not otherwise violated the Act.

Remedy

The appropriate remedy for the violations found herein is an order requiring Starbucks to cease and desist from their unlawful conduct and to take certain affirmative action.

Starbucks, having unlawfully discharged Gonzalez, DeLeon and Gierkey, shall reinstate them to their former jobs or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privilege previously enjoyed. It, having also unlawfully failed to promote Gierkey to a shift supervisor role, shall promote her to this role upon her reinstatement. It shall make these employees whole for any loss of earnings and other benefits, and all other direct or foreseeable pecuniary harms, suffered as a result of its unlawful discrimination against them. *Thryv, Inc*., 372 NLRB No. 22 (2022). This make whole remedy shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *King Soopers, Inc*., 364 NLRB 1152 (2016), enfd. in relevant part 859 F.3d 23, 429 U.S. App. D.C. 270 (D.C. Cir. 2017), Starbucks shall compensate these employees for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in New Horizons, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Starbucks shall compensate them for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc*., 363 NLRB 1324 (2016), Starbucks shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 16 a report allocating backpay to the appropriate calendar year for these employees. 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. Starbucks shall also be required to remove from its files any references to the *Notices of Separation* regarding Gonzalez, DeLeon and Gierkey, and the *Final Written Warning* regarding Gierkey, and to notify them in writing that this has been done and that their unlawful discharges and disciplines will not be used against them in any way.

Having found that Starbucks unlawfully unilaterally changed scheduling practices for the 24th Street unit, Starbucks is directed to reinstitute the terms and conditions of employment that existed before its unlawful changes, upon request from the Union. It shall also make employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, if any, resulting from its unlawful unilateral change as prescribed in *Ogle Protection*

Service, 183 NLRB 682 (1970), enfd. 444 F.2d 502 (6th Cir. 1971), plus interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). It shall also compensate any affected employees for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board Order, a report allocating the backpay award to the appropriate calendar years for each employee.

Having found that Starbucks violated §8(a)(5) by refusing to bargain in good faith with the Union regarding safety issues at the Shepherd café, it shall meet, on request, with the Union and bargain in good faith over the terms and conditions of employment of the bargaining unit employees and, if an agreement is reached, embody such agreement in a signed memorandum. It shall also provide the Union with the information sought in its December 27, 2022 email.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[88]

ORDER

A. Starbucks Corporation, Seattle, Washington, its officers, agents, successors, and assigns, shall

1. Cease and desist from

a. Creating the impression that employees' Union and other protected activities were under surveillance.

b. Threatening employees that they would lose their tuition benefits, transfer rights and access to management because of their Union and other protected activities.

c. Threatening employees that collective bargaining would be a futile exercise.

d. Soliciting grievances from employees and making implied promises to remedy their grievances to undermine their Union support.

e. Interrogating employees about their Union and other protected activities.

f. Implicitly threatening employees that they would be retaliated against, if they failed to return signed Union authorization cards to

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

requesting employees.

g. Barring solicitations on behalf of the Union during non-working time in non-working areas of their café.

h. Prohibiting and removing Union postings and related materials from non-work areas, while permitting other non-work publications to remain posted.

i. Directing employees to not record meetings to undermine their protected activities.

j. Telling employees that they could be fired if they did not agree to change their availability requirements to undermine their Union support.

k. Informing employees that they had to obtain management's consent before contacting media outlets to undermine their Union support.

l. Advising employees that its staunchly against unionizing in tandem with the threats and other unlawful commentary described above to undermine their Union support.

m. Barring employees from wearing Union pins and other insignia to undermine their Union support.

n. Disparately enforcing its pin policy, by limiting Union pins and not limiting other non-work-related pins in order to undermine employees' Union support.

o. Barring employees' group texts and chats to undermine their Union support and protected activities.

p. Granting employees additional benefits to undermine their Union support and protected activities.

q. Disciplining, firing or otherwise discriminating against employees because of their Union and other protected activities.

r. Failing to award employees shift supervisor positions because of their Union and other protected activities.

s. Modifying employees' work availability requirements because of their Union and other protected activities.

t. Refusing to bargain collectively with the Union by unilaterally modifying scheduling practices for the 24th Street unit.

u. Refusing to bargain collectively with the Union by refusing to bargain over safety issues concerning the Shepherd unit.

v. Refusing to bargain collectively with the Union by failing to furnish it with information sought in its December 27, 2022 letter, which was relevant and necessary to its role as the unit's exclusive collective-bargaining representative.

w. In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by §7 of the Act.

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

a. Within 14 days from the date of the Board's Order, offer full reinstatement to Gonzalez, DeLeon and Gierkey to shift supervisor positions or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

b. Make Gonzalez, DeLeon and Gierkey whole for any loss of earnings and other benefits, and all other direct or foreseeable pecuniary harms, caused by the discrimination against them, in the manner set forth in the remedy section of the decision.

c. Compensate Gonzalez, DeLeon and Gierkey for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

d. File with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Gonzalez', DeLeon's and Gierkey's corresponding W-2 forms reflecting the backpay award.

e. 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.

f. Within 14 days from the date of the Board's Order, remove from its files any reference to these unlawful discharges and disciplines of Gonzalez, DeLeon and Gierkey, and within 3 days thereafter, notify them in writing

that this has been done and that the discharges and disciplines will not be used against them in any way.

g. Upon request by the Union, and to the extent it has not already done so, rescind the unilateral changes in scheduling practices for the 24th Street unit and make such employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of this unilateral change.

h. Upon request by the Union, meet and bargain in good faith regarding safety issues at the Shepherd café and, if an agreement is reached, embody such agreement in a signed memorandum.

i. Provide the Union with the information sought in its December 27, 2022 email.

j. Within 14 days after service by the Region, post at its 516 West Oltorf Street, Austin, Texas, 504 W 24th Street, Austin, Texas and 2801 South Shepherd Drive, Houston, Texas stores the attached notice marked "Appendix."[89] Copies of the notice, on forms provided by the Regional Director for Region 14, after being signed by the Starbucks' authorized representative, shall be posted by Starbucks and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to the physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since April 1, 2022.

k. During this 60-day posting period, Respondent shall permit a duly appointed Board agent to enter its facilities at reasonable times and in a manner not to unduly interfere with its operations, for the limited purpose of determining whether it is in compliance with the notice posting, distribution, and mailing requirements.

l. Within 21 days after service by the Region, file with the Regional Director for Region 16 a sworn certification of a responsible official on a form provided by the Region attesting to the steps the Respondent has taken to comply.

[89] 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."

Dated Washington, D.C. March 20, 2025

Robert A. Ringler
Administrative Law Judge

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 create the impression that your Union and other protected activities are under surveillance.

WE WILL NOT threaten that you will lose your tuition benefits, transfer rights and access to management because of your Union and other protected activities.

WE WILL NOT threaten that collective bargaining will be a futile exercise.

WE WILL NOT solicit grievances from you and make implied promises to remedy your grievances to undermine their Union support.

WE WILL NOT interrogate you about your Union and other protected activities.

WE WILL NOT implicitly threaten you that you will be retaliated against, if you fail to return signed Union authorization cards to requesting employees.

WE WILL NOT bar solicitations for the Union during non-working time in non-working areas of your café.

WE WILL NOT prohibit and remove Union postings and related materials from non-work areas, while permitting other non-work publications to stay posted.

WE WILL NOT tell you to not record meetings to undermine your protected activities.

WE WILL NOT tell you that you can be fired if you do not agree to change your availability requirements to undermine your Union support.

WE WILL NOT tell you that you have to obtain management's consent before contacting media outlets in order to undermine your Union support.

WE WILL NOT tell you that we are staunchly against unionizing in tandem with making the other threats and unlawful comments described herein to undermine your Union support.

WE WILL NOT bar you from wearing Union pins and other insignia to undermine your Union support.

WE WILL NOT disparately enforce our pin policy, by limiting Union pins and not limiting other non-work-related pins to undermine your Union support.

WE WILL NOT bar your group texts and chats to undermine your Union support and protected activities.

WE WILL NOT grant you additional hours or benefits to undermine your Union support and protected activities.

WE WILL NOT discipline, fire or otherwise discriminate against you because of your Union and other protected activities.

WE WILL NOT reject your shift supervisor application because of your Union and other protected activities.

WE WILL NOT increase your work availability requirements because of your Union and other protected activities.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive collective bargaining representative in the following appropriate collective bargaining unit by unilaterally modifying our scheduling practices at the 504 W 24th Street, Austin, Texas café (the 24th Street unit):

> **INCLUDED**: All full-time and regular part-time barista and shift supervisors employed by the Employer at its 504 W. 24th Street, Austin, Texas facility.
>
> **EXCLUDED**:All office clericals, store managers, professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union as the exclusive collective bargaining representative in the following appropriate collective bargaining unit by refusing to bargain over safety issues at the 2801 South Shepherd Drive, Houston, Texas café (the Shepherd unit):

> **INCLUDED**: All full-time and regular part-time barista and shift supervisors employed by the Employer at its Store 6371 located at 2801 S. Shepherd Drive, Houston, Texas 77098.
>
> **EXCLUDED**:Store managers, assistant store managers, office clerical employees professional employees, guards and supervisors as defined in the Act.

WE WILL NOT refuse to bargain collectively with the Union by failing to furnish it with information sought in its December 27, 2022 letter, which was relevant and necessary to its role as the Shepherd unit's exclusive collective-bargaining representative.

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

WE WILL, within 14 days from the date of the Board's Order, offer full reinstatement to Gonzalez, DeLeon and Gierkey to shift supervisor positions or, if these jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Gonzalez, DeLeon and Gierkey whole for any loss of earnings and benefits, and all other direct or foreseeable pecuniary harms, resulting from their disciplines, discharges and failure to promote less any net interim earnings, plus interest, and **WE WILL** also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Gonzalez, DeLeon and Gierkey for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL file with the Regional Director for Region 16, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of Gonzalez's, DeLeon's and Gierkey's corresponding W-2 forms reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to these unlawful disciplines and discharges of Gonzalez, DeLeon and Gierkey, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and that their disciplines and discharges will not be used against them in any way.

WE WILL, upon request by the Union, and to the extent we have not already done so, rescind the unilateral changes in scheduling practices for the 24th Street unit and make any affected employees whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of this unilateral change.

WE WILL, upon request by the Union, meet and bargain in good faith regarding safety issues at the Shepherd café and, if an agreement is reached, embody such agreement in a signed memorandum.

WE WILL provide the Union with the information sought in its December 27, 2022 email, which was connected to safety issues at the Shepherd café.

STARBUCKS CORP.
(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.

819 Taylor Street, Room 8A24, Fort Worth, TX 76102-6178
(817) 978-2921, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/16-CA-304046 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 **(817) 978-2921**.