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

RESORTS WORLD LAS VEGAS, LLC	
	Case 28-CA-293239
and	
ALEX O'CONNOR, AN INDIVIDUAL	
	Cases 28-CA-295878
and	**28-CA-301606**
	28-CA-310813
BRIAN SATAKE, AN INDIVIDUAL	**28-CA-313877**
	28-CA-317364
and	
KALEN CHAVEZ, AN INDIVIDUAL	**Case 28-CA-320205**

Tucker Bingham, Mehmet Kepir, and Sarah Demirok, Esqs.
for the General Counsel[1]
Paul T. Trimmer and Nicholas Scotto, Esqs.
for the Respondent

DECISION

STATEMENT OF THE CASE[2]

ANDREW S. GOLLIN, ADMINISTRATIVE LAW JUDGE. This consolidated hearing was held on November 14-16, 2023, February 20-23, 2024, June 24-27, 2024, and July 9, 2024, over allegations that Resorts World Las Vegas, LLC (the Respondent) violated Section 8(a)(1), (3), and (4) of the National Labor Relations Act (the Act).

The Respondent hired Alex O'Connor and Kalen Chavez as part-time bartenders. The two worked throughout the Respondent's property, including in the Resorts World Theater (Theater). Beginning in December 2021, the Respondent changed how it made bar assignments in the Theater, and O'Connor and Chavez complained. In late January 2022, management met with O'Connor about the concerns he and other senior bartenders had with the change. Management expressed a willingness to revise the assignment system. Thereafter, O'Connor repeatedly approached Theater managers to inquire about the revisions to the system. This included O'Connor making repeated, unscheduled

[1] On February 3, 2025, President Donald J. Trump appointed William B. Cowen to be Acting General Counsel, replacing former General Counsel Jennifer Abruzzo. For ease and consistency, I will refer to the Acting General Counsel, the former General Counsel, and counsel for the General Counsel collectively as the General Counsel.
[2] Abbreviations used in this Decision are as follows: Transcript citations are "Tr. ___"; Joint Exhibits are "Jt. Exh. ____"; General Counsel's Exhibits are "GC Exh. __"; and The Respondent's Exhibits are "R. Exh. ___". Although I have included certain citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based solely on my review and consideration of the entire record.

visits to their offices at inopportune times. The Theater managers grew frustrated with O'Connor's conduct, and they requested that he be disciplined. Those requests were denied.

In addition to working in the Theater, O'Connor worked in the High Limit Bar, where guests receive complementary (or comped) drinks based on their level of slot or table play. In early February 2022, the Surveillance Department reviewed the point-of-sale (POS) transactions at the High Limit Bar. On two separate occasions, O'Connor created checks including non-alcoholic energy drinks (Red Bulls) entered as table or slot comps for guests. Those drinks were never served to a guest, but rather they were consumed by O'Connor, in violation of company policy. O'Connor was suspended pending investigation. The Respondent later discharged him for theft and for concealing his theft by falsifying transactions in the POS system.

Months after O'Connor's discharge, Chavez continued to raise objections about the assignment system in the Theater. Managers met with him and other bartenders, along with their union representative, to discuss the matter. By this time, the Respondent and the union had negotiated a memorandum of agreement allowing Theater managers to continue using a finalized version of the system at issue, and the bartenders were made aware of this agreement. Chavez alleges that during and after this meeting management exhibited hostility towards him for raising the objections.

In November 2022, the Surveillance Department conducted an audit of the POS transactions in the Theater. On multiple occasions during 2 shifts, Chavez was observed failing to properly ring up and/or receive payment for items he gave to patrons. The Respondent suspended Chavez pending investigation. Following the investigation, it issued Chavez a final written warning because he was deemed to have acted negligently in performing his job duties. In early February 2023, the performance issues continued, and Chavez was discharged.

Brian Satake worked for the Respondent as a master cook. He was also a member of the union's bargaining committee. Satake missed work to attend bargaining sessions, and he contends managers criticized him for his absences. Satake also complained to management about scheduling issues and alleged harassment or retaliation. In April, May, and August 2022, and in January 2023, the Respondent disciplined Satake. These disciplines primarily arose out of interactions he had with his coworkers or members of management. In March 2023, Satake requested family and medical leave to recover following a planned surgery. The request was initially denied but later granted. In March and April 2023, Satake raised several complaints regarding the working conditions in the kitchen where he was assigned to work. In late April 2023, four days after he filed his last complaint, Satake was discharged for allegedly committing a health code violation of placing ready-to-eat bacon into a cardboard box.

O'Connor filed the charges in Case 28-CA-293239, Chavez filed the charge in Case 28-CA-320205, and Satake filed the charges in Cases 28-CA-295878, 28-CA-301606, 28-CA-310813, 28-CA-313877, and 28-CA-317364. The Regional Director for Region 28, on behalf of the General Counsel, issued a series of consolidated complaints against the Respondent.[3] The final being the Order Further Consolidating Cases, Third Consolidated Complaint and Notice of Hearing (Consolidated Complaint), which was issued on October 24, 2023. The Consolidated Complaint alleges the

[3] Cris Aranas filed a charge against the Respondent in Case 28-CA-307861. Allegations from that charge were consolidated for hearing with those from the other charges. At the hearing, the General Counsel withdrew those allegations and severed Case 28-CA-307861.

Respondent violated Section 8(a)(1), (3), and (4) of the Act. Specifically, it alleges the Respondent: violated Section 8(a)(1) by making unlawful threats/statements and maintaining overly broad work rules, and by disciplining, suspending, and discharging Chavez because of his protected concerted activities; violated Section 8(a)(1) and (3) by suspending and discharging O'Connor because of his protected concerted and union activities; and violated Section 8(a)(1), (3) and (4) by disciplining, suspending, denying leave to, and discharging Satake because of his protected concerted, union and Board activities.[4] On November 6, 2023, the Respondent filed its Answer and Statement of Defenses (Answer) to the Consolidated Complaint, denying these alleged violations and raising various affirmative defenses.

At the hearing, the parties were afforded the right to call, examine, and cross-examine witnesses, to present any relevant documentary evidence, to argue their respective legal positions orally, and to file post-hearing briefs.[5] Based on a careful review of the entire record, including the briefs and my assessment of the witnesses, I make the following

FINDINGS OF FACT

Jurisdiction

The Respondent is a limited liability company that operates a resort property in Las Vegas, Nevada (Respondent's property). The Respondent's property opened in June 2021. It consists of multiple hotels, casinos, restaurants, pools, retail stores, and entertainment venues. Among the venues is the 5,000-seat Theater, which opened in December 2021. The Theater is operated by a third party, AEG Presents, that contracts with the Respondent for food and beverage staffing during performances.

In conducting its overall operations, the Respondent purchases and receives products, goods, and materials valued in excess of $5,000 directly from points outside the State of Nevada, and it derives gross annual revenues in excess of $500,000. The Respondent admits, and I find, that it is and has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Background

A. *The Respondent's Operations*

The Respondent has nearly 5,700 surveillance cameras installed throughout its property. The Surveillance Department independently monitors and reviews footage from those cameras. They monitor POS transactions to ensure employees are properly tendering and accounting for items, in accordance with company policy. If the Surveillance Department suspects an employee of fraud, theft, or other misconduct, they will notify Team Member Relations (TMR) and the employee's department management. They will provide a report with their findings and invite a TMR representative and the employee's department manager to come and view the footage. Surveillance will answer questions

[4] At the hearing, the General Counsel withdraw paragraphs 1(f), 3(b), 5(e), 5(h), 6(h), 6(j), and 6(t) of the Consolidated Complaint.

[5] The Respondent requested, and the parties' received, extensions of time, totaling 12 additional weeks, to file their post-hearing briefs.

and conduct additional searches, but they will not make any recommendations or have any involvement in deciding what, if any, disciplinary action should be taken against an employee.

Lindsay Dever has worked in the Surveillance Department since 2021. She testified about technology that Surveillance personnel use, including E-Connect. E-Connect allows Surveillance to match the video footage with the employee's key entries into the POS terminals to determine if they match or whether there are inconsistencies.

TMR investigates suspected violations of company policy that may involve discipline. TMR will randomly assign a partner to investigate the suspected violation. The partner will review the relevant video and documentary evidence, interview witnesses, interview the suspect, and gather any other evidence. They then issue a case summary report containing their findings, the rules or policies at issue, and what, if any, disciplinary action should be taken. That report will then be sent to the employee's department leadership to review. There is a collaborative process between TMR and department leadership to decide on what, if any, disciplinary action to take. (Tr. 256-257).

The TMR director from November 2020 to October 2023 was Heather Thompson. Under Thompson was TMR manager Ksusha Chumak, and TMR partners/representatives Nicole Webb, Krystal Rodriguez, and Jennifer Mendez. At the time of the hearing, Thompson and Rodriguez were no longer employed by the Respondent.

Bartenders are part of the Beverage Department. The director of the Beverage Department from early 2021 until July 2022 was Levan Donato. Under Donato were assistant directors Will Cahow and Drew D'Errico. Cahow later replaced Donato as director after she left. Michael Gray was the general manager of Theater Beverage from about October 2021 until January 2023, when he moved to a non-managerial/supervisory position. Corinee "Cori" Fincken has been the manager of Theater Beverage since October 2021. Gray and Fincken reported to Cahow. At the time of the hearing, Donato was no longer employed by the Respondent.

Chefs and cooks are part of the Kitchen Department. There is one head executive chef. Below the head executive chef are other executive chefs. Below those executive chefs are the assistant chefs (sous chefs), then the master cooks, and then the line cooks. Nikolay "Niko" Gadzhev became the executive chef for the Main Kitchen in January 2023. Prior to that, he was an assistant chef. When he was the assistant chef, he reported to executive chef Brett Blitz. Blitz later died. Steve Almaraz was assistant chef for the Main Kitchen, where he worked from July to October 2022. Fabian Brooks is an assistant chef. At the time of the hearing, Almaraz was no longer employed by the Respondent.

B. *Collective-Bargaining Relationship*

The Respondent's bartenders and kitchen staff are represented by the Bartenders Union, Local No. 165 and the Culinary Workers Union, Local No. 226, collectively referred to as the Local Joint Executive Board of Las Vegas (LJEB or the Union). In about October 2020, there was a card check, and based on the card check, the Respondent agreed to voluntary recognize and bargain with the Union.

The Respondent and the Union engaged in negotiations over an initial collective-bargaining agreement from early 2021 until June 2022. Heather Thompson was one of the Respondent's bargaining representatives. The parties had small group meetings based on the individual departments and then began main table negotiations. Most of the meetings, particularly the small group meetings, were done through videoconferencing. (Tr. 403). The parties eventually reached a collective-bargaining agreement. It is dated June 1, 2022, to May 31, 2025. (Jt. Exh. 1).

Article 20 of the collective-bargaining agreement is entitled Grievances and Arbitration. Section 20.02 states the Respondent and the Union agree to implement an informal Step One Process for individual complaints or disputes raised by an employee. Under Step One, an employee with a complaint or dispute has 5 days to raise and discuss the matter with their immediate supervisor. The supervisor then shall use their best efforts to respond to the employee about the complaint(s) within 5 days of their discussion. The agreement gave the parties until September 1, 2022, to provide training to managers and stewards on how to conduct this Step One process. (Jt. Exh. 1, pg. 50).

C. *The Respondent's Rules and Policies*

1. General Rules of Conduct

The Respondent maintains several rules and policies. It notifies employees of these rules and policies, as well as any changes, through an online app called Beekeeper. Among the rules that apply to all employees are the General Rules of Conduct (GRCs). They include the following:

> 1. Rude, discourteous, or unprofessional behavior toward a guest, coworker or any other person on Company property. Each Team Member is expected to work in a cooperative manner with managers, supervisors, coworkers, guests and vendors.
>
> 2. Insubordination or otherwise being uncooperative with supervisors, Team Members, guests and/or regulatory agencies, or otherwise engaging in conduct that does not support the Company's goals and objectives.
>
> 3. Dishonesty. Team Members will be forthcoming and honest in all written and verbal communication connected to Company records, work communications, or which relate in any way to Company investigations regarding violations of Company policies. Team Members will not knowingly make false statements or omit pertinent information in connection with Company records, work communications, or employment records.
>
> 4. Failure to cooperate in a Company investigation or audit or withholding or tampering with information in connection with such an investigation or audit. You have a duty to cooperate fully and truthfully with any and all Company audits and investigations regarding suspected violations of Company policies.
> […]
>
> 6. Job abandonment or leaving work area without proper authorization during an assigned shift.

7. Off-duty misconduct that adversely affects the Company, a guest, another Team Member, or affects a Team Member's ability to do their job, including violation of any federal, state, or local laws, or that in any way would potentially affect the Company's status as a gaming licensee.

8. Using abusive or profane language in the presence of, or directed toward, a supervisor, another Team Member, guest, customer, or any other person on Company property.

9. Making a knowingly false, fraudulent, or defamatory statement to or about another Team Member, guest, visitor, vendor, the Company, or any of its facilities.

10. Misconduct, carelessness, or negligence in the performance of your job, or any misconduct detrimental to the orderly and ethical operation of the business.

11. Failure to follow and observe all safety, fire prevention, and health rules and practices.
…
14. Stealing, embezzlement, theft, or conversion of Company property, goods, or services.

15. Engaging in any unethical behavior for personal gain
…
23. Engaging in inappropriate, immoral, or illegal behavior at work or while on Company business.
…
29. Using or authorizing others to use complimentary tickets, goods, or services given to or intended for guests without authorization from your manager…

(GC Exh. 2).

2. Beverage Consumption Policy and Revisions

The Respondent also has a Beverage Consumption Policy that addresses what drinks employees may consume, for free, while on duty. The original policy stated they could have coffee, tea, water, and soft drinks. (GC Exh. 3). The term "soft drinks" was not defined. The policy was later revised to specify that employees could have soda, water, or juice from the gun or the Smart Tender, Resorts World waters, and coffee (no espresso). They could not have Red Bulls, canned or bottled sodas, canned or bottled juices, Fiji water, and Pelligrino or other sparkling water. (GC Exh. 4). The date listed on the revised policy is January 27, 2022, but it was not approved and disseminated to employees until February 27, 2022. (GC Exh. 25 and 26).

3. Ardent Progressive Systems and Games Policy and Comped Drinks

The Respondent provides complementary (or comped) drinks to guests while they are gaming, based on their level of play. For those guests playing the slot machines, the Respondent uses an Ardent Progressive System. On the back of a bar top slot machines, there are two lights. A small light on the left, which is blue, and then a center light that has a ring around it, which is either green or red. The blue light designates the guest has inserted enough money and is entitled to a comped beverage. The middle button with the ring around it, with the green or red light, signifies a guest's level of play. After

the guest is served a comped drink, the bartender is to press the button in the center of that ring light, designating that they have given the guest a drink. A green light means the guest is eligible for a comped drink, up to a certain dollar value. A flashing red light means the guest's level of play is decreasing and soon no longer be eligible for comps. A solid red light means the guest is no longer eligible. According to the Respondent's policy, when a bartender sees a flashing red light, they are to notify the guest that their level of play has dropped. The bartender then has the discretion to either offer the guest one last comped drink or to start a tab for them. (GC Exh. 7). The default is to offer the guest one last comped drink as a courtesy.

Alleged Unfair Labor Practices

A. *Alex O'Connor and Kalen Chavez*

1. Background

Alex O'Connor and Kalen Chavez began working for the Respondent as part-time bartenders when the property first opened in June 2021. At the time, O'Connor had over 10 years of bartending experience, including at casino bars along the Las Vegas strip. (R. Exh. 23). Both were initially assigned to work in the casino portion of the property. In December 2021, they began getting assignments in the Theater.

About once a month the bartenders complete sheets listing where, in order of preference, they want to work. The Respondent reviews the sheets and awards preferences based on seniority. Based on their early date of hire, O'Connor and Chavez were two of the most senior bartenders.

The Theater has four seating levels. Each level has multiple bars, and each bar has multiple wells, that are staffed during performances by the Respondent's part-time bartenders. Initially, the Theater Beverage managers made bar/well assignments based on seniority. Most bartenders in the Theater preferred working on the first level because that is where all guests entered and exited, and those bars/wells tended to be busier and more lucrative as far as gratuities.

2. Announced Change to a Rotation System

In late December 2021, Michael Gray, the general manager of Theater Beverage, and Cori Fincken, the manager of Theater Beverage, held pre-shift meetings with the bartenders to announce they would be moving to a rotation-based system when making bar/well assignments. They explained that the change would make the assignments fairer and more equitable for all the bartenders. They also explained that finalizing the rotation system would take time, but they would begin implementing versions of the system over the next few weeks.

O'Connor, Chavez and other senior bartenders were upset by the change. On December 29, 2021, O'Connor sent Gray and Fincken an email on behalf of the senior bartenders urging them to reconsider the change to a rotation system. (GC Exh. 23). Gray forwarded O'Connor's email to his supervisor, William Cahow, who, at the time, was the assistant director of the Beverage Department.

Cahow then spoke with Levan Donato, who, at the time, was the director of the Beverage Department. Cahow and Donato agreed to meet with O'Connor and listen to his concerns.

3. January 25, 2022 Meeting and Subsequent Email

An initial version of the rotation system was implemented in the Theater beginning in early January 2022. O'Connor, Chavez, and other senior bartenders tracked the assignments and the rotation, noting that certain bartenders were not getting rotated out of the preferred bars/wells. They began tracking this on a Excell spreadsheet.

On January 25, 2022, Donato and Cahow met with O'Connor to discuss his December 29 email. O'Connor began by voicing the objections he and other senior bartenders had with the new system. He showed Donato and Cahow the Excel spreadsheet and stated it showed the new system was not being implemented fairly and consistently. He pointed out that certain bartenders were not being rotated, and he accused Gray and Fincken of favoritism toward those bartenders they had worked with in the past. Cahow and Donato told O'Connor they would investigate the matter and then schedule another meeting. (Tr. 1582).

Gray was later informed about the meeting with O'Connor. On February 3, 2022, he emailed Donato, Cahow, and Drew D'Errico. (GC Exh. 17). He explained that he had spoken with several Theater bartenders, and they all wanted to keep the rotation system. He added that they told him they were tired of the high-seniority bartenders "complaining and bringing down the team and not supporting the process." In this email, Gray also accused O'Connor of insubordination. He stated O'Connor had made false statements in his written communications about the rotation system, which Gray added "needs to be addressed." He also stated that O'Connor's comments/complaints to Theater managers about the rotation system during performances were completely "unprofessional" and they let him know it was "inappropriate."[6] Finally, Gray wrote, "I do not like anyone attacking my character. Everything we have done at the [T]heater had been a process and we have done what is best for the TEAM, Beverage Department and Resorts World."

4. February 5, 2022 Meetings and Exchanges

i. Meeting Between O'Connor, Donato, Gray, and D'Errico

Management met again with O'Connor about the rotation system on February 5, 2022. The meeting took place in Donato's office. Donato, O'Connor, Gray and D'Errico attended. O'Connor and Gray testified about what they recalled from the meeting.[7]

According to O'Connor, it was Gray who primarily spoke during this meeting. Gray began by stating they had looked into the concerns O'Connor had raised about the rotation system and determined they had no merit. He said that he and Fincken were being as fair and consistent in making

[6] The record does not reflect what comments/complaints O'Connor was making during performances.
[7] Donato was not questioned about this meeting during her testimony. D'Errico did not testify. Her employment status with the Respondent at the time of the hearing was unclear

the assignments as they could be. Gray then began chastising O'Connor. He told O'Connor that he was "bringing up a lot of issues" and "making a lot of problems." (Tr. 777). He told O'Connor, "You need to just worry about yourself," "stop making problems," and "just do you." (Tr. 778). Gray then returned to discussing the rotation system. He mentioned that management was going to work on revisions to see if they "could make it a little bit better." They were not ready yet but would be soon. (Tr. 779).

According to Gray, Donato primarily spoke during this meeting, and the managers listened to O'Connor's input and suggestions about the rotation system. (Tr. 1720). Gray provided his comments about the system, how it was implemented, and the culture they were trying to create with it. (Tr. 1721). Gray was specifically asked whether he made the above statements to O'Connor, and he denied each of them. (Tr. 1721-1722).[8]

ii. Conversation Between Fincken and Chavez

Also, on about February 5, 2022, Chavez was in the Theater prior to his shift. He was standing by the bulletin board looking at the posted work schedules and bar assignments. He noticed that certain of the listed bartenders were not being rotated, but he was. Fincken was standing nearby. Chavez stated, "Man, I cannot wait for the Union to come in here and fix this rotation." According to Chavez, Fincken responded, "Well, the Union is not going to help you guys because we have the right to manage." (Tr. 1117-1118). Fincken, during her testimony, had no recollection of this conversation or of making this statement. (Tr. 748).

5. Conversation Between Fincken and Chavez about Jigger Use

On February 8, 2022, Fincken called Chavez into her office. When he arrived, she gave him a document and said, "You need to sign this because you were seen not using your jigger." (Tr. 1108). A jigger is a device the bartenders use to measure the amount of alcohol poured into a drink. Chavez testified the document Fincken handed him did not look like any disciplinary document he had ever seen before. (Tr. 1111). She told him it was a "verbal coaching." Chavez signed the document and left. (Tr. 1112). The document was not presented during the hearing, and it is not part of the record.[9]

Chavez testified he was aware of the Respondent's policy requiring bartenders to use a jigger when pouring drinks, but he stated it was a very relaxed rule. He regularly poured mixed drinks without using a jigger, which is called "free pouring." He also testified that several other bartenders were not using their jiggers while working at the Theater bars. (Tr. 1108).

Fincken was not questioned about this meeting, the jigger policy, or the document she gave Chavez to sign. Cahow, however, testified the Respondent supplied each well with a jigger to use. He also stated a mandate went out to all the bartenders to use them, and that managers coached bartenders continuously whenever they were seen not using a jigger. (Tr. 1577).

[8] As discussed below, I credit Gray over O'Connor regarding the contents of this meeting. His testimony was logical and consistent with the purpose and context of the meeting.

[9] As explained below, the evidence does not support this was viewed as a verbal coaching under the Respondent's progressive discipline policy, because there is no reference to it in any document.

6. Subsequent Communications

On about February 7, 2022, O'Connor emailed Gray (copying Donato) asking to meet the following day to see the revisions to the rotation system. (GC Exh. 22). The next morning, Gray replied that he would be meeting with Cahow to discuss the rotation, and then he would update Donato and D'Errico. After that was done, Gray stated he would let O'Connor know when a good time would be to meet about the revisions. O'Connor replied that he looked forward to hearing from Gray "later on." (GC Exh. 22).

7. Meeting Between O'Connor, Chavez, and Gray

O'Connor, however, did not wait to hear from Gray. That same day, he and Kalen Chavez went to the manager's office and asked to see the revisions. There is a dispute over what was said. According to O'Connor, Gray responded that the revisions were not ready yet. He explained how it was going to work generally, but that he did not have anything to show them. Gray then stated, "You guys always seem to be stirring up the pot and making issues." (Tr. 780). According to Chavez. after he and O'Connor asked to see the revisions, Gray told them, "You guys have been hounding me for weeks over this rotation. I'm working on it. I am just waiting on getting things approved by [Cahow]." (Tr. 1104-1105).[10] According to Gray, O'Connor and Chavez came into his office, unannounced, and asked to see the revised rotation system before it was completed. Gray told them he didn't have time to talk to them then because he was busy. He told them the process was still in motion, and the revisions would first go to his superiors for their review. He then told them they could schedule a meeting with his superiors to discuss the revised system. (Tr. 1730-1731).[11]

8. O'Connor's Continued Communications and Visits

Following this meeting, O'Connor repeatedly inquired about the rotation system. He would enter the Theater several hours prior to his shift and go to the manager's office and ask to see the revisions. These visits were often unscheduled and occurred when Gray and Fincken were busy performing their pre-show duties. They both asked O'Connor not to come at those times because it was disruptive, but O'Connor ignored those requests.

On February 16, 2022, Gray emailed Donato, Cahow, and D'Errico to report that O'Connor had called him on his cell phone (without permission) asking about the rotation system. (GC Exh. 17).

[10] The General Counsel asked Chavez what Gray meant by this, and the Respondent's counsel objected based on lack of personal knowledge about what Gray meant. In response, I asked Chavez whether Gray said anything else, and Chavez testified as follows:

> He just was agitated that we were consistently coming to him for more information. And he was -- in the beginning was an open-door policy. And it ended up being like, "Stop coming to me. Don't even talk about the rotation. Like it -- we're getting it done. I'm just waiting for approval."

(Tr. 1105). I find that this was Chavez offering his overall impression of what Gray meant, as opposed to what Gray said. As such, I give no weight to this testimony

[11] As discussed below, I credit Gray regarding what was said during this conversation. It is logical and consistent with email he sent earlier that day to O'Connor when he asked to come in an review the revisions.

Gray informed them he told O'Connor that he was waiting to hear from Cahow about the proposed revisions. O'Connor asked Gray if he could come in later that evening to see the proposed revisions, and Gray told him no, because they needed to focus on preparing for the upcoming performances in the Theater. O'Connor became upset with this and began raising his voice.

In the email, Gray added that O'Connor should be disciplined for his behavior. He stated, "There is nothing wrong with us verbally telling him what is happening. I find it unacceptable to need one employee's approval." Gray also noted in the email that he had reported to Cahow other "recent incidents" involving Chavez and two other high-seniority bartenders. The email does not specify what those incidents were, or when they occurred.

Later that same day, Gray emailed Donato, Cahow, and D'Errico that O'Connor had showed up in the Theater unannounced again. He wrote that O'Connor previously had been told that he cannot come into the Theater off the clock. When Fincken instructed O'Connor to leave because he was not clocked in, O'Connor cited the Respondent's open-door policy. Gray told O'Connor that the managers were all busy at that time getting ready for the performance that evening. Gray reported that O'Connor then went to the Beverage Department office, and D'Errico sent him away. (GC Exh. 17).

Two days later, Fincken emailed Beverage manager Sophia Ellis asking her to issue O'Connor a verbal warning for continuing to enter the Theater before the start of his shift. (GC Exh. 18). She noted that O'Connor's conduct violated AEG's policy regarding employees accessing the Theater. The request to issue discipline was forwarded to Cahow. Cahow responded to Fincken in an email, stating that the AEG policy only restricted employees from accessing the Theater during construction. He stated that while they could have a conversation with O'Connor about choosing a more appropriate time to discuss matters, without a firm policy in place restricting employee access to the Theater, they would not issue O'Connor a verbal or written warning.

9. February 16, 2022 Exchange Between O'Connor and Gray

On February 16, 2022, O'Connor arrived for work in the Theater prior to his shift. He noticed that the popcorn sold at the bars had not been delivered yet. He went to the Theater manager's office and reported it to Gray. Gray and O'Connor headed down to the bars to see what was happening. According to O'Connor, as they walked, another bartender named Isaac walked toward them. Isaac asked O'Connor, "Hey, did you ask [Gray] about the popcorn?" O'Connor responded, "Yeah, I am asking about it now. I hope I don't get in trouble for asking." According to O'Connor, Gray looked him in the eyes and said, "Don't worry. If it is not for this, I'll find something else." (Tr. 784). Gray denied making this statement. (GC Exh. 12).[12]

10. Surveillance Department's Investigation of O'Connor

On around February 1, 2022, Lindsay Dever, who was a fraud specialist in the Surveillance Department at the time, began an investigation into POS transactions at the High Limit Bar. As part

[12] Gray was not asked about this during his testimony. He, however, was asked about it during the investigation TMR conducted following O'Connor's discharge, and he denied the alleged statements. (GC Exh. 12).

of the investigation, she reviewed videos of suspicious transactions. One of the transactions she reviewed involved O'Connor, who she did not know at the time. The transaction occurred on January 28, 2022, at about 6:54 a.m. O'Connor, who was working alone at the High Limit Bar, served a guest playing at one of the tables a complementary bottle of Michelob Ultra.[13] O'Connor returned to the bar and entered the transaction into the POS. He keyed in a bottle of Michelob Ultra (valued at $10), as well as a can of sugar-free Red Bull (valued at $8), both as table comps. (GC Exh. 9). There is no dispute that O'Connor never served a can of Red Bull to that guest, or any other guest. Instead, about a half hour later, O'Connor took a can of sugar-free Red Bull from the refrigerator behind the bar. He opened and poured it into a plastic cup and then began drinking it. (R. Exhs. 27-33).[14]

Dever's practice when she sees something like this is to review the employee's other transactions to determine if there is a pattern suggesting the conduct was intentional. Dever, however, was off work between February 3-8, 2022. She emailed her supervisor with her findings up to that point, and that she would resume her review upon her return. (R. Exh. 50).

Dever reviewed O'Connor's transactions more generally. One of the transactions she reviewed was also on January 28, at about 4:31 a.m. It involved Kalen Chavez, who was not working at the time. Chavez sat down at one of the tabletop slot machines at the High Limit Bar. O'Connor was working at the time. The two began talking and Chavez inserted a $20 bill into the slot machine. There were no other guests at the bar at the time. O'Connor served Chavez a glass of Knob Creek whiskey (valued at $14) as a slot comp. As Chavez played, O'Connor continued to serve him slot comps. Chavez left the bar at about 6:23 a.m., cashing out with $149. (GC Exh. 9).[15]

In reviewing the January 28, 2022 exchange between O'Connor and Chavez, Dever noticed the lights for Chavez's slot machine were frequently flashing red, including each time O'Connor served him another drink. Dever testified that it was her understanding at the time that a flashing red light meant the guest was not playing enough to receive another comped drink. This, along with the fact that Chavez did not insert any additional money into the slot machine over the 2 hours he remained seated at the bar consuming comped drinks, raised a red flag for her. (Tr. 1315).

Dever continued reviewing O'Connor's POS transactions at the High Limit Bar. She discovered another instance of O'Connor consuming a can of sugar-free Red Bull that he had entered into the POS as a slot comp. This occurred in the early morning of February 18, 2022. The surveillance video shows 3 guests sitting at the bar. At 5:26 a.m., O'Connor entered a transaction into the POS, and a receipt printed out. He placed the receipt face down in front of the glass that was in front of one of the guests. The receipt generally goes into the glass. A few minutes later, O'Connor entered another transaction into the POS, printed a receipt, and placed that receipt on the bar in front of one of the guests. At no point does O'Connor serve any of the guests a drink. About four minutes later, the guests

[13] While complementary drinks are free to the guest, the Respondent tracks and is required to pay a tax on each.
[14] In my review of the video evidence, I noted that whenever O'Connor poured a drink for a guest at the High Limit Bar, he did so on the bar or at bar level. Each time he opened and poured a can of Red Bull for himself, he did so below the bar, as if to hide it.
[15] The record does not reflect how many or how frequently Chavez made bets during the nearly 2 hours he sat at the bar. As stated, Chavez inserted the $20 when he sat down, and did not insert any additional money. He testified that he placed $1.25 bets. (Tr. 1114).

leave the bar. After they leave, O'Connor throws the receipts he placed on the bar into the trash. He then gets a can of sugar-free Red Bull out of the refrigerator behind the bar, opens and pours it into a plastic cup, and drinks it. A review of the POS transactions shows that at 5:26 a.m. O'Connor rang up one can of sugar-free Red Bull as a slot comp. It was the sole item on the check. (GC Exh. 9). The receipt for that transaction was one of those he placed face down in front of the guests at the bar and later threw into the trash. None of the guests consumed a can of Red Bull.

On February 22, 2022, Dever emailed Heather Thompson in TMR and Levan Donato in the Beverage Department to briefly summarize her observations and to ask them to set up a time to come to the Surveillance Department to review the video. (R. Exh. 20). TMR representative Nicole Webb and Donato went and reviewed the surveillance video. The video also was reviewed by Thompson and Cahow. After reviewing the video, TMR placed O'Connor and Chavez on suspension pending investigation (SPI). (GC Exh. 8). It is common practice for TMR to place an employee suspected of misconduct on SPI while it investigates and recommends what, if any, action should be taken.

11. Suspension Pending Investigation and Discharge of O'Connor

Part of TMR's process is to meet with an employee placed on SPI and a manager from their department for a "due process meeting." The purpose of the meeting is to discuss the allegations and to give the employee an opportunity to explain their side of the story. Nicole Webb held the due process meeting with O'Connor on February 25, 2022. Sophia Ellis, a Beverage manager, also attended. (Tr. 1528). In this meeting, Webb asked O'Connor about his understanding of the Beverage Consumption Policy and the Ardent Progressive Systems and Games Policy. And then she asked him about the events of January 28 and February 18, 2022.

O'Connor stated that under the Beverage Consumption Policy, he was allowed to consume bottled water, coffee, tea, and soft drinks "from the gun." (Tr. 1529). Webb then went through the videos from the Red Bull incidents. O'Connor explained that guests often offered to buy him drinks. He would decline alcoholic beverages because it was against policy, but he sometimes accepted a Red Bull if a guest insisted. (Tr. 794-796).[16] Regarding the January 28 incident, O'Connor told Webb that

[16] O'Connor testified that when he started working for the Respondent, he had a manager, named Will, who told him this was allowed. The only instruction Will gave him was that it had to be entered into the POS as a table or slot comp. (Tr. 822-823; 1048).

Heather Thompson, TMR Director, testified employees were not permitted to accept comps from guests. The reasoning is that a comped drink is provided to a guest because they are gaming and have earned it, not because the guest is paying for it. Allowing employees to accept such comps could lead to potential abuse, where employees might improperly attribute items to a guest comp and claim that the guest provided it, which is strictly prohibited. (Tr. 479-480). Will Cahow essentially corroborated this, when he stated that employees were not permitted to receive comped beverages as tips from guests who have earned them from gaming. He stated the practice does not exist and is not considered acceptable within the industry. (Tr. 1580; 1597).

I credit Thompson and Cahow over O'Connor. Their testimony was logical, reasonable, and consistent with the Respondent's policies, including GRC 29, which prohibits employees from using comps given to guests without authorization from their manager.

the guest at the table who ordered Michelob Ultra was the one who comped him the Red Bull.[17] He did not mention anyone else comping him that drink. (Tr. 1531).[18] Regarding the February 18 incident, O'Connor stated it would have been a guest who comped him the Red Bull. Webb asked what guest comped him, and O'Connor could not recall. (Tr. 1533-1535).

As for the Ardent Progressive Games and Systems Policy, O'Connor explained his understanding of the lights, what they meant, and how they worked. He acknowledged that on January 28, 2022, he gave Chavez 2 comped drinks when the light was flashing red. He stated he had been told by a manager that bartenders have discretion to serve a comped drink to a guest with a flashing red light if the guest is actively gaming and playing at a regular pace.[19]

12. Revised Beverage Consumption Policy

On February 27, 2022, Cahow issued the revised Beverage Consumption Policy. (GC Exhs. 4, 25, and 26). As stated, it prohibits employees from consuming, among others, Red Bulls, without payment or management authorization. It further stated that failure to comply with this policy is considered theft and will result in disciplinary action up to, and including, separation. (GC Exh. 4). It is dated January 27, 2022. According to Cahow, that was the date it was sent to TMR for its approval. (Tr. 1575). There was no other evidence presented regarding the approval process, or why it was not issued until February 27, 2022.

13. Discharge of O'Connor

i. Events

Following TMR's investigation, Webb communicated with her supervisor, Heather Thompson, and they concluded that O'Connor should be discharged for theft of the Red Bulls. (GC Exh. 12). Thompson concluded based on O'Connor's extensive experience working at Las Vegas casinos that he

[17] Based on my review of the video, it appears that after O'Connor delivers the Michelob Ultra to the guest, the guest calls O'Connor back over and hands him something, which presumably was a gratuity (cash or chip) for serving him the beer. O'Connor gestures in appreciation and returns to the bar. O'Connor had no further interaction with this guest. The guest continued to play and then left. I find it highly improbable that this guest, based on their brief and limited interaction, placed an order, received the beer, called O'Connor back to give him a tip, *and then also told O'Connor to have a comped beverage of his choice on him.*

[18] During his testimony, O'Connor stated Chavez who comped him the Red Bull on January 28, 2022, and later stated it may have been Chavez. Chavez testified he offered to comp O'Connor a Red Bull as he was cashing out and leaving the High Limit Bar. As stated, there is a dispute over whether Chavez had earned enough comps to pay for the drinks that he consumed that morning. I find it highly doubtful he had accrued enough comps to also "buy" O'Connor a Red Bull. Overall, based on O'Connor's shifting testimony, along with Chavez not appearing to have earned enough comps, I do not find their testimony credible.

[19] In this due process meeting, O'Conner informed Webb that he believed he was being harassed by the Theater managers for raising issues about the new rotation system they implemented, and for accusing them of favoritism. TMR separately investigated these accusations, including interviewing Gray and Fincken. TMR concluded the claims of harassment or favoritism by Gray could not be substantiated, but the claims against Fincken were partially substantiated in terms of how the scheduling was conducted After O'Connor was made aware of the results of the investigation, he raised for the first time that a group of bartenders working in the Theater had collected money and purchased Gray and Fincken each a $500 gift card, which O'Connor argued was unethical. This was later confirmed, and Gray returned the gift cards to TMR. (GC Exh. 12).

"absolutely knew" he was not authorized to take and consume the cans of Red Bull without payment or management authorization, and he falsified the POS transactions to cover it up. (Tr. 574).[20]

Webb and Thompson, however, did not recommend any disciplinary action regarding the slot comps O'Connor gave Chavez under the Ardent Progressive Systems and Gaming Policy. They concluded that O'Connor gave Chavez the first drink as he inserted at least $20 into the slot machine, which complies with the Policy for an initial drink. And when O'Connor later served Chavez the second and third comps while the lights were flashing red, Webb and Thompson concluded the Policy, while somewhat unclear, allowed the bartender's discretion in serving the guest one last comped drink. And they concluded that it appeared that Chavez was playing the entire time and cashed out with $149. (GC Exh. 12).

Donato informed TMR that the Beverage Department agreed with their recommendations regarding O'Connor. On March 2, 2022, TMR issued O'Connor a discharge letter. (GC Exh. 11). The letter cites several GRCs that were violated, including GRC 14, which prohibits theft. It specifically states that on January 28 and February 18, 2022, O'Connor consumed unauthorized beverages and concealed his conduct by ringing the drinks up as table or slot comps. (GC Exh. 11).

ii. Comparables

Following O'Connor's discharge, the Respondent discharged other Beverage Department employees for theft. Those discharges include: a bartender caught on video voiding a beverage served to a guest and keeping the cash payment as a tip (R. Exh. 75); a bartender caught on video giving away products in exchange for cash (R. Exh. 76); a bartender caught on video voiding items and under-ringing items served to guests to get higher tips (R. Exh. 77); and a cocktail server caught on video consuming 2 cans of juice from the refrigerator in the back of house, without payment (R. Exh. 78).

The Respondent, however, did not discharge a busser from the Kitchen Department who was observed drinking cranberry juice from an opened bottle. The bottle had been cleared and was taken back to the dish pit area of the kitchen. It was in this area where the busser drank the juice. There is no dispute that the juice otherwise would have been discarded. The incident was reviewed by TMR and a Kitchen Department manager. Even though the busser was on a final written warning for prior infractions, TMR and the Beverage Department concluded not to discipline him because TMR could not establish he was aware of the Beverage Consumption Policy, and because the product he consumed was going to be discarded. (Tr. 1650; 1654) (GC Exh. 35).

The Respondent also did not discipline employees observed taking and consuming products from a storage area on the property. TMR investigated the incident and concluded the products they consumed were expired, and the employees had been given permission by a manager to consume them. (R. Exh. 51).

[20] Chavez and O'Connor offered conflicting testimony about whether bartenders could consume canned drinks, like Red Bull, without payment or a comp. Chavez testified it could occur if it was approved by a manager. (Tr. 1166). O'Connor, in contrast, testified that a manager's approval was not necessary, and that the requirement was that it be accounted for in the POS. (Tr. 830-832). I conclude that, consistent with the Beverage Consumption Policy, an employee may only consume a Red Bull, for free, if it is approved by a manager.

14. Suspension Pending Investigation of Chavez

On February 22, 2022, TMR also placed Chavez on SPI for his conduct on January 28. As stated, Dever reported to TMR and the Beverage Department that she found it suspicious that Chavez only inserted the initial $20 into the slot machine and continued to receive slot comps, including while the light was flashing red. On February 24, 2022, Webb and Ellis conducted a due process meeting with Chavez, in which they asked him about the Ardent Progressive Systems and Games Policy. He told them he could not confidently explain the policy to them, but it was his understanding that the flashing red light meant the guest was slowing down their play. He stated he was uncertain if the guests should continue to receive slot comps when there is a flashing red light. (Tr. 1211). Following this meeting, Chavez reviewed the policy and emailed Webb with what it said, which was that if there was a flashing red light, the bartender is to approach the guest, tell them that their play is slowing down, and either offer them another comped beverage or offer to open a tab for them.

On February 28, 2022, Webb emailed Donato, Cahow, and Ellis, stating that TMR recommended that Chavez be returned to work with no discipline, and that he be paid backpay for the shifts he missed while out on SPI. She explained the recommendation was based on inconsistencies between the existing policy/standard operating procedure and what was observed in the surveillance footage. (GC Exh. 46). On March 2, 2022, Donato replied to Webb's email, stating the Beverage Department disagreed with returning Chavez to work with full backpay because they believed, based on the surveillance video, that he knowingly pressed the reset button on the back of the machine. Donato asked if Chavez could be brought back with a written warning (and no backpay).[21] Later that day, Webb responded. She stated she could not confidently determine if Chavez reset the slot machine, or if he was checking the reflection of the colored light on the palm of his hand.[22] Webb added that Chavez received a final written warning in October 2021, for receiving comped drinks that were not earned prior to him actively gaming. Webb stated that in light of this final written warning, TMR needed to understand what they would be disciplining him for. The implication being that if they disciplined him again for what would be the same or similar offense, it would result in discharge under the progressive disciplinary system. Donato did not respond. The following day, Webb emailed Donato, Cahow, and Ellis, to return Chavez to work, and, that if he inquired about backpay, to let TMR know. (GC Exh. 46). Chavez returned to work on March 3. The record does not reflect whether he inquired about his backpay.

15. Meeting With Cahow

Between June and October 2022, Chavez circulated a petition for bartenders to sign indicating they wanted scheduling/bar assignments to be based on seniority. (GC Exh. 39). In October 2022, Cahow met with several of the senior bartenders, including Chavez, along with their Union

[21] TMR representative Krystal Rodriguez testified that an employee placed on SPI typically is not paid backpay if the alleged misconduct is substantiated. (Tr. 1650). The implication being that if the misconduct is not substantiated and no discipline is issued, the employee is paid back for their missed time during the SPI.

[22] I questioned Dever about the possibility of a button, switch, or mechanism behind the machine that could be flipped to change a light from blue to red. (Tr. 1282). Dever responded she did not know if such a mechanism existed. No other evidence was offered about this.

representative (Joe Cano), regarding the matter. The Union and the Respondent had recently negotiated a memorandum of agreement that allowed the Respondent to continue assigning bartenders in the Theater in accordance with its existing practice, which was the rotation system that was finalized in late February 2022. (Jt. Exh. 1). In describing the rotation system, Cahow compared the assignment of bartenders to the assignment of cocktail servers. This comparison bothered Chavez, and he told Cahow that the bartenders were not cocktail servers. According to Chavez, Cahow said "aggressively between his teeth" that he understood they were not cocktail servers. (Tr. 1129). Cahow recalled Chavez getting upset when he made a comparison to how cocktail servers were assigned, and he responded to Chavez that he knew they were not cocktail servers, but Cahow said it as a matter of fact, and he did not grit his teeth or exhibit any kind of anger. (Tr. 1591-1592). No other witnesses were called regarding this meeting.

Later that day, Chavez was working and setting up his bar in the Alley Lounge. According to him, Cahow came and stood at the front of his bar and just started staring or glaring at him for about 20-30 seconds. Chavez walked away to the back of the bar and asked a barback whether what Cahow was doing was weird to him, and Chavez stated that it looked like Cahow was trying to intimidate him. (Tr. 1130). Cahow denies ever staring or trying to intimidate Chavez. (Tr. 1593). No other witnesses were called regarding this.[23]

16. Surveillance Department Conducts Audits of Theater POS Transactions and Suspends and Later Disciplines Chavez

In November 2022, Lindsay Dever conducted a periodic audit of the POS transactions in the Theater. She reviewed multiple transactions, including those involving Chavez while he was bartending. (R. Exhs. 40-46; 52-58). She reviewed transactions from the evening of November 16, 2022, in which Chavez failed to properly ring up and/or collect payment for items he served guests.

The first occurred at 7:57 p.m., when two guests approached Chavez's bar and placed an order for one Fiji water, one Bud Light, and one Bud Light Cherry. He served the items but failed to charge for the Fiji water, resulting in a loss of $8.

A minute later, two other guests came over and placed an order for 2 Golden Mules with 2 shots of alcohol in each. Chavez prepared and served the drinks. One of the guests handed Chavez a $20 bill, which Chavez then placed in the tip bucket. No check was created in the POS. At the end of his shift, Chavez created a check for the 2 Golden Mules at $20 each, as hospitality drink comps. The comps were both approved by a supervisor. It was unclear whether the drinks would have cost an additional fee for the double shots of alcohol, but it was not accounted for in the transaction.

Five minutes later, two guests approached Chavez's bar and placed an order. One guest showed her Resorts World employee badge. Chavez prepared and served them 2 margaritas in souvenir cups. The charge for the cups is $12 each. No check was created in the POS, and no payment was made. At the end of the shift, Chavez created a check for this transaction listing 2 margaritas at $18 each, as

[23] I credit Cahow regarding these interactions. Chavez's testimony was self-serving and uncorroborated.

hospitality drink comps. The comps were approved by the same supervisor. Nothing was entered into the POS to account for the souvenir cups.

Four minutes later, a female guest approached Chavez's bar and ordered a Sour Apple Smash drink, a pack of licorice, and a bag of pretzels. Chavez served her the items but failed to charge her for the pretzels, resulting in a loss of $6.

Dever also reviewed Chavez's transactions from November 19, 2022, in which he again failed to ring up and/or collect payment for items he served to guests. During that shift, a female guest approached Chavez's bar and ordered 2 Tito's drinks, which cost $20 each, in 2 souvenir cups. Chavez served the items to the guest. The guest inserted her credit card into the reader but removed it before the transaction was finalized. She then walked away. Chavez appeared not to notice this.

The next guests came to the bar and placed their order. They ordered one Tito's drink at $20, in a souvenir cup. When Chavez was about to enter this into the POS, he noticed that the credit card payment for the prior order had not been completed. Rather than notify management, Chavez voided out half of the prior order and charged this guest for one Tito's drink in a souvenir cup ($32). No payment was received for the prior order, resulting in a loss of $64.

About 50 minutes later, a female guest approached Chavez's bar and ordered one Gran Coramino Cristalino drink and a can of chips. Chavez served both items but only charged the guest for the drink, not the chips, resulting in a loss of $6.

On November 28, 2022, Dever prepared a report with her findings. (R. Exh. 15). She notified TMR and the Beverage Department. In her email, she stated that in reviewing transactions of bartenders in the Theater, she observed Chavez conducting voids and failing to tender items served to guests over the course of 2 shifts, resulting in a total loss of $84. (R. Exh. 58). She included overhead photos and a breakdown of a few of the transactions. TMR representative Krystal Rodriguez was assigned to investigate. During the investigation, Chavez was placed on SPI. Rodriguez conducted a due process meeting with Chavez.

In the meeting, Rodriguez went through each of the videos with Chavez. Regarding the first transaction, where Chavez failed to ring up the Fiji water, Chavez explained he had a headache during that shift and inadvertently failed to include the water. (Tr. 1640). Regarding the second transaction, where Chavez failed to ring up the bag of pretzels, he stated he did not recall the incident. (Tr, 1641). Regarding the third transaction, where Chavez provided 2 Golden Mules with double shots, he recalled later entering them as hospitality comps with the approval of a supervisor, but he acknowledged he likely forgot to account for the drinks having double shots in them. (Tr. 1642). Regarding the fourth transaction, where Chavez provided 2 margaritas in the souvenir cups, he could not specifically recall but believed they were hospitality comps. As for failing to account for the souvenir cups, Chavez could not recall, but he indicated he likely forgot. (Tr. 1642). Regarding the fifth transaction, where Chavez provided 2 Tito's drinks in souvenir cups without payment, he stated that there were 2 guests, a male and a female. Chavez recalled the female guest remained at the bar while the male guest went to get another credit card to use. However, the video footage shows that both guests walked away with their drinks. (Tr. 1643). Regarding the sixth transaction, when Chavez serves the Gran Coramino Cristallino

drink and a can of chips but fails to ring in the chips, he stated that there may have been a system malfunction. Rodriguez later looked and there was no indication there had been any malfunction with the POS system at the time. (Tr. 1644).

Following her investigation, Rodriguez did not recommend that Chavez be discharged. She suggested that he receive a final written warning for job performance issues. (R. Exh. 73). Her concluded he did not act with the intent to steal from or defraud the Respondent. (Tr. 1646). Chavez was returned to work from SPI (with no backpay) and received a final written warning. (R. Exh. 74).[24]

17. Chavez is Suspended and Later Discharged for Continued Performance Issues

On about January 13, 2023, the Surveillance Department conducted another audit of the POS transactions in the Theater. As part of the audit, Surveillance Department personnel reviewed transactions involving Chavez. They reviewed a transaction from January 7, 2023, at about 9:27 p.m., in which a guest ordered one regular cocktail with Grey Goose vodka and one full can of Red Bull, and one souvenir cup with Grey Goose vodka and one full can of Red Bull. Chavez prepared the drinks. He rang up (on one ticket) and collected payment for 2 Grey Goose drinks at $20 each and one souvenir cup at $12. Chavez then fist-bumped the guest who then departed with both drinks. He failed to ring up the 2 Red Bulls that were used ($8 each), resulting in a loss of $16. Surveillance personnel reviewed Chavez's other transactions from that night. In two other transactions, he properly accounted for the Red Bulls he had added to drinks served to other guests, showing that he knew he was supposed to charge for the Red Bulls. Dever created a report and forwarded it to TMR and the Beverage Department. (R. Exhs. 17 and 18). Chavez was again placed on SPI. (GC Exh. 33).

TMR representative Jennifer Mendez, TMR manager Ksusha Chumak, Beverage manager Doug Kern, and Union steward Christian Martinez held a due process meeting with Chavez about the January 7 incident. (R. Exh. 19). Chavez was asked about the transaction and why he did not charge for the 2 Red Bulls. He stated he did not recall the incident, but that he had been distracted that evening because it was the Adult Video News Conference.

Following the meeting, TMR recommended that Chavez be discharged for the incident. The recommendation was based on him being issued a final written warning 2 months earlier for the same job performance issues. (R. Exh. 73). The Beverage Department agreed. On January 23, 2023, Mendez issued Chavez a discharge letter. (GC Exh. 34).[25]

B. *Brian Satake*

1. Background

[24] Rodriguez testified it was rare (less than 5 times) for her to find that an employee "accidentally" failed to tender or receive payment for transactions. (Tr. 1655).

[25] Mendez's report indicated that Chavez had committed theft. His discharge letter reflets that as well. Mendez was new to job at the time, and this was admittedly an error. TMR notified the Union representative of the error, and it further stated it would remove any reference to "theft" from Chavez's documents. (Tr. 1668-1169).

Brian Satake began working for the Respondent as a master cook in about April 2021. He began working in the Famous Foods production room, which makes food for several restaurants on the property. As a master cook, he reported to assistant/sous chefs and executive chefs. He regularly worked the swing shift, which was from 1 p.m. to 9 p.m.

In May 2021, he became a member of the bargaining committee for the Culinary Union 226. He attended up to 5 bargaining sessions. According to Satake, he was not required to request time off from work to attend negotiations because the Respondent and the Union would coordinate. However, Satake would still notify management when he needed to be off for bargaining. (Tr. 870).

2. Exchange Between Sanchez and Satake

According to Satake, in early 2022, he was heading towards his workstation in the Famous Foods production room. As he was walking through the hallway, his supervisor at the time, chef Ray Sanchez, and chef Michael Frauenheim were walking towards him. Sanchez said, "Oh, so all of a sudden, Brian, I'm hearing that you need to have this time off to go to the Union meeting." Satake responded that it wasn't "all of a sudden." He said that they were supposed to know about it already. Sanchez then asked, "Well, can you just come [to work] after?" And Satake said, "I don't know what time it's going to end." Sanchez said, "Well, just come after, whenever it ends." Satake told him again that he did not know when that was going to be, so he could not give a definite answer. (Tr. 868-869). According to Satake, Sanchez then said, "Oh, this is the guy who has better stuff to do rather than to come to work, the Union stuff." That was the end of the conversation. (Tr. 868). Sanchez, who stopped working for the Respondent at some point in 2022, did not recall making this statement. He recalled Satake telling him that he needed to attend negotiations, and Sanchez told him that was okay. (Tr. 1774-1775).

3. "Reassignment" from Famous Foods Production Room

On about April 27, 2022, Satake had a conversation with assistant executive chef Steve Almaraz in the Main Kitchen. According to Satake, he was upset about certain things happening in the kitchen, about how broth for soups was being made. Almaraz told Satake not to question him on how it was made, and that Satake was not a chef. Satake then complained that Almaraz refused to change his schedule when he had granted similar changes for other cooks. Almaraz then asked Satake to continue the conversation in the chef's office. They went into the office and there was another chef there (Tom), and Satake explained his concerns. Almaraz responded by telling Satake that if he did not want to work in the Famous Foods production room, that was up to him. And Satake told Almaraz that if he was going to continue running things the way he was, then he did not want to be working there. Almaraz said, "Okay, you don't have to work in the [Famous Foods production] room anymore. You can work in the Main Kitchen." (Tr. 887-888). At this point in the conversation, Almaraz allegedly told Satake, "Go home early today and enjoy the weekend, clear your mind. I see, you're under a lot of stress. I think that this Union stuff is getting to you, getting in your head." (Tr. 887-888). Satake declined and stated he would finish his shift. After this conversation, Satake began working in the Main Kitchen.

Almaraz worked for the Respondent until he resigned on October 1, 2022. According to him, Satake approached him to complain about his schedule. They spoke in the chef's office. Satake stated he did not like his work schedule, and Almaraz told him that is what he signed up for, and that if he was not happy with it, he should talk to human resources. Almaraz denied making any of the other

alleged statements. (Tr. 1748). Almaraz testified he was aware Satake was on the Union bargaining committee, and there were days Satake would have to take off work to attend negotiations. When Satake notified him that he needed to take off, Almaraz would request replacement employees to cover Satake's shift. Almaraz denied ever discussing the Union or negotiations with Satake, or any of the other kitchen employees. (Tr. 1750).[26]

4. May 13, 2022 Written Coaching and Due Process Meeting

On about May 5, 2022, Satake was leaving for the day, and he went into the Famous Foods production room where he had left his toolbox. Upon entering the room and seeing his toolbox, Satake noticed there was a bag on the top of it. The bag belonged to cook Leon Leonetti. Another cook, Alexis Cortes, was there and told Satake that Leonetti had been "talking shit" about Satake, asking "Why is Brian's toolbox in the room? He doesn't even work there. He should get his shit out of here." After that, Satake went looking for Leonetti. He found Leonetti in the Main Kitchen. According to Satake, he asked Leonetti, "What's your problem? Why are you always talking shit about me?" Satake then said, "Why you gotta be a bitch?" Leonetti turned and walked toward the chef's office. Satake followed Leonetti for about ten feet when he saw chef Jorge Luis come out of the office to find out what the commotion was about. Leonetti said to Satake, "You gotta stop tripping on me." Satake replied, "Just shut your fucking mouth man, that's what gets us in trouble." (R Exhs 2 and 24).[27] Leonetti's recollection was similar, except he denies using any profanity and he contends that Satake stated he would be waiting for Leonetti after he got off work, which Leonetti took as a threat of violence. (Tr. 1616-1617).

Luis, who resigned in November 2022, did not specifically hear or recall what Satake or Leonetti said to one another, only that Satake was yelling and using profanity. (R. Exh. 21). He did not hear Satake threaten to wait for Leonetti after work. (Tr. 1626-1629). However, he did arrange for Security to escort Leonetti to his car at the end of his shift.

Luis later spoke with Almaraz. They notified TMR about what happened. (R. Exh. 21). Satake and Leonetti each prepared a statement for TMR. (R. Exhs. 22 and 24).

On about May 8, 2022, TMR placed Satake on SPI. (R. Exh. 21). The next day, TMR representative Nicole Webb interviewed Leonetti. Leonetti's responses were consistent with his prior written statement, including that he did not use profanity toward Satake. (R. Exh. 2). On May 13, 2022, Webb and chef Michael Frauenheim held a due process meeting with Satake. In this meeting, Satake provided the same information he included in his statement, including admitting that he used profanity toward Leonetti. Following these meetings, Webb recommended that Satake return to work from SPI without backpay, and that he be issued a written coaching for displaying unprofessional and rude/discourteous behavior, specifically for seeking out a coworker to address a personal issue while at work, and for raising his voice and using profanity toward that employee in the workplace. The "plan for improvement" given to Satake, which was communicated orally at the meeting and later in writing, states:

> Brian was reminded to approach all problems and issues in a professional and respectful manner. These matters should be addressed privately and are not to disrupt

[26] As discussed below, I credit Almaraz regarding this meeting.

[27] I credit Satake's prepared statement as his recollection of what occurred over his testimony. It was prepared closer in time when he presumably had a clearer recollection.

> business or productivity. Brian should escalate all concerns to management if he is unable to resolve these matters on his own. Further violations will result in coaching up to and including separation.

(GC Exh. 36).

TMR did not recommend disciplining Leonetti because there was no evidence corroborating Satake's statement that he also used profanity during their exchange. Similarly, no action was taken against Satake for allegedly telling Leonetti that he would be waiting for him after work, because that statement could not be corroborated.

5. June 14, 2022 Interactions with Fabian Brooks

At some point, Satake returned to work in the Famous Foods production room and began working under chef Fabian Brooks. On June 14, 2022, Satake prepared a handwritten statement accusing Brooks of harassment and retaliation regarding his work schedule and job assignments. In the statement, Satake requested a Step One meeting under the collective-bargaining agreement to discuss the accusations. (GC Exh. 32). That same day, Satake went to the Chef's office to deliver the statement. Brooks was there, along with another manager named Maribel. Satake told Brooks he had prepared a statement addressing how Brooks was mistreating him. Brooks asked Satake to come into the office so they could discuss the matter. Satake declined, stating it was all in the statement. Satake then told Brooks that he should have Maribel read and explain the statement to him. Satake testified he said this because Brooks' first language was Spanish, and he did not want there to be any misunderstanding about what was written in the statement.[28] However, Satake did not explain this to Brooks. Brooks told Satake that he did not need someone to read him the statement. (Tr. 355-356). Brooks took the statement and began looking at it. Satake asked for a copy, and Brooks made him a copy. Brooks told Satake that they would wait for chef Steve Almaraz to come in the next day to respond. Brooks shared Satake's statement with TMR representative Nicole Webb, and he later spoke with Heather Thompson.[29]

A couple hours after handing his statement to Brooks, Satake was in the kitchen area making a garnish for a dish that included peppers. Satake prepared the garnish and asked Brooks to taste it. Brooks tasted and noted that it was missing ginger and garlic. Satake acknowledged that he forgot to add those ingredients. Brooks told him that was not good and that he needed to fix it. He then stood there and watched Satake remake the dish. Satake became annoyed and said that "instead of just watching me, why don't you find me some more peppers to cook." Brooks responded, "Hey Brian, you don't tell me what to do." (GC Exh. 38).

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[28] On cross-examination, Satake acknowledged he had no reason to believe that Brooks could not read English, and that he was concerned based on Brooks' heavy accent. (Tr. 1012-1013).

[29] At the hearing, Brooks initially testified, in response to the General Counsel's questioning, that he was not bothered by Satake's suggestion that he would need someone to read and explain the statement to him. (Tr. 354-355). However, Thompson testified that Brooks was quite upset with what Satake had said to him at the time. (Tr. 440). I credit Thompson. As discussed below, I found her to be a credible witness. I also credit her based on my observations of Brooks' demeanor as he continued to respond to question about his June 14 exchange with Satake about the statement. His facial expression, body language, and tone all indicated increasing agitation as he testified about what happened. He was particularly defensive to any suggestion that he could not understand or be understood if it was in English. (Tr. 1732-1733).

Satake later prepared a statement regarding this exchange, alleging that it further showed Brooks was harassing him. (GC Exh. 38). He then gave it to Brooks. Brooks emailed Satake's statement to Webb, and he gave his own recollection of what happened. (R. Exh. 3). Their statements regarding this exchange are largely consistent with one another.

After receiving the statements, Webb forwarded them to Heather Thompson. The Respondent was not holding Step One meetings at that time because the managers and stewards had not yet received training on how to conduct those meetings. As noted, the parties' collective-bargaining agreement gave until September 1, 2022 to conduct this training before holding Step One meetings.

6. June 28, 2022 Meeting

On June 28, 2022, there was a meeting held to discuss Satake's June 14 statements and his interactions with Brooks that day. (GC Exh. 48(a)-(b)). The meeting was attended by Thompson, Webb, Brooks, Satake, and a union representative. Thompson went through and discussed Satake's statement regarding his exchanges with Brooks. She asked Satake if he thought it was rude and discourteous for him to tell his supervisor to have someone read and explain a statement to him, and to tell his supervisor to go find him some peppers. Satake stated he did not. He explained he wanted to make sure there were no misunderstandings about the contents of his statement accusing Brooks of harassment and retaliation, and he was concerned Brooks would not be able to read and understand the statement on his own. He explained that he asked Brooks to find more peppers because he was concerned there would not be enough to make the dish. As Thompson continued to probe, Satake continued to deny doing anything wrong. He then pointed out that this was not why he had requested the Step One meeting. Thompson commented that he cannot just submit the statements he did and then walk away. She told him she needs to ask questions to understand what happened. Thompson then went through Satake's interactions with Brooks, as well as Satake's interactions with his coworkers. Satake was given the chance to explain the issues he was having generally with Brooks and how he supervised him. Brooks responded to Satake's accusations. There was no resolution, and Satake stated he wanted to go home. He did.[30]

7. August 17, 2022 Discipline

Following this meeting, Satake went out on FMLA leave following surgery. He was on leave for over a month. He returned in August 2022. On August 17, 2022, chef Steve Almaraz issued him a final written coaching for violating the GRCs by displaying "rude and discourteous behavior" toward a supervisor (Brooks) on June 14, 2022. (GC Exh. 17). Thompson testified the coaching was issued because of Satake's derogatory suggestion that Brooks was unable to read/understand English, and for later telling Brooks how he should be performing his job. (Tr. 438-443).

8. January 10, 2023 Discipline

On January 10, 2023, chef Luis Celis issued Satake a verbal coaching for failing to show up for his scheduled shift without proper notice on December 1, 2022. (GC Exh. 40). Satake later prepared a statement challenging the discipline. (GC Exh. 49). He stated that he was on approved FMLA leave at the time. He went on to allege the discipline was retaliatory, alleging that every time

[30] No discipline or threat of discipline was issued regarding Satake's behavior towards Thompson in the June 28 meeting. (Tr. 434; 438)

he complained of unfair treatment, he received some sort of backlash, including discipline. He pointed out he had filed a grievance on the day cited in the discipline, and he was disciplined on the same day he was notified about the status of that grievance. TMR looked into whether he was on FMLA on December 1, 2022. After it concluded that he was, it rescinded the coaching. (Tr. 454; 918).

9. Subsequent FMLA Request

Satake required another surgery on his hand. On around February 9, 2023, he submitted a request for FMLA leave. The paperwork he received indicated that he had been approved for general medical leave, not FMLA leave. On March 1, 2023, he emailed the Respondent asking whether he would be using his remaining FMLA leave first and then it would switch to general medical leave. (R. Exh. 5). That same day, Satake received an email response indicating he had not worked enough hours to qualify for FMLA leave, and that he was eligible for general medical leave. (R. Exh. 5).

On March 3, 2023, Satake submitted another request through Beekeeper for medical leave. (GC Exh. 50). His request for FMLA was denied again because he was not eligible, even though the denial letter states he would have sufficient hours accumulated on the day his leave was scheduled to begin. He, however, had been approved for general medical leave. Satake later sought to cancel the leave request through Beekeeper, because did not know what general medical leave was and whether it provided the same protection as FMLA leave.

On March 8, 2023, Heather Thompson emailed Satake asking him to clarify if he wanted his medical leave to be cancelled or processed under FMLA. (R. Exh. 6). Thompson explained the Respondent's system reflected Satake was approved for FMLA for a portion of the leave period, and for general medical leave for the rest of the leave period after his FMLA balance ran out. Satake eventually went out on leave to have the second surgery on his hand. He was on approved leave for the entire period of his absence from work.

10. Satake's Subsequent Complaints about Working Conditions

On March 16, 2023, Satake submitted a voluntary statement to TMR accusing assistant chef Jayson Ocilka of retaliating against him for raising concerns about the operation of the kitchen. (GC Exh. 41). On April 4, 2023, Satake submitted a supplementary statement. He raised additional issues and examples, including accusations of potential health code violations in the kitchen. TMR representative Krystal Rodriguez investigated. On April 10, 2023, she interviewed executive chef Niko Gadzhev about Satake's accusations. Gadzhev denied any retaliation of Satake. Satake submitted additional statements in support of his accusations. Those accusations were investigated, but TMR was unable to substantiate them.

In his testimony, Gadzhev stated that Satake "complained about things too much." He also stated that Satake had his own way of doing things. And that if it was not done his way, Satake would complain, and he would complain to everybody. (Tr. 634).

11. Chinese Bacon Incident

On April 14, 2023, Satake was working in the Famous Foods production room from 2 p.m. to 10 p.m. One of the tasks he was assigned that day was to prepare the Chinese bacon. Chinese bacon arrives in vacuum-sealed packages shipped in cardboard boxes. There are about 20 packages per box.

Satake testified that during his employment he prepared the Chinese bacon about 100 times. Each time he followed the same process. He opens the packages and empties the contents into a stainless-steel pan. The bacon arrives pre-sliced. He uses a knife to remove a layer of skin. He then cuts the slices of bacon into equal-sized pieces. He puts those pieces into a metal pan. He later takes those pieces to the deep fryer in another room where he fries them. He drains the excess oil, transfers the pieces onto a sheet, flattens it, and lets it chill. (Tr. 926-927).

On April 14, 2023, Satake was assigned to prepare the Chinese bacon. His workstation that day consisted of four steel tables pushed together. There is a counter area that is used as a cutting surface. Satake began preparing the bacon. But he had to walk away for up to 30 minutes to perform other tasks. When he returned, he completed preparing the bacon. He stated he was not made aware of any issues.

According to Niko Gadzhev, at about 4:07 p.m., he passed by Satake's workstation and saw that Satake was not there. Gadzhev saw Satake's knife (yellow handle) on the counter by a pile of cut Chinese bacon. To the left of the cut pieces, there were slices of unpackaged but uncut bacon. To the left of those uncut slices was a cardboard box sitting on the counter. Gadzhev looked inside the box and saw cut pieces of fried bacon. Gadzhev went looking for Satake but could not find him. Gadzhev also called his supervisor, chef Brett Blitz, to report what he had seen. Using his cellphone Gadzhev took four photos of the workstation. (GC Exh. 16). One of the photos shows uncut slices of fried bacon inside a cardboard box. (Tr, 1703-1704). At about 4:25 p.m., Gadzhev emailed the photos to Blitz, executive chef Devin Hashimoto, and Heather Thompson. In the email, Gadzhev referred to the bacon in the cardboard box as a "major" health code violation. Gadzhev also wrote, "As we all know, Brian is .5 away from a last disciplinary/final written action which is a discharge. Please advise how we should respond." (GC Exh. 43). Gadzhev then left the area to attend a meeting. He did not do anything with the bacon in the box.

At around 5:40 p.m., Gadzhev returned to the Famous Foods production room. He saw Satake standing at the counter, cutting the slices of bacon.[31] Gadzhev watched Satake cut the bacon for about a minute or two. (Tr. 687).[32] He said hello to Satake, but he did not say anything else. He used his cellphone to take one photograph showing Satake (from the back) cutting the bacon on the counter. At

[31] In the earlier photos, the cardboard box was on the counter with no pan underneath it. In the subsequent photo, the cardboard box is on a large sheet pan on the counter. The box in the subsequent photo also appears to be different than the box in the earlier photos. In the initial photos there is a piece of what appears to be shipping tape sticking out from inside the box. That does not appear in the subsequent photo. (GC Exh. 16). Of course, it is possible that the tape was simply removed.

[32] Gadzhev's testimony regarding what he saw varied. He initially testified he saw Satake cutting the bacon *and* putting it back in the cardboard box. (Tr. 645-646). He repeated that again a few moments later. (Tr. 658-659). Later, in response to my questions asking him again to go over what he saw, Gadzhev testified he saw Satake cutting the bacon, he but did not mention Satake putting it back in the box. (Tr. 687). This, of course, could have been an inadvertent omission, or it could have been an accurate statement what he saw. As discussed below, I conclude, based on the evidence, that Gadzhev did not actually see Satake put the bacon in the box.

5:42 p.m., Gadzhev texted Blitz that photo.[33] Gadzhev testified he later went back to Satake's workstation after the end of his shift and threw out all the bacon Satake had prepared that day. (Tr. 647; 655-656).

12. Due Process Meeting and Discharge

On April 26, 2023, Satake was called into a meeting with Gadzhev, Nicole Webb and Union steward Jackie O'Brien. Webb and Satake testified about this meeting. According to Satake, Webb began the meeting by asking him if he was responsible for cutting the Chinese bacon on April 14, and he said he believed so. Webb asked him to explain the process he follows when preparing the bacon, and Satake explained his process. She then showed him a series of four photos. One photo was of the workstation counter. In the middle of the counter was a pile of cut pieces of bacon and a yellow-handled knife. Satake acknowledged that it was his knife. In front of the cut pieces of bacon and the knife was a large stainless-steel metal pan. The contents of the pan were not visible. To the left of the cut pieces of bacon and the knife were several unpackaged but uncut slices of bacon. To the immediate left of the slices of uncut bacon was an opened cardboard box. The contents of the box are not visible. Another photo was of the workstation counter from a different angle. It shows the same items. It also does not show the contents of the metal pan or the cardboard box. A third photo is of the inside of a cardboard box half-filled with fried slices of bacon. The final photo is a close-up of an opened carboard box filled with unopened packages of Chinese bacon. This box does not appear in the photos of the workstation counter. (GC Exh. 16, pgs. 2-5). Satake was not shown the photo Gadzhev took of him cutting the bacon.

After showing Satake the four photos, Webb asked him if he was the one who put the bacon in the cardboard box. Satake said no. (Tr. 935). After that she said, "But that is your knife, right?" And Satake told her it was. Webb then asked, "But you weren't the one that put that Chinese bacon in that box?" And Satake again told her no. Webb then asked who he thought put the bacon in the box. And Satake told her, "I don't know, probably the same person that took the photos." O'Brien then asked Satake if he was claiming he was set up. Satake said yes, but he could not prove it. (Tr. 935-936).

According to Webb, Satake confirmed he was assigned to prepare the Chinese bacon. She showed him the photos, including the bacon in the box. Satake stated that putting bacon into the box was not part of his normal practice, but he did not have any explanation as to why or how the bacon ended up in the box. Webb recalled that when she directly asked Satake if he put the bacon in the box, he responded that he could not recall. (Tr. 128-129)[34]

[33] Gadzhev testified that he took photos of Satake while he was cutting the bacon, but he did not testify as to how many. Only one photo was offered into evidence. It shows Satake with his back to the camera standing over the counter with a knife in his right hand, cutting the bacon. To his immediate left is the cardboard box on the sheet pan. On his immediate right is a standing garbage can on the ground. Further to the right, on the counter, are two large, stacked stainless-steel pans. The photo does not show whether there was a stainless-steel pan in front of Satake, like what appeared in the earlier photos. There is no photo showing Satake putting bacon in the cardboard box. There also are no photos of what is inside of the cardboard box next to Satake while he was cutting the bacon.

[34] As explained below, I credit Satake over Webb regarding this meeting.

Rather than suspend Satake, TMR determined he would be allowed to continue working pending the outcome of the investigation. Satake, however, stated he did not want to continue working under the circumstances, and he asked to be placed on SPI because of the stress the situation was causing. After that request was denied, Satake called off work for his next few shifts. (R. Exh. 7).

Webb recommended that Satake be discharged. She concluded he committed a serious health code violation by placing the unpackaged bacon in a non-safe food container, and he was at the final step of the progressive disciplinary system. (GC Exh. 42). The Kitchen Department agreed with the recommendation. On April 28, 2023, TMR issued Satake a discharge letter.

CREDIBILITY

Several allegations in the Consolidated Complaint turn on witness credibility. My credibility analysis relies upon a variety of factors, including the witness's demeanor, the context of the testimony, the quality of the recollection, testimonial consistency, the presence or absence of corroboration, bias, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. See *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996), enfd. sub nom. 56 Fed.Appx. 516 (D.C. Cir. 2003). Of course, credibility findings need not be all-or-nothing propositions. Indeed, nothing is more common in judicial decisions than to believe some, but not all, of what a witness says. *Daikichi Sushi*, supra at 622; *Jerry Ryce Builders*, 352 NLRB 1262, 1262 fn. 2 (2008), citing *NLRB v. Universal Camera Corp*., 179 F.2d 749, 754 (2d Cir. 1950), reversed on other grounds 340 U.S. 474 (1951).

The General Counsel called several of the Respondent's supervisors and managers as adverse witnesses and then called O'Connor, Chavez, and Satake. The Respondent recalled several of the supervisors and managers as part of its defense.[35] In general, I found Will Cahow, Krystal Rodriguez, Fabian Brooks, Jennifer Mendez, Heather Thompson, Levan Donato, Cori Fincken. Lindsay Dever, Nathan Lloyd, Leon Leonetti, Jorge Luis, Ksusha Chumak, Steve Almaraz, and Ray Sanchez to be largely credible. Each had a candid and straightforward demeanor, their recollection was generally clear, detailed, and consistent despite the passage of time, and their testimony was logical and consistent with video, audio, or documentary evidence.

I found Michael Gray, Nicole Webb, Brian Satake, and Kalen Chavez to be partially credible. Gray regularly struggled to independently recall certain events and was, at times, evasive or non-responsive. But I have credited those portions of his testimony regarding key events or conversations because it was largely consistent with documentary evidence, logical in the context, and more credible than the testimony offered to the contrary. Webb provided testimony that was detailed, straightforward, and largely supported by the documentary evidence. However, I do not credit her testimony that Satake did not deny putting the Chinese bacon into the cardboard box. Conversely, I found Satake's testimony about that incident to be largely credible. However, I do not find other portions of his testimony to be

[35] The Respondent did not to cross examine several of the supervisors and managers the General Counsel called adversely, and, instead, recalled and questioned them as part of its case. I make no findings regarding that strategy as the Respondent made clear that would be its approach prior to the hearing.

reliable, particularly regarding earlier conversations he had with members of management. His testimony about those conversations lacked context, was unsupported, and/or was inconsistent with the other evidence. The same is largely true regarding Chavez and his testimony about the exchanges he had with members of management. I also believe Chavez fabricated, in its entirety, his testimony about offering to "use his comps" to "buy" O'Connor a Red Bull on January 28. That fabrication, which I conclude was likely offered in an attempt to support his friend and fellow discriminatee, undermined his overall credibility, particularly when evaluating otherwise unsupported testimony offered to support his own case.

In general, I found Niko Gadzhev and Alex O'Connor not to be credible witnesses. As discussed below, Gadzhev's investigation and course of conduct regarding the alleged bacon incident is highly suspect. His explanations were vacuous and illogical under the circumstances. As for O'Connor, his testimony was largely self-serving, unsupported, and contradicted by the credible evidence. This was most notable regarding his shifting testimony about the Respondent's alleged (unwritten) policy and practice regarding the consumption of drinks, which significantly undermines his overall claims surrounding his suspension and discharge.

LEGAL ANALYSIS

A. General Rules of Conduct

Paragraph 5(b) of the Consolidated Complaint alleges that since about January 7, 2022, the Respondent maintained overly broad and discriminatory work rules, in violation of Section 8(a)(1) of the Act. Section 8(a)(1) makes it an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of their rights under Section 7 of the Act. Section 7 provides employees "the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection."

An employer violates Section 8(a)(1) by maintaining a work rule or policy that would "reasonably tend to chill employees in the exercise of their Section 7 rights." *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. mem., 203 F.3d 52 (D.C. Cir. 1999). The Board developed a two-step inquiry to determine if a rule would have such an effect. *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646-647 (2004). First, a rule will be deemed unlawful if it explicitly restricts Section 7 activities. Second, even if the rule does not explicitly restrict protected activities, it will be deemed to be unlawful if: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. at 643.

In *Stericycle Inc*., 372 NLRB No. 113 (2023), the Board set forth the current standard for determining whether an employer's maintenance of a rule inhibits employees' protected activity in violation of Section 8(a)(1) where the rule does not expressly restrict protected activity and was not

adopted in response to such activity.[36] Under *Stericycle*, the General Counsel must prove that a challenged rule has a reasonable tendency to chill employees from exercising their Section 7 rights. Id. slip op. at 2. When evaluating whether the General Counsel has done so, the rule is interpreted "from the perspective of an employee who is subject to the rule and economically dependent on the employer . . . even if a contrary, noncoercive interpretation of the rule is also reasonable." Id. If the General Counsel carries the burden of showing a "tendency to chill," then the rule is presumptively unlawful. Id. If the rule is shown to be presumptively unlawful, the employer may avoid a finding that it violated the Act if it shows that the rule "advances a legitimate and substantial business interest and that the employer is unable to advance that interest with a more narrowly tailored rule." Id. In evaluating the rule, the Board returns to a "case-specific approach" that looks to "the specific wording of the rule, the specific industry and workplace context in which it is maintained, the specific employer interests it may advance, and the specific statutory rights it may infringe." Id. slip op. at 20. In determining if the rule is narrowly tailored, the Board will evaluate any explanations or illustrations contained therein regarding how the rule does not apply to Section 7 activity. Id. slip. op. at 22 fn. 26.[37]

There is no dispute the GRCs apply to all employees throughout the Respondent's property. The General Counsel alleges that GRCs 1, 2, 3, 4, 6, 7, 8, 9, and 23 all have a reasonable tendency to chill employees in the exercise of their Section 7 rights. The Respondent counters that even if that were true each rule advances a legitimate and substantial business interest, namely the Respondent's compliance with the State of Nevada's gaming regulations (Regulation 5, Operation of Gaming Establishments). Section 5.011 states "the [Nevada Gaming Control] Board and the [Nevada Gaming] Commission deem any activity on the part of a licensee, … or an agent or employee thereof, that is inimical to the public health, safety, morals, good order, or general welfare of the people of the State of Nevada, or that would reflect or tend to reflect discredit upon the State of Nevada or the gaming industry, to be an unsuitable method of operation and shall be grounds for disciplinary action ..." It then goes on to provide a non-exhaustive list of activities that would be grounds for disciplinary action of a licensee. Among them is Section 5.011(a), which encompasses the "[f]alure to exercise discretion and sound judgment to prevent incidents which might reflect on the repute of the State of Nevada and act as a detriment to the development of the industry." And there also is Section 5.011(k), which encompasses the "[f]ailure to conduct gaming operations in accordance with proper standards of

[36] In *Stericycle,* the Board overruled *Boeing Co*., 365 NLRB 1484 (2017) and its progeny. In *Boeing*, the Board held that when evaluating a facially neutral policy, rule or provision that, when reasonably interpreted, would potentially interfere with the exercise of rights under the Act, it will evaluate two things: (i) the nature and extent of the potential impact on rights under the Act, and (ii) legitimate justifications associated with the rule. In conducting this evaluation, the Board balanced the employer's business justifications against the extent to which the rule or policy, viewed from the perspective of reasonable employees, interferes with rights under the Act.

The Respondent contends *Stericycle* should not be applied retroactively to these cases because the GRCs at issue were promulgated prior to that decision, and the same or similar rules were deemed not to violate the Act as part of a settlement reached under the prior standard. The Respondent cites cases holding that a change in the law should not be applied retroactively if it would amount to a manifest injustice, see *SNE Enterprises*, 344 NLRB 673 (1947) quoting *SEC v. Chenery Corp*., 332 U.S. 194, 203 (1947). However, those factors are considered when the Board does not specifically address retroactivity. In *Stericycle*, the Board did, holding the new framework applied to all pending cases, at whatever stage, which would include these cases.

Alternatively, the Respondent argues *Stericycle* should be overruled and the Board should return to the *Boeing* standard. This is an action that is beyond my authority as an administrative law judge.

[37] The Board cited to its decision in *First Transit, Inc*., 360 NLRB 619, 621-622 (2014), in which it held that, while a provision or clause advising employees of their Section 7 rights might, in some cases, clarify the scope of a rule and save it from being deemed unlawful, it must address the "broad panoply" of those rights.

custom, decorum, and decency, or permit a type of conduct in a gaming establishment that reflects or tends to reflect on the repute of the State of Nevada and act as a detriment to the gaming industry." (R. Exh. 63). The Respondent argues that as a gaming licensee it must comply with these regulations, and the GRCs are each narrowly tailored to serve that purpose.[38] The General Counsel counters that even if the rules are necessary, they are not narrowly tailored, and there are no explanations or illustrations to ensure the rules do not apply to, or interfere with, the right to engage in Section 7 activity.

As explained below, I recommend finding that certain of the GRCs at issue violate Section 8(a)(1), while others, based on the arguments raised, do not.

GRC 1 prohibits "[r]ude, discourteous, or unprofessional behavior toward a guest, coworker or any other person on Company property." It also requires that employees "work in a cooperative manner with managers, supervisors, coworkers, guests and vendors." The General Counsel argues the rule is unlawfully overbroad because the terms "[r]ude," "discourteous," "unprofessional," and "cooperative" are undefined, and they could reasonably be construed by employees as restricting or limiting Section 7 activity. I agree. The Board has held similar rules, including those prohibiting disrespectful, inappropriate, and/or unprofessional conduct, where those terms are not otherwise defined or limited, would reasonably tend to chill Section 7 activity. See *Component Bar Products, Inc.*, 362 NLRB 1901 fn. 1 (2016); *Casino San Pablo*, 361 NLRB 1350, 1351-1352 (2014); *Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014), enfd. 629 Fed.Appx. 33 (2nd Cir. 2015); and *First Transit, Inc.*, supra. Concertedly objecting to working conditions imposed by a supervisor, collectively complaining about a supervisor's arbitrary or unfair conduct, or jointly challenging an unlawful employment action, which are all Section 7 activities, would reasonably fall within the commonsense definitions of these terms, and, therefore, would reasonably tend to chill employees from engaging in those and similar activities out of fear of discipline or discharge. See generally, *Casino San Pablo*, 361 NLRB at 1352.

The Respondent asserts the rule serves a legitimate and substantial business interest because any company operating under a Nevada gaming license needs to ensure polite and courteous behavior. Although Section 5.011(k) requires licensees *to conduct gaming operations* in accordance with proper standards of custom, decorum, and decency, GRC 1 extends beyond gaming operations and applies to all activity throughout the property, including, for example, cooks, waiters, and housekeeping. Additionally, as worded, it is broad enough to restrict certain Section 7 activity, such as heated discussions, disagreements, or confrontations that can occur during collective bargaining, grievance handling, or other collective action. See *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (Section 7 rights can be exercised by employees without fear of punishment for the heated or exuberant expression and advocacy that often accompanies labor disputes; misconduct during Section 7 activity is treated differently than misconduct in the ordinary workplace setting). In light of GRC 1's undefined terms and broad scope, as well as the absence of any assurances that it does not restrict Section 7 activity, I recommend finding that it violates Section 8(a)(1).

[38] The Respondent also argues that it has never applied any of these GRCs to restrict or limit employees from engaging in Sec. 7 activity, and, in fact, has allowed employees to engage in Sec. 7 activity that would violate one or more of the GRCs at issue. Absent widespread dissemination, these facts do not serve as a defense.

The same is true regarding GRC 2, which broadly prohibits "[i]nsubordination or otherwise being uncooperative with supervisors, Team Members, guests and/or regulatory agencies, or otherwise engaging in conduct that does not support the Company's goals and objectives." The term "uncooperative" and the phrase "conduct that does not support the Company's goals and objectives" are similarly undefined and broad enough to restrict Section 7 activity. For example, a strike, area standards picketing, or other collective action related to employees' terms and conditions of employment would reasonably be viewed as uncooperative and/or not supporting the Respondent's goals and objectives, and, therefore, violate the rule.[39]

The Respondent argues the rule is necessary because if an employee were to disobey a supervisor's directive—e.g., not to serve an intoxicated guest—it could cause the Respondent disrepute and thus revocation of its license. Further, it applies not just to supervisor directives, but also Nevada regulatory agency directives, as gaming investigators can conduct inquiries at any time. An employee's refusal to comply with an investigator's request, e.g., to open a money cage for inspection, could result in a revocation of the Respondent's gaming license.

While these may be true and serve as legitimate reasons for a rule addressing such conduct, GRC 2 applies far more broadly than just these types of situations, and there are no assurances that it would not be applied to restrict Section 7 activity. I, therefore, recommend finding that GRC 2 also violates Section 8(a)(1).

GRC 3 prohibits "dishonesty" and requires all employees to be "forthcoming and honest in all written and verbal communication connected to Company records, work communications, or which relate in any way to Company investigations regarding violations of Company policies." It further states employees "will not knowingly make false statements or omit pertinent information in connection with Company records, work communications, or employment records." The General Counsel's sole argument for why this rule is overbroad is that in requiring employees to be "forthcoming" it does not provide assurances to those represented by a union that they will not be punished for asserting their right to union representation under *NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The General Counsel cites no authority to support this argument.

I find this argument is insufficient to meet the General Counsel's burden. Under *Weingarten*, the employer is required to provide the employee with union representation, upon request, prior to conducting an investigatory interview, and it prohibits the employer from moving forward with the interview without representation once it has been requested. It does not require that the employer notify represented employees in advance of their right to have union representation, or that they will not be punished for exercising that right.

[39] The Respondent cites *Copper River of Boiling Springs, LLC*, 360 NLRB 459 (2014) for support. In that case, the Board applied the pre-*Stericycle* standard and found lawful a rule prohibiting "[i]nsubordination to a manager or lack of respect and cooperation with fellow employees or guests. This includes displaying a negative attitude that is disruptive to other staff or has a negative impact on guests." This rule, regardless of whether would be lawful under *Stericycle*, was less restrictive and more narrowly tailored than GRC 2. It only prohibited insubordination toward a manager, whereas GRC 2 prohibits insubordination and otherwise being uncooperative. Additionally, it prohibited displaying a negative attitude that is disruptive to other staff or has a negative impact on guests, whereas GRC 2 prohibits conduct that does not support the Company's goals and objectives.

Based on the arguments raised, I find the General Counsel has failed to establish that GRC 3 violates Section 8(a)(1).[40]

GRC 4 prohibits an employee from "[f]ailing to cooperate in a Company investigation or audit or withholding or tampering with information in connection with such an investigation or audit" and states they "have a duty to cooperate fully and truthfully with any and all Company audits and investigations regarding suspected violations of Company policies." The General Counsel again argues this rule is overbroad because it does not advise employees of their *Weingarten* rights, or that they will not be punished for asserting them.[41] As stated, I reject this argument because *Weingarten* does not impose these obligations on employers.

The General Counsel further contends the rule is unlawful because it requires that employees be truthful in Company audits and investigations of suspected violations of Company policies, which potentially interferes with employees making a false or misleading statement during Section 7 activity. The General Counsel fails to expand on this argument or cite to any supporting authority. Although the Board has found unlawful rules that prohibit employees from making untruthful, false, or dishonest statements about their employer or its products, see e.g., *Lafayette Park Hotel*, 326 NLRB at 828 and *Cincinnati Suburban Press*, 289 NLRB 966 (1988), I have not found any Board authority holding that employees have the Section 7 right to lie or refuse to participate in an employer's investigation into alleged violations of its policies. Regardless, I do not find an employee, while economically dependent on the employer and contemplating protected concerted activity, would reasonably interpret the plain language of GRC 4 to prohibit or limit them from engaging in Section 7 activity. I, therefore, conclude the General Counsel has failed to meet its burden regarding GRC 4.

GRC 6 prohibits "[j]ob abandonment or leaving work area without proper authorization during an assigned shift." The General Counsel argues this rule would reasonably be read to interfere with an

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[40] Although not raised by the General Counsel, this rule's requirement of honesty in all written and verbal communications would reasonably be construed to prohibit omitting union-affiliated work history from a job application. The Board has repeatedly made clear that those types of omissions or denials, while false or misleading, are protected by the Act because they are not material to the hiring decision. See *T. Steele Construction, Inc.*, 348 NLRB 1173, 1183 fn.15 (2006); *American Residential Services of Indiana*, 345 NLRB 995,1004 (2005); *Winn-Dixie Stores*, 236 NLRB 1547 (1978).

[41] For support, the General Counsel cites *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348-349 (2000). In that case, the Board held a rule requiring employees to cooperate, or risk discipline, in the investigation of "any … violation of …. laws, or government regulations" to be unlawful because it applied to the investigation of unfair labor practice charges, and it failed to provide the assurances required under *Johnnie's Poultry Co*., 146 NLRB 770, 774–776 (1965), enf. denied 344 F.2d 617, 619 (8th Cir. 1965), that the employee's participation in the investigation be voluntary. By citing to the case, the General Counsel seemingly attempts to argue by analogy that the same reasoning applies regarding *Weingarten* rights. But as noted, the difference between an employer's obligations under *Weingarten* versus *Johnnie's Poultry* is that under the latter they are required to notify employees of their rights in advance, regardless of whether they are asserted. As for whether GRC 4 should be found unlawful because it does not provide the assurances required under *Johnnie's Poultry*, that argument was not made. Even if it had been made, it would not be persuasive because the rule applies to Company audits and investigations *regarding suspected violations of Company polices*, not violations of laws (like the Act) or regulations. This same reasoning applies to why the lack of *Johnnie's Poultry* notice would not cause GRC 3 to violate Section 8(a)(1).

employee's right to engage in a strike or work stoppage. The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice. *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963). The Board has long held that an employer violates Section 8(a)(1) by maintaining a blanket prohibition against work stoppages, i.e., those that fail to distinguish between protected and unprotected work stoppages. *Catalox Corp*., 252 NLRB 1336, 1339 (1980).

The Respondent, in its defense, cites *Wilshire at Lakewood*, 343 NLRB 141 (2004), vacated in part 345 NLRB 1050 (2005), reversed and remanded sub. nom. *Jochims v. NLRB*, 480 F.3d 1161 (D.C. Cir. 2007), in which the Board held a nursing home's rule prohibiting job abandonment was lawful because of the employees' responsibility to provide care to sick or infirm elderly patients. The Respondent argues *Wilshire at Lakewood* applies here because it has an equally important responsibility for ensuring that its gaming area is secure and protected against potential theft or loss. I reject this argument. Even if protecting against potential theft or loss was a legitimate and substantial business interest for a rule that could reasonably chill Section 7 activity, GRC 6, like most of the rules at issue, applies to all employees, not just those involved in gaming or cash handling. As such, I find the rule is not narrowly tailored and, therefore, violates Section 8(a)(1).

GRC 7 prohibits "[o]ff-duty misconduct that adversely affects the Company, a guest, another Team Member, or affects a Team Member's ability to do their job, including violation of any federal, state, or local laws, or that in any way would potentially affect the Company's status as a gaming licensee." The General Counsel argues the rule could reasonably be interpreted as prohibiting or limiting Section 7 activity. Specifically, the rule fails to delimit what sort of activity is out-of-bounds because the clauses that follow are framed in the disjunctive. While the rule prohibits off-duty misconduct that violates any federal, state, or local laws, or off-duty misconduct that would potentially affect the Respondent's gaming license, it also broadly prohibits off-duty misconduct that adversely affects the Company. The latter is undefined and broad enough to encompass Section 7 activity, such as making negative or critical comments about the Company as part of a labor dispute.

The Respondent argues that the rule is necessary because all employees in gaming positions are required to have a gaming card from the Nevada Gaming Commission. If an employee were to commit a felony outside the workplace, it would create a serious problem for regulatory compliance. And the rule cannot solely prohibit violations of the law because other lawful conduct could violate Regulation 5.[42] While this may be true, the rule, as stated, applies to all employees, including those who are not gaming employees, and it is not limited to misconduct that could affect an employee's gaming card or the Respondent's license. A rule of that nature is far more narrowly tailored. That, however, is not the rule at issue. I, therefore, recommend finding that GRC 7 violates Section 8(a)(1).

[42] The Board and the Commission's authority to regulate gaming establishments and gaming employees is contained in Nevada Revised Statutes (NRS) Chapter 463 (Licensing and Control of Gaming). Sec. 463.0157(1) defines a "gaming employee" to include "any person connected directly with an operator of a slot route, the operator of a pari-mutuel system, the operator of an inter-casino linked system or a manufacturer, distributor or disseminator, or with the operation of a gaming establishment licensed to conduct any game, 16 or more slot machines, a race book, sports pool or pari-mutuel wagering …" It excludes "barbacks or bartenders whose duties do not involve gaming activities, cocktail servers or other persons engaged exclusively in preparing or serving food of beverages." NRS Sec. 463.0157(2).

GRC 8 prohibits "[u]sing abusive or profane language in the presence of, or directed toward, a supervisor, another Team Member, guest, customer, or any other person on Company property." The General Counsel argues that the rule is overbroad regarding language directed at supervisors because it could reasonably be read to prevent protected activity which becomes heated and includes negative remarks, harsh criticism, or profanity. Moreover, it is overbroad as applied to other team members. Profanity and hard language are not essential to protected activity, but they are often incidental to it. The Respondent's failure to tailor GRC 8 to this fact results in an overbroad rule.

The Respondent counters the rule is necessary to prevent harassment and inappropriate conduct in accordance with Regulation 5, which requires that licensees maintain a rule for appropriate guest services and prohibits unlawful harassment. The Respondent again cites *Copper River*, in which the Board upheld finding that the employer acted lawfully when it disciplined an employee who said "fuck" to the employer in the presence of employees and guests. The issue, however, is that GRC 8 is not limited to abusive or profane language in the presence of guests; it applies to the use of such language in the presence of anyone on the property, which would include one-on-one conversations between an employee and a supervisor over matters related to collective bargaining, grievances, or other concerns affecting employees' terms and conditions of employment. As such, I recommend finding that GRC 8 is not narrowly tailored and, therefore, violates Section 8(a)(1).

GRC 9 prohibits "[m]aking a knowingly false, fraudulent, or defamatory statement to or about another Team Member, guest, visitor, vendor, the Company, or any of its facilities." The General Counsel argues, without citation to authority, that the rule is overbroad because it could reasonably be read to prohibit false but not maliciously false statements about the Company or its facilities during a labor dispute. The General Counsel is correct that the Board has drawn a distinction between rules prohibiting false statements (unlawful) and maliciously false statements (lawful). In defining what is maliciously false, the Board has held it is made with knowledge of the statement's falsity or with reckless disregard as to the statement's truth. See, e.g., *TNT Logistics North America, Inc*., 347 NLRB 568, 569 (2006), revd. on other grounds sub nom. *Joliff v. NLRB*, 513 F.3d 600 (6th Cir. 2008). GRC 9 only prohibits *knowingly* false, fraudulent or defamatory statements, which falls within the lawful prohibitions I, therefore, conclude the General Counsel failed to meet its burden regarding GRC 9.

Finally, GRC 23 prohibits "[e]ngaging in inappropriate, immoral, or illegal behavior at work or while on Company business. The General Counsel argues the rule is overly broad because the term "inappropriate" is undefined and could reasonably be interpreted to apply to Section 7 activity. I agree. The Respondent again cites its obligations under Regulation 5, and the need to have policies prohibiting behavior that could jeopardize its gaming license. While Regulation 5's proscriptions include immoral or illegal conduct, it does not include conduct that is merely inappropriate. As a result, I conclude the Respondent has failed to establish a substantial and legitimate business interest that could not be served without inclusion of the term "inappropriate." I, therefore, conclude GRC 23 is not narrowly tailored and violates Section 8(a)(1).

B. Alleged Threats and Other Unlawful Statements

Paragraphs 5(c), (f), (g), (j), (k), and (l) of the Consolidated Complaint allege that the Respondent, through named supervisors and agents, violated Section 8(a)(1) when they made threats

or other unlawful statements, and promulgated overly broad rules, because employees were engaging in protected concerted activities. The Board's standard for analyzing a statement alleged to violate Section 8(a)(1) is whether it has a reasonable tendency to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights, regardless of the employer's intent. *KSM Industries, Inc*., 336 NLRB 133, 133 (2001). The Board considers the totality of the circumstances surrounding the statement from the viewpoint of its impact on an employee's exercise of their rights under the Act. Id. See also *American Tissue Corp*., 336 NLRB 435, 441-442 (2001). Whether the employee changes their behavior in response to the statement is not dispositive, nor is the employee's subjective interpretation of the statement. See *Boar's Head Provisions Co*., 370 NLRB No. 124, slip op. at 16 (2021); *Sunnyside Home Care Project*, 308 NLRB 346, 346 fn. 1 (1992).

Paragraph 5(c) of the Consolidated Complaint alleges that on February 5, 2022, Michael Gray, at the Respondent's facility, violated Section 8(a)(1) by: characterizing its employees' protected concerted activities as causing problems; directing its employees to stop asking questions in response to their protected concerted activities; directing its employees to stop bringing up concerns in response to their protected concerted activities; and directing its employees to worry only about themselves in response to their protected concerted activities. This allegedly occurred during the meeting in Donato's office between O'Connor, Donato, D'Errico, and Gray, which Donato held to follow up with O'Connor about the concerns he raised about the implementation of the rotation system.

O'Connor testified Gray made these statements to him during this meeting, and Gray denied doing so. I credit Gray over O'Connor. As stated, in general, I did not find O'Connor to be a credible witness, and I do not credit his testimony about these alleged statements because they are self-serving, unsupported, and contextually inconsistent. Although Gray's email to his superiors 2 days earlier contains several criticisms about O'Connor, those criticisms are not consistent with the above statements. Specifically, in the email, Gray indicated that O'Connor and the other senior bartenders were upset with the change to a rotation system not because it was unfair but because they benefited financially by keeping the seniority-based system. In other words, they were acting out of self-interest. Yet, according to O'Connor, Gray did not chastise him during the meeting for being selfish. He did the exact opposite, by allegedly telling O'Connor that he needed to "just worry about yourself" and to "just do you." Such contradictory sentiments, in my view, cannot be reconciled, particularly considering they occurred about 2 days apart.

Additionally, O'Connor's testimony is entirely inconsistent with the purpose of the February 5 meeting, which, as stated, was to respond to the concerns and accusations O'Connor made about the new rotation system. I find it highly improbable that during such a meeting, Gray would have, in the presence of his superiors, openly chastised O'Connor for raising those concerns, particularly when O'Connor was accusing Gray of acting inappropriately in the handling of the rotation.

Finally, O'Connor testified that Gray appeared angry and exhibited hostility toward him for raising concerns about the rotation system. Yet, according to O'Connor, Gray ended the meeting by expressing a willingness to modify the rotation system "to make it better." Furthermore, two days later, when O'Connor emailed Gray asking to meet to see the revised rotation, Gray did not respond with hostility. He informed O'Connor that once the revisions were approved by his superiors, he would let O'Connor know when a good time for would be the two of them to meet.

Based on the foregoing, I do not credit O'Connor's testimony that Gray made the alleged statements or impliedly threatened O'Connor with unspecified consequences during this meeting for raising concerns about the rotation system. As there is no other evidence to support the allegations, I recommend dismissing them.

Paragraph 5(f) of the Consolidated Complaint alleges that on about February 10, 2022, Gray, at the Respondent's facility, violated Section 8(a)(1) by characterizing its employees' protected concerted activities as being down Gray's throat, which the General Counsel alleges is a threat to employees of unspecified reprisals for engaging in protected concerted activities. This alleged statement/threat occurred during the exchange between O'Connor, Chavez, and Gray on about February 8, when O'Connor and Chavez went to Gray's office asking to see the revised rotation system.

As outlined above, O'Connor, Chavez, and Gray offered conflicting testimony about what Gray said during this meeting. Chavez testified Gray told them, "You guys have been hounding me for weeks over this rotation. I'm working on it. I am just waiting on getting things approved by [Cahow]." O'Connor testified that Gray told them the revisions had not been completed yet, and then commented, "You guys always seem to be stirring up the pot and making issues." Gray, in contrast, testified he told them he didn't have time to talk with them because he was busy. He stated the revision process was still in motion, and then they would be going to his superiors for their review. I credit Gray over Chavez and O'Connor, because his testimony is logical and entirely consistent with the email he sent to O'Connor earlier that same day about reviewing the revisions to the rotation system.

Additionally, even if I were to credit that Gray characterized their inquiries about the rotation system as "hounding" him or "stirring up the pot," I do not find under the circumstances that the statement would reasonably be viewed as an implied threat of unspecified reprisals. As stated, the surrounding circumstances were that earlier that day Gray emailed O'Connor that he was willing to meet with him once the revisions were completed and approved. According to Chavez, Gray essentially reiterated this during their meeting when he told them that he was "working on" the revisions and was "just waiting" on Cahow.[43] As such, I recommend dismissing this allegation.

Paragraph 5(g) of the Consolidated Complaint alleges that on about February 16, 2022, Gray, at the Respondent's facility, violated Section 8(a)(1) by saying he would find something to get an employee in trouble and by threatening employees with unspecified reprisals for engaging in protected concerted activities. This statement/threat allegedly occurred after O'Connor told another employee that he hoped he would not get in trouble for raising the popcorn not being delivered to the Theater with Gray, to which Gray allegedly responded to O'Connor, "Don't worry. If it is not for this, I'll find something else."

Although Gray was not asked about this statement during his testimony, he was asked about it during the TMR investigation surrounding O'Connor's discharge, and he denied it. I credit that denial.

[43] Although Gray requested that O'Connor be disciplined for repeatedly disrupting his workday with unscheduled visits about the rotation system, O'Connor and Chavez were not aware of those requests, and, therefore, the requests could not have influenced their interpretation of what Gray was saying to them.

Part of the reason, in addition to my general discrediting of O'Connor, is that the alleged statement occurred at around the same time Gray and Fincken had emailed upper management requesting that O'Connor be disciplined for continuing to come to the Theater outside of his normal work time, for making repeated, unscheduled visits to the Theater managers' offices while Gray and/or Fincken were working, for repeatedly disrupting their work, and for making false accusations regarding how they were implementing the rotation system. It is inexplicable to me that Gray would tell O'Connor that he would "find" a reason to discipline him when, in Gray's mind, he and Fincken had just given upper management multiple reasons for why they believed O'Connor should be disciplined. Consequently, I do not credit O'Connor's unsupported testimony. I, therefore, recommend dismissing this allegation.

Paragraph 5(j) of the Consolidated Complaint alleges that on about April 29, 2022, Steve Almaraz, at the Respondent's facility, violated Section 8(a)(1) by characterizing employees' union and protected concerted activities as causing clouded judgment and suggesting they were the reason employees were being sent home early, and that he threatened employees with unspecified reprisals for engaging in union and protected concerted activities. This statement/threat allegedly occurred during Almaraz's exchange with Satake in the Main Kitchen. Satake testified he complained to Almaraz about certain things happening in the kitchen, and about how Almaraz refused to change his schedule when he had granted similar changes for other cooks. Almaraz responded by telling Satake that if he did not want to work in the Famous Foods production room, that was up to him. And Satake told Almaraz that if he was going to continue running things the way he was, then he did not want to be working there. At this around this point in the conversation, Almaraz allegedly told Satake, "Go home early today and enjoy the weekend, clear your mind. I see, you're under a lot of stress. I think that this Union stuff is getting to you, getting in your head." Almaraz denied making this statement.

I credit Almaraz over Satake regarding this conversation. The primary reason is that there is no context for Almaraz's alleged statement about Satake's role in the Union. Both testified that Satake was complaining to Almaraz, including about his schedule and Almaraz's alleged unwillingness to change it. And they discussed what Satake could do if he was unhappy in the Famous Foods production room. There had been no mention of the Union. Additionally, Almaraz stopped working for the Respondent about 2 years prior to testifying, and there is no evidence suggesting he would provide false testimony to protect his former employer. As a result, I recommend dismissing this allegation.

Paragraph 5(k) of the Consolidated Complaint alleges that on about May 13, 2022, Nichole Webb, violated Section 8(a)(1) when she: (1) at the Respondent's facility, promulgated an overly-broad and discriminatory rule or directive requiring that communication about work be respectful and professional; (2) at the Respondent's facility, promulgated an overly-broad and discriminatory rule or directive requiring that workplace issues be brought to management or labor relations, if employees cannot raise such issues in a respectful manner; (3) in a written coaching, promulgated an overly-broad and discriminatory rule or directive requiring its employees to approach all problems and issues in a professional and respectful manner; (4) in a written coaching, promulgated an overly-broad and discriminatory rule or directive requiring that problems and issues be addressed privately and not disrupt business and productivity; and (5) in a written coaching, promulgated an overly-broad and discriminatory rule or directive requiring that its employees escalate all concerns to management if they were unable to resolve these matters on their own. These allegations arise out of the due process

meeting Webb had with Satake following his verbal altercation with Leon Leonetti. Webb presented Satake, both orally and a few days later in writing, with a "plan for improvement" that stated:

> Brian was reminded to approach all problems and issues in a professional and respectful manner. These matters should be addressed privately and are not to disrupt business or productivity. Brian should escalate all concerns to management if he is unable to resolve these matters on his own. Further violations will result in coaching up to and including separation.

The General Counsel alleges this instruction is broader than the unlawful language in GRC 1, discussed above, which prohibits rude, discourteous, and unprofessional behavior, because it requires that Satake approach all problems in a "respectful" and "professional" manner. By requiring (and prohibiting) additional conduct beyond that required by the GRC, the General Counsel argues that the Respondent promulgated a new rule or directive that would reasonably tend to restrict or limit employees from engaging in Section 7 activity. The General Counsel further argues the instruction is unlawful because it requires Satake to address matters privately and not disrupt business and productivity. The contention being that a reasonable employee could interpret this directive to prevent public disagreements or displays of protest over terms and conditions of employment. It also is overbroad because it is not limited to working time or to the employer's facility. Additionally, it requires Satake to bring issues with coworkers to management if he cannot resolve issues on his own, which could be read as requiring him to escalate an issue to management whenever a resolution to a disagreement between coworkers is not achieved privately. A disagreement between two coworkers concerning a term or condition of employment can constitute protected concerted activity, which employees have a right to engage in without management's knowledge. By requiring Satake to report any failed attempt between employees to address a disagreement over working conditions, this directive could reasonably be read to require reporting Section 7 activity to management.

The Respondent again counters that the instructions were necessary to comply with its obligations to maintain and enforce certain rules regulating employee workplace conduct to comply with the Nevada Gaming Regulations. It further argues the GRCs and the instructions given to Satake were narrowly tailored to comply with those regulatory obligations.

In general, a statement made to a single employee does not constitute a rule or the promulgation of a rule. *Shamrock Foods Co*., 369 NLRB No. 5, slip op. at 4 (2020); *Costco Wholesale Corp*., 366 NLRB No. 9, slip op. at 1 fn. 3 (2018). The exception would be if the statement is part of a consistent course of action in which the employee could reasonably construe the statement as establishing a new work rule that would be more broadly applicable to all employees. *Renew Home Health*, 371 NLRB No. 165, slip op. at 1 fn. 2 (2022); *St. Mary's Hospital of Blue Springs*, 346 NLRB 776, 777 (2006). I do not find the instruction at issue is part of a consistent course of action or that it could reasonably be construed as applying to all employees. The course of action, if any, would be the maintenance of the unlawful GRCs, which were implemented when the property first opened in June 2021. The instruction given to Satake was nearly a year later, and it was in direct response to Satake's confrontation with Leonetti. Under these circumstances, I do not find Webb's oral or written instruction regarding how Satake should respond in the future constitutes the promulgation of a rule applicable to all employees.

That being said, I find the instruction as it applies to Satake to be unlawfully overbroad. The discipline of Satake for his behavior toward Leonetti was warranted, as was an instruction that he refrain from such behavior moving forward. However, Webb's instruction went well beyond that, and, for the reasons set forth by the General Counsel, imposed overly broad restrictions and obligations on Satake that would reasonably tend to chill his Section 7 activity. I, therefore, recommend finding Webb instructions to Satake relating to his course of conduct moving forward violated Section 8(a)(1).

Finally, Paragraph 5(l) of the Consolidated Complaint alleges that on about August 17, 2022, Almaraz, in a final written coaching, violated Section 8(a)(1) by threatening employees with unspecified reprisals by characterizing employees' union and protected concerted activities as rude and discourteous. This allegation is based on the coaching Almaraz issued to Satake following his interactions with Fabian Brooks on June 14, 2022, when Satake told Brooks he should have another supervisor read and explain the statement Satake handed to him, and later when Satake told Brooks that rather than stand and watch Satake work, Brooks should go and find more peppers to cook. As stated, the coaching states Satake displayed rude and discourteous behavior toward a supervisor, in violation of the GRCs, and further infractions would result in coaching up to and including discharge.

The General Counsel alleges that by issuing the August 17 coaching Almaraz threatened Satake with discharge "for the way he invoked the contractual grievance procedure" on June 14. In support of this allegation, the General Counsel argues that because the coaching was a discriminatory action in violation of Section 8(a)(3), it also constitutes an independent violation of Section 8(a)(1) because it stated further infractions would result in discipline up to and including discharge, which is a statement that would reasonably tend to interfere with, restrain, or coerce Satake in exercise of his Section 7 rights. The General Counsel offers no other arguments for why the coaching violated Section 8(a)(1).

The Respondent contends the coaching was issued because of Satake's insulting suggestion that Brooks needed someone to read and explain the statement to him, and because Satake later told Brooks, his supervisor, that rather than watching him remake the garnish, he should go and find him more peppers. It was these specific statements, as explained by Thompson during the June 28 meeting, that the Respondent deemed rude and discourteous, not Satake invoking the grievance procedure by requesting a Step One meeting.

As explained below, I do not find the August 17 coaching to Satake for these statements violated Section 8(a)(3). As the General Counsel has not articulated another argument for why the coaching independently violated Section 8(a)(1), I recommend dismissing this allegation.

C. Alleged Discrimination, Retaliation, and Disparate Treatment

1. Overview

Paragraphs 5(d), (i), (m), (n) and 6(a)-(r) of the Consolidated Complaint allege that the Respondent took adverse actions against O'Connor, Chavez, and Satake because they engaged in statutorily protected activities. Section 8(a)(3) of the Act makes it an unfair labor practice for an employer, "by discrimination in regard to hire or tenure of employment or any term or condition of employment[,] to encourage or discourage membership in any labor organization." Section 8(a)(4) makes it an unfair labor practice for an employer "to discharge or otherwise discriminate against an

employee because he has filed charges or given testimony under this Act." Violations of Section 8(a)(3) or (4) are also derivative violations of Section 8(a)(1).

When assessing the lawfulness of an adverse action that turns on employer motivation, the Board applies the analytical framework set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved by *NLRB v. Transportation Management Corp*., 462 U.S. 393, 395 (1983). To prove a violation under *Wright Line*, the General Counsel must demonstrate, by a preponderance of the evidence, that the employee's protected or union activity was a substantial or motivating factor in the employer's adverse action against the employee. *SBM Site Services, LLC*, 367 NLRB No. 147, slip op. at 2 (2019). The General Counsel satisfies the initial burden by showing that: (1) the employee engaged in union or other protected activity, (2) the employer had knowledge of the activity, and (3) the employer had animus against union or other protected activity. Animus can be established through direct evidence or inferred from circumstantial evidence on the record. *Intertape Polymer Corp*, 372 NLRB No. 133, slip op. 6-7 (2023). Circumstantial evidence of discriminatory motive may include, among other factors: the timing of the action in relation to the union or protected conduct; contemporaneous unfair labor practices; shifting, false, or exaggerated reasons, offered for the action; failure to conduct a meaningful investigation; departures from past practices; and/or disparate treatment of the employee. Id.

If the General Counsel meets their burden, the burden of proof then shifts to the employer to demonstrate it would have acted the same had the statutorily protected activity not occurred. *Wright Line*, 251 NLRB at 1089. The employer cannot carry this burden merely by showing that it also had a legitimate reason for the action, but must persuade, by a preponderance of the evidence, that the adverse action would have taken place absent the protected concerted or union activity. *Northeast Center for Rehabilitation*, 372 NLRB No. 35, slip op. at 1-2 fn. 5 (2022), and cases cited therein. If the employer fails to meet this burden, a violation will be found because a causal relationship exists between the employee's protected activity and the employer's adverse action. *Intertape Polymer*, supra. The employer's burden also cannot be satisfied by proffered reasons that are pretextual, i.e., false reasons or reasons not in fact relied upon. Indeed, where the reason advanced by an employer for the adverse action either did not exist or was not actually relied on, the inference of unlawful motivation remains intact, and is in fact reinforced by the pretextual reason proffered by the employer. Id.

2. O'Connor

a. Closser Supervision, Suspension, and Discharge

Paragraphs 6(a)-(c) of the Consolidated Complaint allege that the Respondent violated Section 8(a)(1) and (3) of the Act when it more closely supervised, suspended, and discharged O'Connor because he engaged in protected concerted and/or union activities. Paragraph 5(i) of the Consolidated Complaint alleges that on about February 22, 2022, the Respondent violated Section 8(a)(1) when it discriminatorily began enforcing a new policy, or selectively and disparately enforced a previously unenforced policy, regarding employee consumption of Red Bull drinks, guest comping drinks for employees, and comping drinks for guests with flashing red lights, by only applying it against employees who engaged in protected concerted activities.

In applying the *Wright Line* framework, I find the General Counsel has established that O'Connor was engaged in known protected concerted activities from about December 27, 2021, through his discharge, when he raised and requested action on collective concerns related to the change

to and implementation of the rotation-based assignment system in the Theater. He also was known as a Union supporter who attended meetings related to bargaining.

As for animus, the General Counsel cites Gray's internal emails, as well as his alleged statements to O'Connor discussed above. Although I do not credit that Gray made the alleged statements, I find he sent the February 3 and 16, 2022 internal emails, which show Gray's direct hostility toward O'Connor for raising the collective concerns. As the General Counsel points out, those emails contain Gray's views that O'Connor's claims of favoritism in the department were an unappreciated attack on Gray's character. Gray characterized O'Connor's questioning of the schedule as "insubordination," and he stated that less senior bartenders were "brought down" by the "negativity" of the senior bartenders, like O'Connor, complaining about the change to a rotation system. Gray requested that O'Connor's behavior be "addressed." In one of the February 16 emails, Gray reported that O'Connor was calling him and coming to his office, without an appointment, asking about the revisions to the rotation system, and Gray stated he believed O'Connor should be disciplined. However, as noted, TMR and upper-level managers in the Beverage Department declined to discipline O'Connor for the complained-of conduct.

In addition to Gray's emails, the General Counsel cites the timing of the adverse actions, as well as the evidence of disparate treatment regarding the Respondent's enforcement of its policies, as circumstantial evidence of animus. As for the timing, the General Counsel points to the overlap between O'Connor's protected activity in late January and early February 2022, Gray's emails, and the Surveillance Department's review. As for disparate treatment, the General Counsel points to the busser from the Kitchen Department who was not disciplined after he drank cranberry juice from a bottle in the kitchen dish pit, despite him being on a final written warning, as evidence the Respondent was more lenient on employees who did not engage in protected activities.

The Respondent denies it discriminated against O'Connor because of his protected activities, and it argues the General Counsel failed to establish the necessary causal nexus for any of the adverse actions. Regarding the allegation that it more closely supervised O'Connor, the Respondent points out that its Surveillance Department operates independently from TMR and the other departments to ensure they make neutral observations and reports, and there was no evidence that Lindsay Devers or anyone else in the Surveillance Department knew about O'Connor's protected activities at the time they were reviewing and reporting on his transactions. The Surveillance Department conducts periodic audits of all employees, and it investigates suspicious behavior, which is why it reviewed POS transactions at the High Limit Bar. There is no evidence that anyone from TMR or any other department asked anyone in the Surveillance Department to monitor O'Connor or Chavez or to review their transactions.

Regarding O'Connor's suspension and discharge, the Respondent argues that even if the General Counsel had met its burden, and the burden shifted, it has established it would have taken the same actions in the absence of his protected activities. Specifically, it cites the examples of others it has discharged. It cites specifically to the cocktail server it discharged for taking and drinking unopened cans of juice from one of the refrigerators, despite having no prior discipline. It also cites the bartenders it discharged because they failed to ring up, voided, or failed to collect payment for products given to guests in exchange for cash.

As for the busser, the Respondent contends he is not comparable. The Respondent decided not to discipline him, despite his prior discipline, because it could not establish that he was aware of the Beverage Consumption Policy at the time, and the juice he consumed was in an opened container, in the dish pit, that was going to be discarded. O'Connor opened and consumed multiple cans of Red Bull intended for guests.

Based on my review, I find the General Counsel met its initial burden of establishing a prima facie case of discrimination related to O'Connor's protected concerted activity. He engaged in protected activity when he raised collective concerns with management about the change to and implementation of the rotation-based system for assigning bars in the Theater. This activity was known by those in the Beverage Department and TMR, and the emails Gray and Fincken sent establish that the activity was viewed, at least by them, with hostility and animus. That being said, I also find the Respondent has established it would have taken the adverse actions at issue in the absence of O'Connor's protected activities. The Respondent suspended and later discharged O'Connor for theft and for concealing his theft by falsely entering the items as comps given to guests. As noted, the Respondent has discharged others for theft, including other bartenders and a cocktail server. The busser is not, in my view, a comparable, or evidence of disparate treatment. As noted, the item he consumed was going to be discarded, as opposed to product available for sale. More significantly, unlike O'Connor, the busser did not attempt to conceal his conduct. For these reasons, I recommend dismissing the allegations that the actions taken against O'Connor violated Section 8(a)(1) or (3). [44]

b. Discriminatory Enforcement of Policies

The General Counsel next alleges the Respondent discriminatorily enforced new or existing policies against O'Connor because of his protected activities. First, the General Counsel points to the policy regarding employee consumption of Red Bull, and its application to O'Connor. They argue the Respondent's revised policy dated January 27, 2022, which prohibits drinking Red Bull, was not published to Beekeeper by Cahow until February 27, 2022, after O'Connor was under investigation for the consumption of Red Bull. The timing of the Respondent's publication of this revised policy in relation to O'Connor's activities suggests that it was intended to prohibit what O'Connor had done *ex post facto*. This inference is strengthened by the fact that the policy appears to be backdated to the day before O'Connor was first observed drinking a Red Bull. Additionally, this rule was promulgated by Cahow, who had first-hand knowledge of O'Connor's protected activities and knew how frustrated Gray and Fincken had become with O'Connor because of those activities.

The Respondent argues the revised policy and its timing are irrelevant because O'Connor was suspended and later discharged under the original policy, which he acknowledged during his due process meeting only allowed him to consume coffee, tea, water, and soft drinks from the gun. The Respondent further argues it has consistently enforced the policy to discharge employees who take and

[44] I do not find the General Counsel has established a prima facie case of discrimination related to O'Connor's union activity. O'Connor attended a few meetings related to bargaining, and Heather Thompson saw him at one. The General Counsel, however, failed to present any direct or circumstantial evidence establishing animus or hostility for that activity. Regardless, even if they had, I conclude the Respondent would have taken the same adverse actions at issue.

consume (or allow others to consume) products that are for sale, without payment or a manager's authorization.

I credit and agree with Heather Thompson that O'Connor "absolutely knew" he was not permitted to consume a can of Red Bull without payment or a manager's authorization. He had over 10 years of bartending experience, including at several Las Vegas casinos. If he truly believed that a can of Red Bull, which the Respondent sells for $8, qualified as a "soft drink" employees could consume for free, there would be no reason for him to enter it into the POS system, and there certainly would be no reason for him to enter it as a table or slot comp. The logical conclusion, which is the one Thompson made, is that O'Connor took these steps to conceal what he was doing. As stated above, the Respondent has discharged other employees for theft or for fraud. Here, there appears to be evidence of both. I, therefore, recommend dismissing this allegation.

Second, the General Counsel points to the policy against guests comping drinks for employees, and its application to O'Connor. GRC 29 prohibits employees from using complimentary tickets, goods, or services given to or intended for guests without a manager's authorization. The General Counsel argues that while this rule applies, there is no record of its application prior to O'Connor engaging in his protected concerted activities. This argument presumes that guests used their comps "to buy" O'Connor the Red Bulls he consumed. During his due process meeting, O'Connor could not identify which, if any, of the guest(s) used their comp(s) to buy him the Red Bull(s). The same is true of when he testified at the hearing. He could not clearly identify which guests allegedly comped him with the Red Bulls. At the due process meeting, he identified the guest who ordered the Michelob Ultra on January 28, as the one who comped him the Red Bull. At the hearing, he changed his story and said it was Chavez. Later, O'Connor asserted that it did not matter whether a guest comped him the drink, because he could take a can of Red Bull whenever he wanted, just as long as it was entered into the POS. However, Chavez refuted that, stating that managerial approval was necessary. There is no dispute that O'Connor did not obtain a manager's approval for the Red Bulls he consumed on the dates at issue. I, therefore, recommend dismissing this allegation.

Third, the General Counsel points to the Ardent Progressive Systems and Games Policy and continuing to comp guests playing slots when there are flashing red lights, and its application to O'Connor. They argue the record does not reflect past instances of the Respondent using the flashing red lights to discipline its bartenders until the Respondent used it as a tool to punish O'Connor and Chavez. The Policy states that when the lights are flashing red, the bartender is to use their discretion in whether to give the guest one last complementary drink, and that was what O'Connor did when he served Chavez the additional comped drinks. The Respondent defends that it did not discipline or discharge O'Connor because he violated the Ardent Progressive Systems and Games Policy. It suspended O'Connor to investigate whether he had violated the Policy and had given Chavez comped drinks that he had not earned. The Respondent concluded that he had not violated that Policy. The discharge letter only addresses O'Connor's theft of the Red Bulls and his concealment of that theft by falsifying their POS entries as comps. I, therefore, recommend dismissing this allegation as it relates to O'Connor.

3. Chavez

Paragraphs 5(d), (i), (m), and (n) of the Consolidated Complaint allege the Respondent disciplined, suspended, and discharged Chavez because he engaged in protected concerted activities, in violation of Section 8(a)(1).

a. Verbal Coaching

Paragraph 5(d) alleges Fincken "disciplined" and suspended Chavez on about February 5, 2022, for failing to use a jigger when mixing drinks.[45] The exchange occurred on about February 8, 2022, and there was no suspension. As stated, Fincken called Chavez into her office about not using a jigger, and she gave him a document to sign, which he signed. This document was not presented at hearing, and Chavez could not recall what it said, other than he had never seen a form like it before. Chavez testified that Fincken described it as a "verbal coaching." It is not clear whether the coaching was the document, their verbal exchange, or both. Fincken was not questioned about this exchange with Chavez, or the document. Cahow, however, testified that managers were to coach bartenders continuously whenever they were seen not using a jigger.

Before analyzing this allegation under *Wright Line*, I first must determine whether this constituted "discipline." The Board has held that verbal warnings, coachings, and reprimands are forms of discipline if they are part of a disciplinary process (e.g., a progressive disciplinary system) and lay a foundation for future disciplinary action against the employee. See *Alter Care of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 565-566 (2010); *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), enfd. in pertinent part 206 Fed.Appx. 405 (6th Cir. 2006), cert. denied 549 U.S. 1338 (2007). Whether they lay a foundation for future discipline is based on whether the employer may consider it when deciding whether to impose discipline and/or what kind of discipline. *Promedica Health Systems*, 343 NLRB at 1351-1352. Although a warning, coaching, or reprimand is a form of discipline if it automatically leads to discipline in the event of a future infraction, an automatic link is not required. Instead, they may qualify as a form of discipline if they are taken into consideration in determining whether further discipline is warranted, even if the employer retains the discretion in making that decision. Id.

[45] In its Answer, the Respondent alleges as an affirmative defense that to the extent any allegations in the Consolidated Complaint involve events which occurred more than six months before the relevant charge was filed, such allegations are barred under Sec. 10(b) of the Act. Sec. 10(b) states that "no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of the charge with the Board and the service of a copy thereof upon the person against whom such charge is made . . ."

In its brief, the Respondent contends that Paragraph 5(d) should be dismissed as untimely. The Respondent notes that Chavez did not file his charge in Case 28-CA-320205 until May 30, 2023, which is ten months after the discipline at issue. While that is correct, I conclude that the allegation is timely because it is encompassed within the original charge O'Connor filed in Case 28-CA-293239 on March 29, 2022. That charge alleges, in relevant part, that within the past six months the Respondent "has retaliated against and discharged employees, *including but not limited to, Alex O'Connor, because they engaged in protected concerted activities*, and the union activities *by, among other things, raising complaints about wages, scheduling, and seniority*." (GC Exh. 1(a) (emphasis added). I conclude that the February 8 verbal coaching, which the General Counsel alleges was issued in response to, or in retaliation for, Chavez and O'Connor raising collective concerns about the rotation system in the Theater, falls within the scope of this charge. I, therefore, decline to find the allegation, which was fully litigated, was untimely.

In applying these factors, I conclude the General Counsel has failed to establish this "verbal coaching" Fincken gave Chavez amounted to discipline. Although the Respondent had a progressive disciplinary system, the details surrounding how it worked or was applied were not established, and there was no evidence presented on whether this "verbal coaching" laid a foundation for, or was taken into consideration in determining, future disciplinary action. The evidence indicates it was not.[46]

Even if Chavez was disciplined for failing to use the jigger, the General Counsel has failed to establish a prima facie case of discrimination under *Wright Line*. Chavez was engaged in known protected concerted activities prior to his exchange with Fincken about using the jigger. He spoke with O'Connor and other bartenders beginning in mid-December 2021 about the collective concerns over the change to the rotation-based system in the Theater. Also, on the same day Chavez met with Fincken, he accompanied O'Connor to Gray's office to ask to see the revisions to the rotation system.[47] The General Counsel, however, failed to present evidence of animus toward Chavez prior to or at this time. As stated, on February 3, 2022, Gray sent an email to his superiors about the concerns raised over the implementation of the rotation system. The email references "high seniority individuals complaining and bringing down the team and not supporting the process," but it focuses on O'Connor, and there is no mention of Chavez. Gray did not mention Chavez, by name, in his emails until February 16, 2022. Additionally, while Fincken recalled O'Connor coming to the Theater and raising issues about the rotation system, she did not recall Chavez doing the same. For these reasons, I find the evidence is insufficient to establish that the alleged "discipline" of Chavez on February 8 was discriminatorily motivated. I, therefore, recommend dismissing this allegation.

b. Discriminatory Enforcement of Policy

Paragraph 5(i) of the Consolidated Complaint alleges the Respondent violated Section 8(a)(1) on about February 22, 2022, when it discriminatorily enforced certain of its policies against employees because they engaged in protected concerted activities. The General Counsel specifically argues the Respondent discriminatorily enforced its policy regarding comping drinks under the Ardent Progressive Systems and Games Policy against Chavez. As stated, the Respondent suspended Chavez pending investigation into whether he violated the Policy by receiving additional comped drinks while at the bar playing slots when his lights were flashing red. The General Counsel alleges the suspension was unlawful because the Policy gives the bartender (O'Connor in this case) the discretion to give the guest (Chavez in this case) an additional comped drink when the guest's light is flashing red. The General Counsel specifically alleges the Respondent discriminated against Chavez because when it was determined that Chavez had not violated this Policy, it returned Chavez to work without backpay.

[46] The investigatory/disciplinary documents for Satake and O'Connor reference their prior disciplines with the last year. For Satake, in the documents relating to his confrontation with Leonetti in May 2022, it states he received a prior verbal coaching for rude and discourteous behavior toward a supervisor in November 2021. But they do not show, and the testimony does not establish, what, if any, effect that prior verbal coaching had, including on the subsequent decision to issue him the written warning for the confrontation with Leonetti.

When Chavez received his final written warning in early December 2022 for his job performance in failing to account for product given to customers in the Theater, there was no reference to this alleged "verbal coaching" for not using a jigger. The Respondent's records state he had "no active coaching." (R. Exh. 16).

[47] The General Counsel does not allege that Chavez's statement to Fincken that he could not wait for the Union to come in and fix the rotation amounted to protected concerted activity. Nor that her response to him was evidence of animus.

As stated, when the Respondent suspends an employee pending investigation and later concludes the employee has not violated a policy, the employee is returned to work with backpay for the shifts they missed during the suspension. Conversely, if the employee is found to have violated the policy and returned to work, they are not paid backpay for the time they missed while on suspension. The General Counsel contends the Respondent discriminated against Chavez because even though it returned him to work without discipline, it did not pay him backpay for the shifts he missed while on SPI.

Although Chavez was not disciplined, he also was not exonerated. As outlined, TMR representative Nicole Webb recommended not to discipline Chavez and to return him to work with backpay because of inconsistencies between the policy and what was observed on the video. Beverage director Donato, however, disagreed. She believed that Chavez knowingly pressed the reset button on the back of the machine, and that he should be brought back with written discipline (and no backpay). Webb pointed out that Chavez was already on a final written warning from October 2021 for improperly receiving comped drinks prior to actively gaming,[48] so she asked what they would be disciplining him for. The implication being that if they disciplined him again for improperly receiving comped drinks while on a final written warning for that same conduct, he would be discharged. In an apparent compromise, Webb returned Chavez to work without discipline, but also without backpay.

Under these circumstances, I do not find the Respondent's suspension of Chavez, or its decision to bring him back without backpay, was discriminatorily motivated. I find it had reason to suspect him of violating policy (again). And, as stated, the Beverage Department suspected he reset the machine, which would have resulted in discipline. Because TMR could not rule that out, it decided on the Solomonic course of action described. I, therefore, recommend dismissing this allegation.

c. Suspension and Final Written Warning

Paragraph 5(m) of the Consolidated Complaint alleges that the Respondent violated Section 8(a)(1) in about November 2022, when it suspended Chavez because he engaged in protected concerted activities. Although the Consolidated Complaint only alleges the suspension, both the suspension and the subsequent final written warning issued on December 5, 2022 were fully litigated at the hearing. The allegation stems from when the Respondent placed Chavez on SPI after the Surveillance Department observed him failing to properly charge or account for transactions at his bar in the Theater. Specifically, the evidence establishes that on November 16 and 19, 2022, Chavez failed to properly account for items that were comped, by not ringing in the correct items or totals. He also failed to collect payment and account for items that were served to multiple guests. Finally, on November 19, 2022, Chavez failed to account for a declined credit card transaction. These errors or omissions resulted in the Respondent suffering financial losses of about $84.

The General Counsel argues that in addition to the protected activity Chavez engaged in between December 2021 and February 2022, he engaged in protected activity in the months following O'Connor's discharge. He circulated a petition for seniority-based scheduling in the Theatre, and he

[48] In this correspondence between TMR and the Beverage Department regarding Chavez's prior discipline, there was no reference to a February 8 coaching for failing to use the jigger. That omission further supports my conclusion that Chavez was not "disciplined" for failing to use the jigger.

attended a meeting with Cahow on the matter in October 2022, during which he challenged Cahow's comparison of bartenders to cocktail servers when discussing the rotation system.

According to the General Counsel, Cahow exhibited hostility toward Chavez for these activities. Specifically, during the meeting Cahow allegedly gritted his teeth while acknowledging Chavez's point that bartenders were not the same as cocktail servers, and shortly after that meeting when Cahow allegedly stood and stared at Chavez while he was getting his bar ready.[49] I do not credit that Cahow engaged in this conduct. I also do not find the General Counsel demonstrated animus toward Chavez's protected concerted activity of continuing to pursue seniority-based scheduling in the Theater. Cahow was aware that certain of the senior bartenders, including Chavez, continued to be upset with the change to the rotation system. Cahow, in response, agreed to meet with them and explain why the Theater had moved to a rotation system and how it worked. During that explanation, Cahow also informed the employees that management had negotiated with the Union over the matter, and they reached an agreement allowing it to continue using the rotation system in the Theater.

The General Counsel next argues animus should be inferred from the timing of the SPI and final written warning, which occurred about a month or so after the October 2022 meeting. Although, as stated, animus may be inferred from the close timing between protected activity and the adverse action, that inference may be overcome when there is an intervening event that justifies the adverse action. See *Lou's Transport Inc*., 361 NLRB 1446, 1458 (2014), enfd. 644 Fed. Appx. 690 (6th Cir. 2016); *Dallas & Mavis Specialized Carrier Co*., 346 NLRB 253 (2006). Here, that intervening event is the discovery that Chavez, through his negligence, was failing to account for or giving away products, resulting in financial loss to the Respondent.

The General Counsel argues that the Respondent has not met its burden of showing that it would have disciplined Chavez absent his protected concerted activity. According to the General Counsel, the Respondent's comparator disciplines are readily distinguishable because they involved an aspect of monetary gain on the part of the employee, which is absent in Chavez's case. I agree that the comparables the Respondent presented are distinguishable because they involved theft or other intentional acts for financial gain, which is why they were all discharged. Here, the Respondent determined that Chavez had not engaged in theft or an intentional act for his financial gain, which is why he was not discharged, and, instead, placed on a final written warning.

Based upon my review of the evidence and arguments, I find that the General Counsel has failed to establish that the suspension and discipline regarding these November 2022 incidents were discriminatorily motivated. I, therefore, recommend dismissing this allegation.

d. Discharge

Paragraph 5(n) of the Consolidated Complaint alleges that in about January 2023, the Respondent violated Section 8(a)(1) when it suspended and discharged Chavez because he engaged in

[49] The General Counsel also cites, as evidence of animus, to Gray's email statements in February 2022, for which Cahow was aware, and to TMR's decision to return Chavez from SPI without backpay later that month. As discussed, I do not find the emails or the decision not to pay backpay is evidence of animus.

protected concerted activity. Chavez was suspended pending investigation after the Surveillance Department again believed he failed to account for and collect payment for items he prepared and sold to a guest. The guest ordered 2 drinks, each with a full can of Red Bull. Chavez prepared the drinks, did not ring up the cans of Red Bull, and fist-bumped the guest as he left with the drinks. The conduct resulted in a financial loss of $16. He was observed correctly ringing up the Red Bulls in two other transactions that same shift. Following the investigation, the Respondent discharged him based on the fact he was on a final written warning for the same conduct.

The General Counsel raises the same arguments regarding Chavez's suspension and discharge as it did regarding his suspension and final written warning that he received about 2 months earlier. For the same reasons, I reject those arguments and find the General Counsel has failed to meet its burden, particularly regarding animus. Chavez does not dispute that he engaged in the underlying conduct, and he clearly was aware that he was on a final written warning at the time that stated any further violation of policy could result in discharge. I, therefore, recommend dismissing this allegation.

4. Satake

a. Removal from Famous Foods Production Room

Paragraphs 6(d) and (e) of the Consolidated Complaint allege that on April 29, 2022, the Respondent violated Section 8(a)(1) and (3) when it removed Brian Satake from working in the Famous Foods production room and sent him home from work because he joined and assisted the Union and engaged in concerted activities.

These allegations arise from the conversation Satake had with assistant executive chef Steve Almaraz. According to Satake, he was upset about certain things happening in the kitchen, including how soup broth was being made. He also complained that Almaraz had not allowed hm to change his schedule. Almaraz told Satake that if he did not want to work in the Famous Foods production room, that was up to him. And Satake told Almaraz that if he was going to continue running things the way he was, then he did not want to be working there. Satake contends, and Almaraz denies, that Almaraz then said, "Go home early today and enjoy the weekend, clear your mind. I see, you're under a lot of stress. I think that this Union stuff is getting to you, getting in your head."

The General Counsel alleges that Almaraz sent Satake home and reassigned him to the Main Kitchen because of Satake's role or activities with the Union. They argue that an employer may not discriminate against an employee due to their union activities, including by providing better terms and conditions, and that it was immaterial whether Satake asked to be reassigned if the reassignment was granted due to his union activities. The General Counsel relies exclusively on Almaraz's alleged statement that when he told Satake that he should go home early and enjoy the weekend it was because Almaraz believed "the Union stuff" was going to Satake's head. As discussed above, I do not credit that Almaraz made this comment.

The General Counsel further argues the Respondent has made no showing that it would have reassigned Satake absent his Union activity. The evidence surrounding Satake's reassignment, including who initiated it, when, and why, was limited and vague. Both Satake and Almaraz confirmed that Almaraz gave Satake the choice of whether he wanted to remain in the Famous Foods production room, and Satake was then reassigned. It is unclear whether Satake wanted the reassignment, because

he informed Almaraz that if he was going to continue to run the production room the way he was, Satake did not want to continue working there. There was no evidence presented that Satake's unhappiness with working in the production room had anything to do with the response to his Union activities. As far as going home, Satake testified he declined Almaraz's "offer" and continued working the remainder of his shift.

Based on the evidence, I find the General Counsel has failed to establish that the Respondent discriminated against Satake by sending him home early and/or "reassigning" him because of his protected concerted or union activities. I, therefore, recommend dismissing these allegations.

b. Suspension and Written Coaching (Leonetti)

Paragraphs 6(f) and (g) of the Consolidated Complaint allege that the Respondent violated Section 8(a)(1) and (3) on about May 8, 2022, when it suspended Satake, and on about May 13, 2022, when it issued Satake a written coaching, because of his union activities. These allegations arise from the verbal confrontation between Satake and Leon Leonetti after Leonetti questioned why Satake was putting his toolbox in the Famous Foods production room when he no longer worked there.

The General Counsel contends Satake was involved in protected activity on May 5, 2022, when he confronted Leonetti. They contend the ability of cooks to place their tools on the table in the Famous Foods production room is a term and condition of employment, and Satake engaged in protected concerted activity when he told Alexis Cortes that he was upset Leonetti had put his tools on Satake's toolbox. Cortes engaged in protected activity with Satake by providing more context to the dispute, explaining that Leonetti complained about Satake's continued use of the space after he no longer worked in that area. According to the General Counsel, Cortes' conversation with Leonetti was itself protected concerted activity, revealing the difference in opinion between Leonetti and Satake about Satake using the table to store his toolbox. Satake seeking to speak to Leonetti was therefore the logical outgrowth of Cortes sharing this difference of opinion between the two about a term and condition of employment in the kitchen.

The General Counsel further contends the Respondent violated the Act when it suspended and later issued a written coaching to Satake for his confrontation with Leonetti because Satake's conduct during the confrontation was not so opprobrious as to lose the protection of the Act. The outburst did happen on the production floor, but the nature of the outburst was not severe given the lack of any threats and the fact that profanity is not uncommon in the Respondent's kitchen. Additionally, the dispute between Satake and Leonetti arose out of Satake's unlawful removal from the Famous Foods production room and was therefore caused by the Respondent's unfair labor practices. Finally, the General Counsel points out that Satake's conduct while confronting Leonetti was the basis of his discipline. Therefore, the Respondent displayed animus towards Satake's protected activity and cannot show it would have disciplined him absent his protected conduct.

I reject these arguments. I find Satake was not engaged in any kind of protected conduct surrounding his confrontation with Leonetti. This was a purely personal conflict between two employees over a perceived slight. Satake went looking for Leonetti to confront him. He got directly in Leonetti's face, yelled at him, and directed profanity at him. Leonetti went to find a supervisor, which was the correct course of action under the circumstances, but Satake continued his verbal assault.

The General Counsel also argues that a violation should be found because the Respondent applied GRC 1, an overbroad rule that prohibits "rude, discourteous, or unprofessional" behavior, to

discipline Satake for his behavior toward Leonetti. Discipline imposed pursuant to an unlawfully overbroad rule violates the Act in those situations in which an employee violated the rule by (1) engaging in protected conduct or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act. *Continental Group, Inc*., 357 NLRB 409, 411-416 (2011); *Double Eagle Hotel & Casino*, 341 NLRB 112, 112 fn. 3 (2004). An employer can avoid liability for discipline imposed pursuant to an overbroad rule if it can establish the employee's conduct interfered with the employee's own work or that of other employees, or otherwise actually interfered with the employer's operations, and that the interference, rather than the violation of the rule, was the reason for the discipline. The employer bears the burden of asserting this affirmative defense and establishing that the employee's interference with production was the actual reason for the discipline. That burden only can be met when an employer demonstrates it contemporaneously cited the employee's interference with production as a reason for the discipline, not simply the violation of the rule.

As stated, I do not find Satake was engaged in protected concerted activity when he confronted Leonetti. Nor do I find he was otherwise engaged in conduct that implicated concerns underlying Section 7. And even if he had, I conclude the Respondent has met its burden under *Continental Group*. The confrontation between Satake and Leonetti occurred in the kitchen area, while Leonetti and other employees were working. Chef Jorge Luis heard the confrontation and came out of his office to find out what was happening. He heard Satake talking loudly and directing profanity at Leonetti. Luis reported this to TMR, and TMR placed Satake on SPI. TMR concluded that Satake raised his voice and used profanity toward another employee, in the presence of management. In the plan for improvement, which was presented with his written coaching, TMR instructed Satake to address problems or issues "privately and … not disrupt business and productivity." The only logical inference based on the evidence is that Satake was issued the coaching because his loud and profane conduct disrupted operations and the productivity of employees, like Leonetti, working in the kitchen.

Based on the evidence, I find the General Counsel has failed to establish the Respondent violated Section 8(a)(1) or (3) when it suspended and later issued Satake a coaching in May 2022 in response to his confrontation with Leonetti. I, therefore, recommend dismissing these allegations.

c. Final Written Coaching (Brooks)

Paragraphs 6(k)-(o) of the Consolidated Complaint allege that on about August 17, 2022, the Respondent violated Section 8(a)(1) and (3) when it issued Satake a final written coaching because he engaged in protected concerted and union activities. This allegation stems from the discipline the Respondent issued to Satake, following his return from a medical leave of absence, for the statements he made to chef Fabian Brooks on June 14, 2022.

The General Counsel first argues the August 17 final written warning was unlawful under *Wright Line*. They contend that Satake was engaged in protected concerted and union activity known to the Respondent when he submitted a voluntary statement to Brooks requesting a Step One meeting under the collective-bargaining agreement's grievance procedure to discuss allegations of harassment and retaliation. They further contend animus is established by the timing of the discipline relative to Satake's protected activity, the link between that activity and the conduct relied upon for the discipline, and contemporaneous unfair labor practices. The conduct Heather Thompson found rude -- Satake telling Brooks that he should have someone read and explain the statement to him – was inextricably linked to Satake's protected activity. Additionally, the Respondent offered no comparators of other employees disciplined pursuant to GRC 1 who were not engaged in protected activity. Therefore, it cannot establish it would have taken the same action in the absence of Satake's protected activity.

Based on my review of the evidence, I conclude the decision to issue Satake the final written warning was not discriminatorily motivated because he requested a Step One meeting. When Satake presented his statement to Brooks and informed him it accused him of harassment and retaliation, Brooks did not respond with any type of hostility. He invited Satake into the chef's office to discuss his concerns. Satake declined. After Brooks forwarded Satake's voluntary statement to TMR, TMR promptly scheduled and held a meeting to discuss Satake's allegations, even though the parties had agreed not to conduct those meetings until they had received training, which was to occur by September 2022. In that June 28, 2022 meeting, Satake was given the chance to raise his complaints about Brooks, and Brooks was allowed to respond to those complaints.

As stated, there is no evidence of animus for Satake requesting a Step One meeting. The issue was Satake's unfounded and insulting suggestion that Brooks needed someone to read and explain the statement to him. The General Counsel contends Satake merely was asking Marabel to "translate" the statement for Brooks to make sure there was no misunderstanding. However, that is not what Satake said. He told Brooks to have someone "read and explain" the statement to him, not translate it. Additionally, Satake acknowledged that he had no reason to believe that Brooks was unable to read or understand English, only that he spoke English with a heavy accent. During this exchange, Brooks informed Satake that he did not need anyone to read and explain the statement to him. Brooks later reported to TMR that he found that suggestion insulting. Thompson shared that view, and she notified Satake as much when they met to discuss his allegations.

The other component of the final written warning was that Satake followed this insulting statement up with another equally offensive statement later that day. Brooks assigned Satake to prepare a garnish, and Satake mistakenly forgot to include certain ingredients. When Brooks told Satake to remake the dish and stood there and watched to make sure it was done correctly, Satake became annoyed. He told Brooks, his supervisor, that rather than standing there and watching him, Brooks should go and find him more peppers. Brooks told Satake he did not get to tell him how to do his job.

The General Counsel next argues the warning was unlawful under *Continental Group*, because the Respondent issued the discipline after concluding that Satake's behavior toward Brooks violated GRC 1, which, as stated, is an overly broad rule prohibiting rude, discourteous and unprofessional behavior. The General Counsel argues that invoking collectively bargained rights is an activity which implicates the concerns of Section 7, and the Respondent has failed to prove it relied upon a disruption or interference with its operations, rather than the rule itself, in disciplining Satake.

As discussed above, the Respondent did not conclude Satake violated GRC 1 by invoking his right to a Step One meeting. He violated the rule by insulting Brooks and telling him how he should do his job. The first insult occurred after he submitted his request for a Step One meeting, and the other occurred a few hours later, in an unrelated conversation. Satake was not engaged in protected activity, or in activity that implicates Section 7, when he told Brooks to have someone read and explain the written statement to him, implying, without any basis, that Brooks was unable to read and understand the statement on his own. He also was not engaged in protected activity, or in activity that implicates Section 7, when he later told Brooks that rather than stand and watch him remake the garnish, he should go and get him more peppers. Although Satake claimed in his written statement the latter situation was further evidence of Brooks' harassment of him, Satake acknowledges the exchange began after he failed to make the garnish correctly. As Satake's supervisor, Brooks had a legitimate basis for instructing Satake to remake the garnish, and for monitoring him to make sure it was done correctly, regardless of whether Satake agreed with that course of action.

Finally, the General Counsel argues the warning was unlawful under *Atlantic Steel Co.*, 245 NLRB 814 (1979). *Atlantic Steel* applies when an employer defends a disciplinary action based on employee misconduct that is part of the *res gestae* of the employee's protected activity. In these circumstances, the Board balances the alleged misconduct against the protected activity to determine whether the misconduct is so serious that it deprives the employee of the protection of the Act. This determination is made by considering: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's misconduct; and (4) whether the misconduct was in any way provoked by the employer's misconduct or unfair labor practices. The Board has long recognized that "although employees are permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer's right to maintain order and respect." *Piper Realty Co*., 313 NLRB 1289, 1290 (1994), citing *NLRB v. Thor Power Tool Co.,* 351 F.2d. 554, 587 (7th Cir. 1965).

In applying the *Atlantic Steel* factors, the General Counsel argues Satake did not lose the protection of the Act. They contend the place of the discussion was in the chefs' office, not on the production floor in the kitchen; the discussion was about Satake requesting to hold a Step One meeting to discuss alleged harassment and retaliation; the nature of the outburst was requesting Maribel to translate the written statement into Spanish and instructing Brooks that Satake's issues were in the statement; and the outburst was provoked by conduct which Satake believed was retaliatory. As such, they contend all four factors are met. I disagree.

The subject matter of "the statement" at issue was not Satake's request for a Step One meeting; it was his suggestion that Brooks was unable to read and understand English without assistance. I do not find that statement was part of the *res gestae* of any protected activity. *Atlantic Steel* deals with situations in which profanity or insults occur in the course of a heated or confrontational exchange or are otherwise provoked by the employer's conduct. Brooks did nothing in the course of receiving Satake's written statement to provoke or cause Satake to make the insulting statement.

Additionally, as discussed, the nature of the outburst was not Satake asking Maribel to translate the statement into Spanish for Brooks; it was suggesting to Brooks that he was unable to read and understand Satake's statement on his own. Finally, there is no evidence that Satake's suggestion about Brooks' ability to read and understand English was provoked by Brooks' alleged retaliatory conduct. There is no evidence connecting the two.

Based on the foregoing, I conclude the General Counsel has failed to establish that Satake's final written warning violated the Act. I, therefore, recommend dismissing these allegations.

d. Attendance-Related Coaching

Paragraph 6(p) of the Consolidated Complaint alleges that on about January 10, 2023, the Respondent violated Section 8(a)(1), (3), and (4) when it issued Satake an attendance-related discipline because he engaged in protected concerted and union activities, and because he filed charges in Cases 28-CA-295878, 28-CA-301606, 28-CA-310813, and 28-CA-313877. The allegation stems from the verbal coaching Satake initially received for his absence on December 1, 2022, for which he had requested and was eligible for FMLA leave. Satake filed a grievance over this matter, and Heather Thompson reviewed the attendance records and concluded Satake had, in fact, been on approved leave, and that the leave had not been recorded correctly. The discipline was rescinded and removed.

The General Counsel argues the Respondent issued the discipline because of Satake's known protected concerted and union activities, including filing grievance requests and submitting voluntary statements, discussed above. They argue animus can be inferred from the pretextual nature of discipline, in that Satake had properly requested leave for December 1. The Respondent offered no reason other than an internal recordkeeping error for issuing the discipline and offers no reason at all for the 5-week delay between the alleged occurrence and the discipline. They further argue the subsequent rescission of the discipline is irrelevant because it is the issuance of the discipline that violates the Act.[50]

The Respondent counters there is no violation because Satake did not suffer an adverse employment action with the rescission of the coaching. Further, it contends there is no nexus between Satake's alleged protected activities and the rescinded discipline.

Based upon my review, I find that regardless of whether the rescinded coaching amounted to an adverse employment action, the evidence does not support that it was discriminatorily motived. I credit Thompson that it was a record-keeping error. I, therefore, recommend dismissing the allegation.

e. Denial of FMLA Leave

Paragraph 6(g) of the Consolidated Complaint alleges that between about February 13, 2023, and March 6, 2023, the Respondent violated Section 8(a)(1), (3), and (4) when it denied Satake's FMLA request because he engaged in protected concerted and union activities, and because he filed charges in Cases 28-CA-295878, 28-CA-301606, 28-CA-310813, and 28-CA-313877.

The General Counsel alleges Satake was engaged in union activity through his involvement on the bargaining committee and his grievance filings. The Respondent knew of Satake's activity because they were directed at members of management and TMR. Animus is established through contemporaneous unfair labor practices and pretext. In the context of Satake's FMLA requests, pretext is shown by the fact that Satake was denied his request for lack of sufficient hours worked even though his denial letter states he would have enough time on the first date of his leave. Thompson testified that eligibility is calculated based on hours worked at the time of application, not at the beginning of leave. This testimony is severely undercut by the fact that the computer program calculates the projected hours worked at the start of leave and displays the projected hours in the letter to the applicant.[51]

The Respondent counters that the General Counsel cannot establish a prima facie case of discrimination because Satake did not suffer an adverse employment action. It contends the automated leave system showed Satake did not have the requisite hours worked to qualify for FMLA, so he was instead approved for general medical leave under the parties' collective-bargaining agreement. Thompson later communicated with Satake regarding his leave request and his subsequent rescission of that request. When there was no longer any uncertainty over whether Satake had the requisite hours to qualify for FMLA, he was approved for such leave. As a result, there is no violation.

Based upon my review of the evidence, I conclude that while there may have been initial confusion regarding Satake's FMLA eligibility, it was not discriminatorily motivated, and he did not suffer any adverse action because he was approved for general medical leave under the contract, and then he was approved for FMLA leave. I, therefore, recommend dismissing this allegation.

[50] The General Counsel presented no argument regarding how this conduct violated Sec. 8(a)(4).
[51] The General Counsel again presented no argument regarding how this conduct violated Sec. 8(a)(4).

f. Discipline Resulting in Discharge

Paragraph 6(r) of the Consolidated Complaint alleges that on about April 28, 2023, the Respondent violated Section 8(a)(1), (3), and (4) when it discharged Satake under its progressive disciplinary system because he engaged in protected concerted and union activities, and because Satake filed charges in Cases 28-CA-295878, 28-CA-301606, 28-CA-310813, and 28-CA-313877.

The General Counsel raises many of the same arguments regarding Satake's prior protected concerted and union activities, as well as the animus surrounding those activities, in support of the allegation regarding his discharge. However, they also point to the complaints Satake filed against the kitchen managers, beginning in mid-March 2023. In early April 2023, following his return from FMLA leave, Satake filed complaints and statements under the collective bargaining agreement against kitchen managers and other cooks, including potential health code violations regarding product being improperly handled and stored. Satake stated that he had reported these issues to managers, but nothing was done. He also accused the kitchen managers, particularly assistant chef Jayson Ocilka, of retaliating against him for raising concerns about how they were running the kitchen. TMR interviewed executive chef Niko Gadzhev and Ocilka about the allegations. Satake continued to file statements raising various issues. The date of Satake's last statement to TMR was April 13, 2023. The following day, Satake is alleged to have committed the health code violation of placing the Chinese bacon in a cardboard box. The General Counsel focuses on the timing and the Respondent's investigation and response to the alleged violation to argue pretext, because the evidence does not support that Satake committed the alleged violation.[52]

The Respondent counters that there is no evidence of animus or a causal nexus between Satake's protected activities and the discipline that resulted in his discharge. It further argues that even if the General Counsel were able to satisfy their burden under *Wright Line*, it has established it would have taken the same action in the absence of any protected activity. It bases this argument on its decision to discharge another kitchen employee who admitted during an internal health inspection that he had failed to wash his hands before putting on gloves. (R. Exh. 79). Like Satake, this other employee was on a final written warning at the time, and discharge was the next step under the progressive disciplinary system.

I conclude the General Counsel has established a prima facie case of discrimination. Satake was engaged in known protected activity in mid-March through mid-April 2023, when he filed complaints and submitted statements under the collective-bargaining agreement about the working conditions in the kitchen, including raising concerns about managers and potential health code violations. The timing of this discipline in such close proximity to that activity creates a strong inference of animus. As does the fact that Gadzhev, who was the one who responded to or defended against those complaints, also was the one who investigated Satake regarding the health code violation. I find this significant in light of Gadzhev's acknowledgement at the hearing that he believed Satake "complained about things too much," and would "complain to everybody" if tasks or issues were not handled the way he thought they should be.

Another significant factor supporting animus, as well as pretext, is Gadzhev's investigation and overall course of conduct regarding Satake's alleged violation. The Board has held an employer's rush

[52] Again, the General Counsel presented no argument regarding how this conduct violated Sec. 8(a)(4).

to judgement or incomplete investigation is evidence of pretext. *St. Paul Park Refining Co., LLC.*, 366 NLRB No. 83, (2018), enfd. 929 F.3d 610 reh'g and reh'g en banc denied (8th Cir. 2019); *Stahl Specialty Co*., 364 NLRB 535 (2016); *Relco Locomotives, Inc*., 358 NLRB 298 (2012), enfd. 734 F.3d 764 (8th Cir. 2013); *Health Management, Inc*., 326 NLRB 801, 806 (1998); and *Firestone Textile Co*., 203 NLRB 89, 95 (1973). Based upon my review, I conclude both the existence and absence of evidence regarding Satake's role in the alleged violation establish the Respondent was more interested in finding a reason to discharge him than in determining whether he was responsible.

One factor supporting this conclusion is the photographs Gadzhev took of Satake's workstation. As outlined, the first four photographs Gadzhev took were while Satake was away. Two of the photographs show the workstation table, from different angles. Both show the knife, the cut and uncut bacon on the counter, the metal pan, and the cardboard box. Curiously, neither of the photographs show what was inside the pan or the box.

Another of the photographs shows a cardboard box half-filled with slices of bacon. In his report to TMR, Gadzhev stated he had discovered pieces of cut up bacon in a cardboard box at Satake's workstation, and that Satake was cutting up the bacon and putting it into the box. There are two issues with this. The first is that the slices of bacon in the box were uncut. The second is that they had already been fried. At the due process meeting, Satake was asked to explain how he goes about preparing the Chinese bacon. He stated he cuts the slices of bacon up, puts it into a metal pan, and takes it over to the deep fryer to fry it. The photograph suggests two possibilities. Either Satake did not follow this process, or he was not the one who put the bacon into the box. Neither Webb nor Gadzhev investigated this inconsistency. Nor did they question why Satake would put cut pieces of unfried bacon into a box already half filled with slices of fried bacon.

Then, there are the photographs Gadzhev did not take. When Gadzhev returned to the workstation at around 5:40 p.m., after his meeting, he testified (initially) that he saw Satake cutting the bacon and placing it into the cardboard box. Gadzhev remained in the production room for a few minutes. In that time, he took a single photograph. The photograph shows Satake (from the back) cutting slices of bacon. According to Gadzhev, the "serious" health code violation that Satake committed was putting the bacon into the box. Yet, there is no photograph of that occurring. If your stated reason for taking the photograph is to have proof of the violation, then reason would dictate you would photograph the violative conduct. Gadzhev also did not photograph the contents of the box next to Satake. During his testimony, Gadzhev offered no explanation for this.

Next, in addition to the photographs showing apparent inconsistencies with Satake's established practice for preparing the bacon, there are the photographs showing apparent inconsistencies relating to health and safety protocols. As noted by the General Counsel, in the earlier photographs where Satake is not present, the cardboard box is on the counter and there is nothing underneath the box, which itself is a health code violation. In the later photograph of Satake cutting the bacon, the box is sitting on two stacked baking sheets, creating a sanitary barrier between the bottom of the box and the table/counter. It is incongruent for Satake to have earlier put the cardboard box directly on the counter (as shown in the initial photos) and then place the slices of bacon in it, and then for him to later take the sanitary step of putting the box on the baking sheets, only to continue the unsanitary practice of placing the slices of bacon into the box. As the General Counsel points out, it is inherently unlikely Satake would have cured one health code violation upon his return but continue to commit the arguably more serious violation of placing the bacon in the box.

Then there is Gadzhev's course of action after allegedly observing Satake commit the violation.

When Gadzhev saw Satake cutting the bacon and placing it into the box, he did not confront Satake about the health code violation. Gadzhev testified this was because he had been told not to by TMR. I do not credit this testimony. The only written direction TMR gave regarding the matter occurred the following day, and that was for the Kitchen Department to not issue Satake discipline for the violation until TMR conducted its investigation of the matter. Also, it is entirely inconsistent with Gadzhev's role as a supervisor not to address with one of his employees problematic conduct. It also is inconsistent for TMR's role in ensuring that rules and policies are followed for it to direct a supervisor not to intervene or take action to stop and address a clear rule or policy violation.

Not only did Gadzhev not confront Satake, but he let Satake continue preparing the bacon for the remainder of his shift. After Satake's shift was over, Gadzhev threw all the bacon Satake prepared that day into the trash. Gadzhev offered no explanation for why he chose this extremely wasteful course of action.

Finally, there is the Respondent's failure to investigate anyone else for the violation. During his due process meeting, Satake was asked whether he thought he may have been set up, and he stated that it was possible, but that he did not have any proof. There is no doubt Satake was unpopular among certain of his coworkers and supervisors. Yet, there was no inquiry or effort made by Gadzhev or Webb to look into the possibility that the violation could have been committed by someone else.

Thus, the General Counsel has met the initial *Wright Line* burden by establishing that Satake engaged in protected conduct of which Respondent was aware, and Respondent harbored animus towards that protected activity. I conclude the Respondent's decision to discharge Satake was discriminatorily motivated and that its stated reason for doing so is pretextual.

The burden then shifts to Respondent to demonstrate it would have terminated Satake even in the absence of his protected conduct. Respondent has not met that burden.

As for the Respondent's purported comparable, I find the situations are distinguishable. First, the other kitchen employee admitted to committing the health code violation. He acknowledged he had failed to wash his hands before putting on the gloves. Satake, on the other hand, denied committing the violation at issue. I credit his denial. I find that he prepared the Chinese bacon about 100 times during his employment, and each time he followed the same procedure, and that procedure included placing the bacon into a metal pan, not a cardboard box.

Second, the other kitchen employee had been placed on a final written warning just 3 weeks prior to his discharge, and that warning was for failing to wear a mask. That meant he had committed two health and safety violations in less than a month. Satake certainly had prior discipline, but none of it involved a health and safety violation.

In short, whereas the Respondent's purported comparable is an admitted, repeat violator of the established health and safety protocols, Satake is not. And, for the reasons stated, the Respondent's investigation and conclusion that Satake violated the health and safety protocols by placing the bacon into the cardboard box does not withstand scrutiny.

For these reasons, I recommend finding that Satake's discipline and discharge violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. Resorts World Las Vegas, LLC (Respondent) has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act

2. The Respondent violated Section 8(a)(1) of the Act by maintaining General Rules of Conduct (GRC) 1, 2, 6, 7, 8, and 23.

3. The Respondent, through Nicole Webb, violated Section 8(a)(1) of the Act on about May 13, 2022, when she instructed Brian Satake, orally and in writing, to approach all problems and issues in a professional and respectful manner, to address matters privately and not disrupt business or productivity, and to escalate all concerns to management if he is unable to resolve these matters on his own, without advising him that he retained the right to engage in Section 7 activity.

4. The Respondent violated Section 8(a)(1) and (3) of the Act on about April 28, 2023, when it discharged Brian Satake for engaging in protected concerted and union activities.

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

REMEDY

Having found that the Respondent engaged in certain unfair labor practices, the Respondent is ordered to cease and desist from such conduct and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent is ordered to offer Brian Satake reinstatement to his former position, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed, and to make him whole for any loss of earnings and other benefits he may have suffered because of discrimination against him. The backpay remedy shall be computed on a quarterly basis, less any interim earnings, as prescribed in *F. W. Woolworth* Co., 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Thryv, Inc*., 372 NLRB No. 22 (2022), the Respondent shall also be ordered to make Satake whole, with interest, for any other direct or foreseeable pecuniary harms suffered because of his termination, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. See *King Soopers, Inc*., 364 NLRB 1153 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017). Compensation for these harms shall be calculated separately from taxable backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Further, the Respondent is ordered to compensate Brian Satake for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016). In accordance with *Cascades Container Board*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), the Respondent is further ordered to file with the Regional Director for Region 28 copies of the W-2 form(s) reflecting his backpay award. The

Respondent is also ordered to expunge from its files any references to the unlawful discharge of Brian Satake and notify him in writing that this has been done and that evidence of the unlawful action will not be used against him in any way.

The Respondent also is ordered to rescind General Rules of Conduct (GRC) 1, 2, 6, 7, 8, and 23. It is further ordered to rescind the verbal and written directive Nicole Webb gave to Brian Satake on around May 13, 2022, when she instructed Brian Satake, orally and in writing, to approach all problems and issues in a professional and respectful manner; to address matters privately and not disrupt business or productivity; and to escalate all concerns to management if he is unable to resolve these matters on his own.

Ther Respondent also shall be ordered to post a notice, as detailed in the order below.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[53]

ORDER

The Respondent, Resorts World Las Vegas, LLC, and its officers, agents, successors, and assigns shall:

1. Cease and desist from:

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted and/or union activities.

(b) Maintaining a rule or policy stating that, "Rude, discourteous, or unprofessional behavior toward a guest, coworker or any other person on Company property. Each Team Member is expected to work in a cooperative manner with managers, supervisors, coworkers, guests and vendors."

(c) Maintaining a rule or policy stating that, "Insubordination or otherwise being uncooperative with supervisors, Team Members, guests and/or regulatory agencies, or otherwise engaging in conduct that does not support the Company's goals and objectives."

(d) Maintaining a rule or policy stating that, "Job abandonment or leaving work area without proper authorization during an assigned shift."

(e) Maintaining a rule or policy stating that, "Off-duty misconduct that adversely affects the Company, a guest, another Team Member, or affects a Team Member's ability to do their job, including violation of any federal, state, or local laws, or that in any way would potentially affect the Company's status as a gaming licensee."

(f) Maintaining a rule or policy stating that, "Using abusive or profane language in the presence of, or directed toward, a supervisor, another Team Member, guest, customer, or any other person on Company property."

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

(g) Maintaining a rule or policy stating that, "Engaging in inappropriate, immoral, or illegal behavior at work or while on Company business."

(h) Issuing a verbal or written instruction to employees that they are to: approach all problems and issues in a professional and respectful manner, to address matters privately and not disrupt business or productivity, or to escalate all concerns to management if he is unable to resolve these matters on his own, without advising them that they retain the right to engage in Section 7 activity.

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

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

(a) Within 14 days, offer Brian Satake immediate and full reinstatement to his former job, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

(b) Make Brian Satake whole for any loss of earnings, other benefits, and for any other direct or foreseeable pecuniary harms resulting from his discharge, as provided in the remedy portion of this decision.

(c) Compensate Brian Satake for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(d) File with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, or such additional time as the Regional Director may allow for good cause shown, a copy of Brian Satake's W-2 form(s) reflecting the backpay award.

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

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

(g) Within 14 days from the date of this Order, rescind General Rules of Conduct (GRC) 1, 2, 6, 7, 8, and 23.

(h) Within 14 days from the date of this Order, rescind the instruction Nicole Webb issued to Brian Satake, orally and in writing, on about May 13, 2022.

(i) Within 14 days after service by the Region, post at its Las Vegas, Nevada property copies of the attached notice marked "Appendix."[54] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. 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 shall be mailed to all current employees and former employees employed by the Respondent at any time since January 7, 2022.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. July 2, 2025

Andrew S. Gollin
Administrative Law Judge

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

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

APPENDIX

NOTICE TO EMPLOYEES

(To be printed and posted on the official Board notice form)

THE NATIONAL LABOR RELATIONS ACT GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 do anything to interfere with, restrain, or coerce you in the exercise of the above rights.

WE WILL NOT discipline, discharge, or otherwise discriminate against employees because they engage in protected concerted and/or union activities.

WE WILL NOT maintain a rule or policy stating that, "Rude, discourteous, or unprofessional behavior toward a guest, coworker or any other person on Company property. Each Team Member is expected to work in a cooperative manner with managers, supervisors, coworkers, guests and vendors."

WE WILL NOT maintain a rule or policy stating that, "Insubordination or otherwise being uncooperative with supervisors, Team Members, guests and/or regulatory agencies, or otherwise engaging in conduct that does not support the Company's goals and objectives."

WE WILL NOT maintain a rule or policy stating that, "Job abandonment or leaving work area without proper authorization during an assigned shift."

WE WILL NOT maintain a rule or policy stating that, "Off-duty misconduct that adversely affects the Company, a guest, another Team Member, or affects a Team Member's ability to do their job, including violation of any federal, state, or local laws, or that in any way would potentially affect the Company's status as a gaming licensee."

WE WILL NOT maintain a rule or policy stating that, "Using abusive or profane language in the presence of, or directed toward, a supervisor, another Team Member, guest, customer, or any other person on Company property."

WE WILL NOT maintain a rule or policy stating that, "Engaging in inappropriate, immoral, or illegal behavior at work or while on Company business."

WE WILL NOT issue verbal and/or written instructions to employees that they are to: approach all problems and issues in a professional and respectful manner, to address matters privately and not disrupt business or productivity, and/or to escalate all concerns to management if they are unable to resolve these matters on their own, without advising them that they retain the right to engage in Section 7 activity.

WE WILL NOT in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed by Section 7 of the Act.

WE WILL offer Brian Satake immediate and full reinstatement to his former job, or if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Brian Satake whole for any loss of earnings and other benefits resulting from his termination, less any net interim earnings, plus interest. **WE WILL** also make Satake whole for any direct or foreseeable pecuniary harms he suffered because he was fired, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Brian Satake for the adverse tax consequences, if any, of receiving a lump-sum backpay award and **WE WILL** file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award(s) to the appropriate calendar year(s), as well as a copy of the corresponding W-2 form(s) reflecting the backpay award(s).

WE WILL remove from our files any reference to the unlawful discharge of Brian Satake, and within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against them in any way.

WE WILL rescind General Rules of Conduct (GRC) 1, 2, 6, 7, 8, and 23.

WE WILL rescind the instruction Nicole Webb issued to Brian Satake, orally and in writing, on about May 13, 2022.

RESORTS WORLD LAS VEGAS, LLC
(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. We conduct secret-ballot elections to determine whether employees want union representation, and we investigate and remedy 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 or you may call the Board's toll-free number 1-844-762-NLRB (1-844-762-6572). Callers who are deaf or hard of hearing who wish to speak to an NLRB representative should send an email to relay.service@nlrb.gov. An NLRB representative will email the requestor with instructions on how to schedule a relay service call.

2600 North Central Avenue - Suite 1400 Phoenix, AZ 85004-3099
Telephone: (602) 640-2160
Hours of Operation: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-286885 or by using the QR code below. NEW QR CODE 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.