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

FOXY LOXY PRINT GALLERY & CAFÉ, LLC,
FOXY LOXY BAKERY, LLC D/B/A HENNY
PENNY ART SPACE & CAFÉ, AND FOX & FIG, LLC,
AS A SINGLE EMPLOYER,

Respondent, **Case Nos. 10-CA-323297**
10-CA-324201
and **10-CA-326729**

SERVICE EMPLOYEES INTERNATIONAL UNION,

Charging Party.

Kurt Brander and Demi Kim, Esqs.
for the General Counsel.
Wade Herring and Brian Sopp, Esqs.
for the Respondent.
Dorothy Singletary, Esq.
for the Charging Party.

DECISION

STATEMENT OF THE CASE

Renée D. McKinney, Administrative Law Judge. This case was tried[1] in Thunderbolt, Georgia on August 13, 2024. Service Employees International Union ("Union") filed the initial charge in Case 10-CA-323297 on August 7, 2023[2] and the first amended charge on January 8, 2024; the initial charge in Case 10-CA-324201 on August 21, the first amended charge on November 28, and the second amended charge on January 8, 2024; the initial charge in Case 10-CA-326729 on September 27 and the first amended charge on January 8, 2024. The General Counsel issued the complaint on May 14, 2024 and an amendment to the complaint on July 18, 2024.

[1] During my review of the record, I identified transcript corrections that are warranted. Those corrections are set forth in Appendix A to this Decision and Recommended Order.

[2] All dates are in 2023 unless otherwise indicated.

The complaint, as amended, alleged a single employer relationship between Savannah, Georgia's Foxy Loxy Print Gallery & Café , LLC ("Foxy Loxy"), Henny Penny Art Space & Café ("Henny Penny"), and the now-defunct Fox & Fig, LLC ("Fox & Fig"); that Respondent unlawfully applied facially neutral handbook rules and policies to discharge 12 employees because they went on strike; that Respondent maintained an unlawful social media policy; that Respondent's owner, Jennifer Jenkins and Director of Operations, Julie Kaufman, made threats to employees and informed them that it would be futile for them to select the Union as their bargaining representative; and that Respondent told employees who refrained from going on strike that they would receive bonuses and gave bonuses to reward those employees who refrained from going on strike.[3] The answer and answer to the amendment to the complaint denied the alleged violations and affirmatively raised 18 defenses.[4] After the conclusion of the trial, Respondent and the General Counsel filed briefs.

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

FINDINGS OF FACT

I. JURISDICTION

Respondent admits and I find that, at all material times, Respondent Foxy Loxy has been a limited liability company with an office and place of business in Savannah, Georgia, and has been operating a public restaurant selling food and beverages. Annually, in conducting its business operations, Respondent Foxy Loxy derives gross revenues in excess of $500,000 and purchases and receives products, materials, and goods in excess of $5,000 from points outside the State of Georgia.

Respondent admits and I find that, at all material times, Respondent Henny Penny has been a limited liability company with an office and place of business in Savannah, Georgia, and has been operating a public restaurant selling food and beverages. Annually, in conducting its business operations, Respondent Henny Penny derives gross revenues in excess of $500,000 and

[3] As observed by Respondent in its brief (R. Br. 28.), no evidence was presented by the General Counsel in support of these allegations at hearing. Further, the General Counsel's brief contained no argument to support the allegations. As such, I am dismissing the allegations contained in complaint paragraphs 16, 17 and the legal conclusions pertaining to these paragraphs in complaint paragraphs 21 through 23.

[4] Respondent argues that the U.S. Constitution mandated the granting of a jury trial (R. Br. 35.) in the instant case. I reject this defense as the Board has previously rejected such claims. *HHS Aviation, LLC*, Case 12-CA-326227, fn. 2 (Sept. 11, 2024) (unpublished order) ("The Respondent's argument that it is entitled to a jury trial under the Supreme Court's recent decision in *S.E.C. v. Jarkesy*, 603 U.S. ___ (2024), is unpersuasive. The Supreme Court has long held that unfair labor practice cases do not arise under common law and that the Board's processes do not violate the Seventh Amendment. See *NLRB v. Jones & Laughlin Steel Corp*., 301 U.S. 1, 48-49 (1937); see also *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 453-55 (1977)."). To the extent that Respondent asserted other affirmative defenses in its answers, it produced no testimony or argument on brief to support those affirmative defenses, and I thus deem them waived. See *Yorkaire, Inc*., 297 NLRB 401 (1989), enfd. 922 F.2d 832 (3d Cir. 1990).

purchases and receives products, materials, and goods in excess of $5,000 from points outside the State of Georgia.

I also find that at all material times through November 2023, Respondent Fox & Fig had been a limited liability company with an office and place of business in Savannah, Georgia, operating a public restaurant selling food and beverages. During the 12-month period preceding November 2023, in conducting the business operations described in subparagraph (a), Respondent Fox & Fig derived gross revenues in excess of $500,000 and purchases and receives products, materials, and goods in excess of $5,000 from points outside the State of Georgia.

I find that at all material times, Respondent Foxy Loxy, Respondent Henny Penny, and Respondent Fox & Fig have been affiliated business enterprises with common ownership, directors, management, and supervision. They also have administered a common labor policy, have provided services for each other, have interchanged personnel with each other, have maintained interrelated operations, and have held themselves out to the public as a single-integrated business enterprise.

Based on the operations described above, I find that at all material times, Respondent Foxy Loxy, Respondent Henny Penny, and Respondent Fox & Fig (collectively, "Respondent") have constituted a single-integrated business enterprise and a single employer within the meaning of the Act.

I further find that, at all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and that the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. "The Foxy Family"

Located in Savannah, Georgia and owned by Jennifer Jenkins, Chief Executive Officer, Foxy Loxy is a coffee shop and Tex-Mex cantina serving tacos. (Tr. 563, 564.)[5] Henny Penny, a bakery and coffee shop, is located down the street from Foxy Loxy. (Tr. 567.) Henny Penny also has an art space for escorted children, with an art attendant on duty. (Tr. 567-568). Fox & Fig, also owned by Jenkins, was located on Troup Square in Savannah; it served vegan food. (Tr. 568). Fox & Fig closed in November 2023. (Tr. 569.)

As admitted by Respondent and established through testimony at hearing, among Jenkins' 2(11) supervisor and 2(13) agent supervisory and managerial staff were the following:

[5] I use the following abbreviations in this decision: "Tr." for transcript; GCX. for General Counsel exhibit; RX. for Respondent exhibit; "GC Br." for the General Counsel's brief; and "R Br." for the Respondent's brief. Although I have included citations to the record to highlight particular testimony or evidence, my findings and conclusions are based not solely on the evidence specifically cited but rather are based my review and consideration of the entire record, including the demeanor of the witnesses. I have also considered the relevant factors in making my credibility findings which includes: "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.'" *Daikichi Corp*., 335 NLRB 622, 623 (2001) (quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003).

Julie Kaufman is Director of Operations. (GCX. 1(o) and (w).) She handles business operations, assisting Jenkins in day-to-day matters; supports café general managers and the shift leads; and also performs human resources duties such as payroll and onboarding of new hires for all the café s. (Tr. 565, 571.) Kai Sims was a manager at Foxy Loxy. (Tr. 624; GCX. 1(o) and (w).). Stephanie Tarnowsky[6] was a General Manager at Henny Penny and Fox & Fig. (Tr. 574; GCX 1(o) and (w).)

B. The Demand Letter and Respondent's Responses to It

Juno Ambrose[7] worked at Foxy Loxy as a prep cook. (Tr. 22). In early 2023, Ambrose and unidentified coworkers began to discuss working conditions, including wage theft and discrimination. (Tr. 24-25.) In March 20234, via Instagram, Ambrose contacted the Union of Southern Service Workers ("USSW"), an affiliate of the Union, via Instagram. (Tr. 25, 501, 03). In April 2023, Ashley Rose Venerable from USSW reached out to Ambrose and they began to have conversations about unionizing. (Tr. 25, 503.) Between April and August 2023, Ambrose and their coworkers met to talk about unionizing in-person, by videoconference, and through the messaging app Signal. (Tr. 26, 128, 181.) The employees decided to serve their employer with a demand letter, which they drafted with Venerable's assistance. (Tr. 26, 129, 222.) Ambrose, Fox & Fig employee Jonathan Garmendez; and Henny Penny bakery shift lead Rose Waldron shared the draft with coworkers and asked them to sign the letter if they wished to support its demands. (Tr. 29.)

That letter sought, with subparts under each demand, "dignity [and] equal treatment"; "health and safety"; "fair and consistent scheduling"; "fair pay we can build lives on"; and "our right to organize [and…]a seat at the table." (GCX 2.) The letter gave "ownership and management" two weeks to comply with the employees' demands.

More than 40 employees signed the letter, including the following alleged discriminatees: Ambrose (Foxy Loxy); Zach Boykin (Henny Penny); Sabrina Clausen (Foxy Loxy); Kole Cox (Foxy Loxy); Garmendez (Fox & Fig); Andrea Guzman (Foxy Loxy); Absalom Jackson (Foxy Loxy); Chrush Jalen[8] (Foxy Loxy); Kai Kennedy (Foxy Loxy); Troy Nelson (Henny Penny); and Waldron (Henny Penny). (Tr. 22, 27, 126, 219, 256, 356, 359, 379, 410, 479, 491, 508; GCX 2.)

On July 21, two USSW representatives and a group of employees, including Ambrose, Garmendez, Oak, and Ross delivered the demand letter in-person to Foxy Loxy and Fox & Fig. (Tr. 29, 182.) Ambrose read the letter aloud and posted it on the corkboard in the back office; no manager was present, (Tr. 27, 183.) At Fox & Fig, General Manager Tarnowsky was present; Garmendez read the letter to Tarnowsky and presented the letter to her. (Tr. 29, 222.) Jenkins was on vacation that day but returned to Savannah on July 22 in response to the demand letter. (Tr. 74, 571, 584.)

[6] Tarnowsky's name is misspelled as "Tarnowski" in the complaint, transcript, General Counsel's brief, and Respondent's brief. However, GC 19, GC 20, RX 10, and other documentary exhibits establish the correct spelling as reflected in this decision.

[7] Named in the complaint as "Samantha Hughes".

[8] Named in the complaint as "Christian Deveaux".

On July 26, Jenkins messaged the employees via Slack on the #foxandfig channel. (GCX 3.) The message stated that Jenkins was aware of

> conversations about unionization. We fully respect the rights of employees to explore union representation. However, I want to be clear: We do not need a union, with its fees and dues for employees, coming between us. We believe that keeping a direct relationship between the company and our employees is fundamental to the well-being of employees and our business that we have built together.
>
> You are not required to sign a union card. That is your decision alone. And if you have already signed a card, you can change your mind.
>
> It costs money for employes to join a union and to stay in a union. Unions are supported by dues, fines, fees, initiation fees, and assessments they get from their member—*employees*, not the company.
>
> The Union of Southern Service Workers is new and unproven. It is not based here. You will have very little say in how the union is run, and many things could be decided that you will not like. And no union, old or new, can get more than what the company is able to give and we have been giving to our teams beyond our means since COVID.
>
> Here in Savannah, we pride ourselves on our local community—let's keep it that way.
>
> I will follow-up [sic] with more information about benefits for employees and the financial status of our business, but given the events of recent days, I wanted to make sure that you had direct and truthful information.

(GCX 3.) (emphasis in original)

In response to this message, employee Garmendez sent a message clarifying the role of a union in the workplace from her perspective and asserting that "Nobody is required to join us and whether you do or do not [] this will not be silenced or stopped." Ambrose sent a similarly toned message to the channel in response to Jenkins. Employee Alice Ross replied to Garmendez with a graphic showing bowling pins falling backwards as they were hit with the word "Strike!" (GCX 3.)

On July 29, copying employees Ross and Garmendez, Ambrose sent an e-mail to Jenkins and Kaufman. (Tr. 90; RX 6.) The e-mail requested a virtual meeting on July 31 or August 1 with one or both to

> discuss our demand letter, our right to organize, and transparency around the cafés.

> We will have representatives from each store in attendance as well as our USSW organizer. Not every attendant is included on this email thread….If we have not received a reply by 7/31 5:00 PM[,] we will take it as a sign our demands will not be met.

On July 30, Kaufman declined to meet via Zoom but stated that the employer would respond to the demand letter by the original two week deadline, if not sooner. (RX 6.)

On August 1, Kaufman, on behalf of Jenkins, sent a Slack message to employees. (GCX 4.) The message began with an explanation of Jenkins' goal in opening Foxy Loxy 13 years prior and her motivations for doing so:

> …to create an inviting third place where people of all ages and backgrounds could enjoy ethically-sourced [sic] craft coffee alongside delicious, small-batch food and pasties. Our coffee, food, art[,] and music coming together in esthetically pleasing spaces where customers want to spend their time, while providing jobs[,] and even careers[,] for people is what drives me to do everything in my power to keep these places alive and thriving….

The message attributed the cafés' success to "the help of our employes, past and present…." It also stated that if Jenkins' "goal had been to make a lot of money, [she] would have done something else, somewhere else." The message further explained that each café in the "Foxy Family" was a separate business entity. The message decried "[t]he opposition, accusations and simply untrue information targeted" at her and the café s, which was "distressing, hurtful and divisive."

Finally, the message noted that "the businesses don't make money" and

> I cannot give what I do not have. I, like many small business owners, still carry personal debt from starting a business. I make only a modest income from the businesses as you can see from the attached financial information.

Kaufman attached profit and loss summaries for each café for 2020 to 2022 to the Slack message in the interest of being "as transparent as possible."

On August 4, Jenkins sent another Slack message to employees about the café s' financial information. (GCX 5.) The message stated that Jenkins was

> aware that confidential profit [and] loss statements are being passed around. They are confidential for many reasons one being one needs to know what it is saying, what the numbers mean.

The message identified the statements at issue as "two summaries, the Tax Basis Summary and the Revenues [and] Expenditures without Depreciation and Other Income Summary." That other income, the message explained, was the Paycheck Protection Program ("PPP") loans taken by the café s during the COVID-19 pandemic to pay employees. Kaufman testified that Jenkins was not referring to the profit and loss summary that she had shared with

the employees on August 1 via Slack but a more detailed document that was 30-40 pages long. (Tr. 582.)

On August 3, Jenkins learned that her father was terminally ill and informed the employees in the same Slack message on August 4 that she would be less present at work in order to help her father, and to become the part-time caregiver of her mother, who was suffering from a chronic debilitating illness. (Tr. 584-585; GCX 5.)

C. The Strike Notice and Strike

The employees were dissatisfied with Jenkins' responses to their demand letter. (Tr. 34, 130.) They decided to stage a one-day strike on August 5 to get management to listen to and discuss employees' concerns with them. (Tr. 34-35, 92, 131, 142, 185, 225.) With Venerable's aid, the employees put together a strike notice and began gathering signatures. (Tr. 35, 185-86, 413-414). All of the alleged discriminatees signed this paper strike notice, which Respondent received only after the strike. (Tr. 36, 132, 185, 225-226, 262, 300, 341, 362, 381, 413-414, 436, 483, 494.) Kaufman acknowledged at hearing that she learned about the planned strike prior to August 5. (Tr. 589.)

On August 5, the day of the strike, striking employees and their supporters gathered across the street from Foxy Loxy at the public library parking lot. (Tr. 41, 504.) In the parking lot, the picketers made picket signs and employees signed the paper strike notice. (Tr. 41, 504.) Laurel Ashton, a field coordinator for USSW, had come to town to support the August 5 strike. (Tr. 501.) The strike was scheduled to begin at Noon. (Tr. 495.) Union representatives instructed the picketers to "not block the entrances or the flow of traffic from the store[s]." (Tr. 285-286.)

1. Foxy Loxy

Foxy Loxy barista Jackson was scheduled to work the morning shift starting at 8:00 a.m. and the afternoon shift from 12:00 p.m. to 6:00 p.m. on August 5 and had signed the strike notice. (Tr. 494-495.) When an employee cannot report to work, Respondent's policy is that the employee is required to telephone a manager. (Tr. 675). Jackson did not call off so, about 11:00 a.m., general manager Sims contacted Jackson and asked why he was not at work. (Tr. 495-496.) Jackson, who testified that he was "not feeling it" and was concerned about starting fights with people if he went to work, told Sims that he was sick. (Tr. 495, 496.) Jackson testified that by staying home he was participating in the strike but, because he believed telling Sims that everybody was on strike was "against the cause", he told Sims only that he was sick. (Tr. 495, 496.) Sims, in response, "insinuated" that Jackson might be fired. (Tr. 496.) Kaufman testified that Sims discussed the Jackson matter with her and decided to fire Jackson prior to 11:21 a.m. (Tr. 592.) Respondent's policy regarding no call-no show is discharge—after the manager has determined no critical emergency has occurred. (Tr. 592; JX 4.) Yet, the record does not establish that this policy had been previously enforced by Respondent.

Ashton e-mailed the first strike notice to Jenkins at 11:21 a.m. (Tr. 507; GCX 32.) That e-mail from Ashton listed employees Clausen, Cox, Garmendez, Guzman, Jackson, Jalen, Kennedy, Mashack, and Ross. At 11:45 a.m., Ashton sent another email to Jenkins that Henny Penny driver Boykin had joined the strike. (Tr. 508; GCX 6.)

About Noon, the picketers proceeded to the front of the Foxy Loxy building. (Tr. 41; 508.) As the group gathered, one of the picketers bumped into a bicycle secured to a rack in front of the café, and knocked it over. (RX 11.) She picked it up and righted it, with the assistance of fellow picketers. (RX 11.) Along with some nonemployees, a group of employees, which included Ambrose, Boykin, Cox, Garmendez, Jalen, and Mashack, went inside the café. (Tr. 41, 385, 438.) Employee Cox carried a picket sign: "Foxy Loxy on strike"; employee Garmendez also carried a sign but did not recall what it said. (Tr. 133, 169, 226, 229.) Kaufman testified that customers were confused about what was happening in the café and left via the back courtyard door—or stood pressed to the walls—to avoid the stream of what she referred to as "loud" and "disruptive" chanting employees who entered the building. (Tr. 593.) Yet, Respondent Exhibit 23, which has no sound, shows picketers entering the café but their mouths are not moving. (RX 23.) The recording does not show anyone leaving the café upon the arrival of the picketers.

Ambrose delivered the strike notice to General Manager Sims while Boykin, Cox, Jalen, and Mashack stood to the side waiting. (Tr. 42-43, 160, 301-302, 385, 438.) Garmendez walked with Ambrose to the hallway of the kitchen but did not go inside the kitchen. (Tr. 227.) Ambrose went to the kitchen to retrieve employees Ashley Vance and Faith Louden, who clocked out, gathered their things, and followed Ambrose to the front to join the strike. (Tr. 41-42). Ashton continued to send the list of strikers to Jenkins as the strike progressed. (Tr. 504-505; GCX 32.) At 12:07 p.m., she sent another e-mail informing Jenkins that Louden and Vance had joined the strike. (GCX 32; Tr. 509.)

While inside Foxy Loxy, a customer asked Mashack what was going on, and Mashack told the customer that employees were on strike. (Tr. 302.) Employee Ambrose gave hearsay testimony that a customer who is a local business owner told another employee that the picketers were disrespectful. (Tr. 101.) The picketers were inside the store for approximately two minutes. (Tr. 47.)

As the picketers left the store, they held open the door for one another, leaving as a group—and the others outside the store were chanting and using a bullhorn. (GCX 31.) As the group came back together outside, they chanted for about one minute outside of the store and headed towards Henny Penny—a five-minute walk. (Tr. 43, 44; GCX 31.)

Matthew Kaufman, a videographer not employed by Respondent, and husband of operations manager Julie Kaufman, unasked, made it his business to follow the picketers as they progressed from café to café and recorded their activities with his cell phone. (Tr. 531-532.) He testified that the picketers were standing in front of the customer tables in front of Foxy Loxy, which were therefore, not visible from the street from his vantage point in the recording. (Tr. 534, GCX 31.) Kaufman also testified that there were people visible in the windows in General Counsel's Exhibit 31, which he recorded, who were waiting to leave while the picketers were inside. (Tr. 538.) However, Kaufman's recording does not show this. It shows that just before the picketers left the front of Foxy Loxy, a customer, whom he identified as a café vendor walking into the café, pushed aside Cox, who was standing in front of the stairway that led to the café entrance in preparation for a group photograph. (Tr. 101, 136, 388; GCX 28.) Cox then stepped to the right to make more room for customers to enter via the walkway. (Tr. 136, 150; GCX 28.)

2. Henny Penny

Referring to Respondent's Exhibit 13, a video recording, Matthew Kaufman testified that, again here, as at Foxy Loxy, the crowd of picketers blocked the customer tables in front of the café. (Tr. 542.) However, the tables and chairs are visible and unoccupied in Respondent's Exhibit 13, which is a recording of the picketers as they walked towards Henny Penny—not in front of the café the whole time. When the picketers arrived at Henny Penny, they began to chant. (Tr. 44.) In Respondent's Exhibit 14, the picketers are chanting and standing in front of the café tables and chairs but are not blocking the entry door of the café. Ambrose, Garmendez, Mashack, and Cox went inside to retrieve Henny Penny employees who were walking out to participate in the strike. (Tr. 44; RX 26.) Employees Cox, Garmendez, and Mashack carried picket signs inside, including "Henny Penny on strike". Waldron and Nelson were waiting inside the store but planned to walk out and join the strike. (Tr. 265, 283; GCX 27). Waldron had already clocked out. (Tr. 262-263.) Nelson was not working that day but came to Henny Penny to support the strike. (Tr. 337-338.)

Ambrose and Garmendez entered and hugged Nelson and Waldron while Mashack and Cox stood to the side. (Tr. 139, 309; GCX 27.) The bullhorn that Ambrose carried briefly made a sound when Nelson and Ambrose hugged. (Tr. 348.) Ambrose acknowledged that she carried a bullhorn into the Henny Penny space, as she did the other two cafés but denied that it was used inside. (Tr. 65, 114.) After the hug, Waldron went to the back of the store to ask Kenbi Hankins, the art attendant, if he was comfortable walking out. (Tr. 265; GCX 27.) Hankins joined the strike and walked out with the rest of the strikers. (Tr. 265; GCX 27.) Ambrose, Garmendez, Mashack, and Cox were inside Henny Penny for less than two minutes. (GCX 27; RX 14.) Two customers watched the picketers as they added condiments to their coffee and walked out the front door. (GCX 29.) The employees did not deliver a strike notice because there was no manager present. (Tr. 44.)

A family of three left the art space after the employees left but another family stayed and continued to use the art space without the art attendant. (Tr. 174; GCX 27.) Julie Kaufman testified that the entrance of the picketers "freaked out" one unidentified employee, who retreated to the back of the café, as well as upsetting customers and their children. (Tr. 596, 598.) This retreat is not visible on any of the video exhibits as far as I can tell. I surmise that Kaufman's reference to an upset customer and children is a reference to two young children with a woman visible in General Counsel's Exhibit 27. The woman is turned toward the front window, intently watching, and at least one of the children buried their face in her lap briefly. (GCX 27.)

Boykin, Clausen, Jalen, and Ross stayed outside. (Tr. 365, 391, 442.) Outside of the café, the picketers chanted and took pictures. (Tr. 46; RX 15.) At 12:15 p.m., Ashton sent another email to Jenkins, adding Hankins, Nelson, and Waldron to the list of strikers. (Tr. 509; GCX 32.)

3. Fox & Fig

After leaving Henny Penny, the picketers either walked the 30 minutes to Fox & Fig through Forsyth Park or drove there. (Tr. 49-50, 509; GCX 22.)

At 12:43 p.m., Ashton sent another email to Respondent adding employees Samantha Bell, Lina Carvajal, Marceline Collins, Kyra Hogue, Mo Howard, and Cameron Newell to the list of those who had joined the strike. (GCX 32.)

Once reunited in front of Fox & Fig, the picketers organized themselves outside the building to chant while Ambrose, Garmendez, Cox, Mashack, Waldron, and Nelson went inside, along with Newell, Hogue, Collins, and Howard, which latter group were employees at Fox & Fig. (Tr. 51, 52-53, 140, 231, 233, 268, 311, 342; GCX 29, GCX 30.) Clausen, Ross, Jalen, and Boykin did not go inside the store. (Tr. 366, 393, 446.) In Respondent's Exhibit 25, two customers are seen sitting at the outdoor tables watching the picketing.

Garmendez delivered the strike notice to general manager Tarnowsky. (Tr. 52, 233-234.) Then, Garmendez asked Grayson, the front of the house "manager,"[9] and Elias, the kitchen "manager", if they wanted to join the strike, too. (Tr. 235, 239; GCX 30.) The record does not disclose whether they joined the strike.

When the employees came outside, they joined the chanting picketers. (Tr. 54, 141; RX 16.) They chanted for about three more minutes. (RX 16.) From Fox & Fig, the picketers walked to the final location, Troup Square, a park across the street from Fox & Fig. (Tr. 54, 141.) There, the employees spoke to those gathered about their working conditions and grievances for about an hour before they dispersed. (Tr. 55-56.)

At 12:58 p.m., also from Troup Square, Ashton sent another email to Jenkins that Landri Lind and Joshua Lucas Halsema, Fox & Fig employees, had joined the strike. (Tr. 10; GCX 32.) At 1:30 pm, Ashton sent a final email to Jenkins with photographs of the wet signatures collected for the strike notice. (Tr. 510; GCX 32.)

The final list of names, including both typed and handwritten, showed 26 employees: Samantha Bell, Zach Boykin, Lina Carvajal, Sabrina Clausen, Marceline Collins, Kole Cox, Jonie Garmendez, Andrea Guzman, Joshua Lucas Halsema, Kenbi Hankins, Kyra Hogue, Mo Howard, "Samantha Hughes", Absalom Jackson, Chrush Jalen, Kai Kennedy, Landri Lind, Faith Loudon, Isabella Mashack, Nicole Mills, Troy Nelson, Cameron Newell, MacKenzie Poole, Alice Ross, Ash Vance, and Rose Waldron. (GCX 32.) As detailed below, about half of those employees on the strike notice were later discharged.

At 2:47 p.m., Ambrose posted to one of Respondent's Slack channels:

> As many of you know…Henny Penny, Fox & Fig, and Foxy Loxy are on strike today. We are on strike to demand conversation, an end to wrongful termination, transparency with management, and a SEAT AT THE TABLE. [sic] This is about more than money. We went on strike today because our request for a conversation with management was rejected. Now, I hope that we are taken more serious and in a grounded manner in our attempt to come to an agreement and talk face to face

[9] There is no indication in the record that Grayson, whose last name is unknown, possessed any supervisory indicia.

> with those that have the power to change this. If anyone anyone [sic] has any questions or concerns you are more than welcome to reach out to me.

(GCX 7.)

D. Respondent's August 5, 2023 Post Strike Actions

1. The Discharges

Jackson's termination and separation notice, dated August 5, stated that he was discharged because he was a no call-no show for two shifts on August 5. (Tr. 658; JX 4.) About 12:30 p.m. or 1:00 p.m., Jackson discovered he was removed from Respondent's Slack account and scheduling application, which Jackson interpreted to mean that he was fired. (Tr. 496-497.) Jackson's termination notice stated that he violated the call out policy and the attendance and tardiness policy by missing two shifts; the notice also referenced the disciplinary action policy and at-will employment policy. (JX 4.) Prior to his discharge on August 5, Jackson did not have any disciplinary history. (Tr. 497.)

Following the strike, Kaufman talked to the general managers and shift leads to gather information about what happened at each store. (Tr. 595-598, 624.) Later that evening, after 7:00 p.m., Kaufman, Jenkins, and Sims met at Foxy Loxy, where they discussed firing employees who participated in the strike.[10] (Tr. 624-625.) Based upon what they understood on the evening of August 5, Respondent contends that Jenkins and Kaufman discharged only those employees who had entered the Foxy Loxy or Henny Penny locations earlier that day. (Tr. 624-629; R. Br. 13-14.) No Fox & Fig employees were discharged on August 5 because, according to the Respondent, the store closed to customers that day. (Tr. 599; R. Br. 13.)

Between 8:36 p.m. and 8:38 p.m., Kaufman sent emails with discharge notices to Ambrose, Boykin, Clausen, Cox, Garmendez, Jalen, Mashack, Nelson, and Waldron (GCX 8, 10, 15, 16, 17, 18, 19, 20, 21.) The notices stated that the reason for termination was "unacceptable workplace conduct." Respondent's brief states (R. Br. 24.) that this conduct was comprised of "entering the restaurants." Other than Boykin and Clausen, who had received previous verbal warnings about attendance, none of the discharged employees had any disciplinary history. (Tr. 59, 143, 237, 274, 314, 346, 369, 397, and 448.)

2. Jenkins' Slack Message to Employees

At 9:37 p.m. on August 5, Jenkins sent out a Slack message on the "#bothhouses" channel to employees regarding the strike and Respondent's decision to terminate employees who participated in the strike. It stated in pertinent part:

> Today was a hard day. Employees hired with full consent of Foxy's wages, policies, and workplace philosophies entered three locations and disrupted

[10] On cross-examination, Kaufman agreed with counsel for the Acting General Counsel that she believed on August 5 that the strike was not protected activity because it was "intermittent" and because the strikers were not represented by a union. (Tr. 664, 665.) Respondent has not advanced these theories as defenses to the complaint either in its answers or its post hearing brief.

> business. They were loud, they upset customers, and they affected everyone involved regardless of age or standpoint. The disruption that occurred today was not done in good faith and was unlawful.
>
> Those who participated in this unlawful disruption have been terminated for that reason.

(GCX 9.)

E. Respondent's August 8, 2023 Actions

1. Andrea Guzman

Foxy Loxy barista Guzman was scheduled to work from 12:00 p.m. to 6:00 p.m. on August 5 but did not go, reasoning that the strike started at Noon anyway. (Tr. 414, 415.) Guzman did not call off work. (Tr. 636.) Yet, Guzman was not discharged on August 5. (Tr. 660.) Her next shift, which Guzman worked, was scheduled for 12:00 p.m. to 6:00 p.m. on August 8. (Tr. 417.) Following her shift, Kaufman and Sims met with Guzman in the café's courtyard and told her that she was fired because she was a no-call, no-show on August 5. (Tr. 417-18).

At hearing, Kaufman testified that on August 8, Sims informed her that, during her August 8 shift, Guzman was

> loud and not happy to be there, not participating, and not being a collaborative teammate…and spent a majority of the time on her phone…and was on social media blasting the Company, tagging the Company—on the clock—instead of being the barista that day.

(Tr. 640.) Guzman was not recalled by counsel for the General Counsel to rebut this testimony. Sims did not testify at hearing. Guzman's disciplinary action write up states that she was discharged for "No call, no show. Improper call out procedure. Social media policy violations." (JX 2.)

According to Guzman, after being told that she was terminated, she left the meeting, which lasted fewer than five minutes. (Tr. 418, 429, 642.) However, according to Kaufman, who was present for the discharge meeting, Sims attempted to serve Guzman the write up and to talk about Guzman's behavior that day but Guzman "didn't give him the opportunity to do that, and had a few expletives to say, and walked off, and left." (Tr. 641.) Guzman conceded on cross-examination that she did not want to be at work because it was tense and uncomfortable. (Tr. 426.) Guzman was not recalled by counsel for the General Counsel for rebuttal.

2. Kai Kennedy

Foxy Loxy shift supervisor[11] Kennedy first heard about the union campaign from Ambrose, and she signed the demand letter. (Tr. 479, 482.). Kennedy signed the strike notice on August 4. (Tr. 413-414, 483.) On August 5, Kennedy was scheduled to work 11:45 a.m. to 6:00 p.m. but she did not go. (Tr. 483.) Kennedy testified that she did not go to work that day because she was participating in the strike; she did not participate in the picketing. (Tr. 483.)

On August 8, Kennedy worked her next scheduled shift at Foxy Loxy. (Tr. 485.) At hearing, Kaufman testified that on August 8, Sims informed her that, during her August 8 shift, Kennedy was

> … not happy to even be there. She was loud the whole time, saying [] she didn't like it. She was going to be quitting. She was leaving her job. Just expressing extreme dissatisfaction [] and would take a few breaks. They were a little long. She just wasn't really around, and didn't seem very present, and was not happy to be there, and saying she was quitting, and was going to leave.

(Tr. 634.) Kennedy was not recalled by Counsel for the General Counsel to rebut this testimony.

As she counted out her drawer, Kaufman and Sims called Kennedy outside to the café 's courtyard where she was told that she was fired for a no call-no show on August 5, which was a violation of the handbook. (Tr. 485-486.) Kaufman asked Kennedy if she had anything she would like to contribute; Kennedy said no and walked away. (Tr. 486, 489.) Prior to her discharge on August 8, Kennedy had no history of discipline. (Tr. 487). Kennedy's disciplinary action write up states that the reason for her discharge was "No call, no show. Improper call out procedure." (JX 3.)

F. August 9 Meeting with Alice Ross

On August 9, Kaufman and Tarnowsky called Ross to the office and issued her a disciplinary write up with three causes. (Tr. 192, 643.) The first was for being late on April 12. (Tr. 192, 643-44; RX 10.) Ross stated at hearing that being late on April 12 had never come to

[11] It is established Board law that the party contending that an individual has supervisory status such as to deprive them of protection under the Act has the burden of proving that contention with detailed, specific evidence. *Veolia Transportation*, 363 NLRB No. 188, slip op. at 7 fn. 19 (2016); *G4S Regulated Security Solutions*, 362 NLRB No. 134 (2015), enfd. 670 Fed.Appx. 697 (11th Cir. 2016). Respondent argues on brief (R. Br. 14, 25.) that shift supervisors are not statutory employees, but Kennedy testified on direct examination that she did not have the authority to hire, fire, or set schedules for employees; she had the authority to write up employees but never did so. (Tr. 480). *Dean & Deluca New York, Inc.*, 338 NLRB 1046, 1047 (2003) (supervisory status is not established where the record evidence is "in conflict or otherwise inconclusive."). Titles and paper authorities are not conclusive in establishing supervisory status. *Dole Fresh Vegetables*, 339 NLRB 785 (2003); *Security Guard Service*, 154 NLRB 8 (1965), enfd. 384 F.2d 143 (5th Cir. 1967). For purposes of this decision, I find that Kennedy is not a statutory supervisor.

her attention previously. (Tr. 192.) The second and third causes were violating Respondent's solicitation and social media policies on an ongoing basis from July through August 2023. (Tr. 192.) The verbal warning tracking form received from Respondent does not list any oral warnings of incidents involving attendance, the social media policy, or the solicitation policy. (RX 10.) Ross denied that she received a copy of the write up document from August 9; the copy received into evidence reflects that Ross refused to sign it. (Tr. 196; RX 10.)

Between July 21 and August 8, Ross made ten public posts on Instagram regarding unionization and Respondent. (Tr. 197; GCX 11.) Ross did not post anything else about Respondent on social media. (Tr. 197.) Ross testified on direct examination that she was told during the August 9 meeting that she violated the social media policy by speaking ill of the company. (Tr. 203, 214.) Counsel for the General Counsel did not clarify with Ross whether it was Kaufman or Tarnowsky who made this accusation. Yet, when I asked Ross whether Kaufman or Tarnowsky had made any remarks about her Instagram posts specifically, she admitted that they had not. (Tr. 214.) Rather, Ross clarified that the management comment was aimed generally at employes making negative remarks about the company on social media. (Tr. 214.)

Kaufman testified that the write-up's reference to a violation of the social media policy referred to Ross' use of social media on the clock—not the content of Ross' social media postings. (Tr. 646, 647.) She denied that she followed Ross on Instagram or other social media—and she denied that she had seen any social media posts by Ross. (Tr. 646, 647.) Tarnowsky did not testify at hearing, but Ross testified that none of the supervisors or managers of Respondent followed Ross on social media except Elias, the "head" of the back of the house at Fox & Fig. (Tr. 212-213.) Although Ross was called by counsel for the General Counsel on rebuttal, she was not asked any further questions about Kaufman's or Tarnowsky's remarks regarding social media.

With regard to Ross' asserted violation of the solicitation policy, Kaufman testified that Ross was "soliciting, coercing employees regarding the Union…at Fox & Fig during work at work." (Tr. 647.) Ross testified that she had spoken with coworkers about the Union and gathered signatures for both the demand letter and the strike notice but did not state whether she had done so either at work or on the clock. (Tr. 181.) Yet, on rebuttal, Ross testified that, while working, she and other employees often invited coworkers to their respective bands' performances and that she posted leaflets for those performances on the café's community board. (Tr. 669.) Ross testified that supervisors were aware of her activities because she sometimes invited them to her shows. (Tr. 700.) Further, Ross testified that employees other than Ross sent out such announcements via Slack. (Tr. 700.)

The record reflects that Ross received verbal warnings prior to the strike for tardiness; failure to follow the first in first out procedure with regard to bottles; and for vaping at the front counter while the café was open before August 9. (RX 10.) Specifically as to vaping, Ross admitted on cross-examination that she did not know whether any of her coworkers had been written up for vaping inside the café. (Tr. 216.) According to Respondent's records, Ross also received a disciplinary action write up dated April 12 for calling out less than an hour before her shift, which she denied having received. (Tr. 212; RX 10.) The disciplinary write up dated April 12 is not signed by Ross—nor does it have a notation indicating that Ross refused to sign it.

During this 20-minute meeting on August 9,[12] according to Ross, Kaufman stated that Fox & Fig should have closed years ago because it had been operating at a loss for so long and was only being kept open to keep everyone's jobs. (Tr. 200.) Kaufman was not questioned by either party as to whether she actually made this statement.

Someone—Ross' testimony does not disclose who—also made "a statement that pertained to the benefits plan that was already available, and you know, as though it was a compromise for our demands that we had not asked for." (Tr. 200.) Again, neither party attempted to corroborate with Kaufman that this statement was made or who made it.

Ross also testified that Kaufman said that the process by which employees conducted the delivery of the demand letter was not actually how labor law worked, and employees' asking for a Zoom meeting was not a legitimate method of obtaining negotiation. (Tr. 200-201.) Ross, admittedly paraphrasing, testified that Kaufman said, "something along the lines of, like, you know, if we can't agree then you'll just have to find another job in regard to the strikers who had been fired." they would need to find another job. (Tr. 201.) Once again, neither party asked Kaufman to corroborate whether she made these statements.

Finally, Ross testified that she was "basically" told that she had two strikes and would eventually be out. (Tr. 205.)

[12] As a sanction for Ross' failure to comply with the subpoena issued her by Respondent, I refused to receive GC Exhibits 12 (recording) and 13 (transcription) and they were placed into the rejected exhibits file, which counsel for the General Counsel argues was prejudicial error because the recording is the "best evidence." (GC Br. 26.) I fail to see how this argument is relevant to the reason why I rejected the exhibit.

During a prehearing conference on July 17, 2024, counsel for the Charging Party stated that she represented the discriminatees as individuals. Counsel for the Charging Party timely filed a petition to revoke Respondent's subpoena issued to Ross on July 25, 2024, which I granted in part and denied in part. (JX 5.)

Specifically, as to the relevant request, 6, I agreed with the Charging Party that it was overly broad as issued, although not, as also argued by the Charging Party, improper because it sought disclosure of employees' protected concerted activities. I limited request 6 to those audio or video recordings reflecting Respondents' supervisors and/or agents' oral statements to employees regarding their protected concerted or union activities for the time period July 1, 2023 to the present. I rejected GC Exhibits 12 and 13, which were asserted by counsel for the General Counsel to reflect the full August 9, 2023, meeting between employee Ross, Kaufman, and Tarnowsky, because the audio recordings made by Ross were not produced by the Charging Party despite my August 6, 2024, order.

Yet, at hearing, counsel for the Charging Party and counsel for the General Counsel raised a new defense to the subpoena: that Ross had not received it. (Tr. 193.) Counsel for the Charging Party did not make this argument in the petition to revoke. Counsel for the Charging Party admitted that she did receive a courtesy copy, informed Ross of the requests and asked her to provide responsive documents, and counsel for the Charging Party communicated to Respondent that the subpoena was received. (Tr. 194-195.) Despite Ross' failure to comply, I allowed counsel for the General Counsel to fully examine Ross as to that the August 9, 2023, meeting, including direct, redirect, and rebuttal examinations.

No prejudice resulted from my ruling because counsel for the General Counsel was allowed to fully examine, redirect, and seek rebuttal from Ross as to the August 9 meeting without reference to General Counsel Exhibits 12 and 13. Further, I have credited Ross' testimony as to what Kaufman said at the August 9 meeting.

G. September 19 Discharge of Alice Ross

On September 13, Ross was "cut" from her shift but, according to the employee verbal warning tracking form, she "sat in office til 11 riding the clock on shift despite SL[13] repeatedly assigning/suggesting prep tasks, [T]hey did not complete them. Garmo station[14] not set up until 10:15 a.m." (RX 10.) Ross denied that she refused to set up her station in the kitchen that day and denied any recall of a disagreement with her supervisor that day. (Tr. 210.)

On September 18, Ross was scheduled to work on the grill, which she had not worked before. (Tr. 198-199.) Two employees called out sick and the back of the house "head," Elias, therefore assigned Ross to work three positions: grill, expediter ("expo"), and the dish pit. (Tr. 199). As Ross did not know how to turn on the grill, the café opened late. Ross testified that she refused to work the dish pit because she felt it would compromise the quality of her work. (Tr. 199.)

Kaufman testified that Tarnowsky told her that on September 13[15] no one could find Ross for an extended period of time even though she was needed at work; someone found Ross in the shed where food and dry goods were kept. (Tr. 649-50.) Ross testified on direct examination that she did not remember being found in the shed and denied refusing any job assignments. (Tr. 211.) On cross-examination, Ross stated that she could not remember being in the shed rather than at her "duty station" and testified that there was work-related activity to do in the shed. (Tr. 211.) She also testified that she could not remember whether she was on her cell phone in the shed when found there on September 13. (Tr. 211.)

On September 19, a coworker texted Ross "I am so sorry", the meaning of which Ross did not understand. (Tr. 199.) Ross attempted to log into the scheduling application and Slack on her cell phone and found that she could not do so. (Tr. 199-200). When Ross checked her email, she had received a message from Kaufman stating that she was terminated with a final write-up attached. (GCX 14; Tr. 200.) The e-mail message from Kaufman stated

> Due to an extensive history of ongoing performance issues, as well as attendance and time clock issues, which has continued with little to no improvement since your second and final warning write-up, this has resulted in your third write-up, which is attached to this email. According to the Company handbook p. 6, *"incurring 3 write-ups in total, regardless of topic, results in immediate termination upon the third write up"*, which is effective today, September 19, 2023.

(GCX 14.) (emphasis in original)

[13] I surmise that "SL" stands for "shift leader" and refers to the back of the house "head", Elias.

[14] No explanation or definition of the meaning of "Garmo station" was elicited at hearing.

[15] The record is unclear whether Respondent maintains that this incident occurred on September 13 or 18. Counsel for Respondent asked Ross on cross examination whether she was in the shed on her cell phone on September 13 but asked Kaufman about Tarnowsky's report of Ross being in the shed on September 18. (Tr. 211, 649.)

Reflecting the alleged lapses already detailed above, the September 19 disciplinary action write-up stated that on September 13 and September 18, Ross refused to do tasks required of her job, had poor performance, and did not follow the proper clock-out procedure. (GCX 14.)

H. The Challenged Handbook Policies

Respondent admits and I find that Respondent maintained the following rules[16] in its employee handbook (JX 1.) since about February 7, 2023:

> **At-Will Notice**
>
> Employees are not hired for any definite or specified period of time even though employee wages are paid regularly. Employees are at-will with the Company and their employment can be terminated at any time, with or without cause and with or without prior notice. Company policy requires all employees to be hired at-will and this policy cannot be changed by any oral modifications. There have been no implied or verbal agreements or promises to an employee that they will be discharged only under certain circumstances or after certain procedures are followed. There is no implied employment contract created by this handbook or any other Company document or written or verbal statement or policy.
>
> **Attendance & Tardiness**
>
> Each employee is expected to comply with the hours of work as scheduled and as requested by their immediate supervisor. Employees are expected to be present for work when regularly assigned. Punctuality is crucial for ensuring proper attention is provided to our customers. Employees are expected to be at their assigned work stations ready to work at the beginning of their scheduled shifts.
>
> Employee attendance is a major concern of the Company. Unsatisfactory attendance including tardiness and leaving work early is unacceptable performance. Tardiness is defined as reporting to work 5 minutes or more beyond scheduled start time.
>
> For all instances of tardiness, regardless of the employee's communication with management, a pattern of attendance policy violations may result in disciplinary action up to and including a write-up or temporary suspension of shifts, per manager discretion. If an employee is ill, injured, or an unexpected emergency arises which prevent them from coming to work, the employee must notify their supervisor or manager as soon as possible before the start of their scheduled work day. If an employee's supervisor or manager is not available, the employee should contact a member of management. If an employee is physically unable to contact the Company, they should direct another person to make the contact [to] management on their behalf. Leaving a message with a fellow staff member is not

[16] Format emphasis in original.

considered proper notification. If an employee is physically able to contact their manager and fails to do so, an automatic write-up will occur.

When an employee calls out, they are to advise the Company of their expected date of return. Management reserves the right to require proof of illness, injury or accident, including a doctor's statement or notice for any temporary disability.

Repeated absences, excessive absences (excused or unexcused) or a pattern of absences is unacceptable job performance. If an employee is absent for three consecutive days and has not provided proper notification, the Company will assume that the employee has abandoned their position and may be treated as having voluntarily terminated employment with the Company.

If an employee becomes ill at work they should notify their supervisor or manager immediately. If an employee is unable to perform their job tasks they may be sent home for the remainder of the day or until able to work again.

Employees will be at their workstation ready to begin work at the start of their scheduled shift or resumption of work duties. If employees are not prepared they will be considered tardy. Excessive tardiness, whether excused or unexcused, constitutes unacceptable work performance.

All absences are to be arranged and approved per the Company’s request off policy, at least two weeks in advance. This includes vacations and time off for any other reasons. Please speak to and work directly with your General Manager. For all instances of tardiness, regardless of the employee’s communication with management, a pattern of attendance policy violations may result in disciplinary action up to and including a write-up or temporary suspension of shifts, per manager discretion.

Disciplinary Action

A high level of job performance is expected of every employee. If an employee's job performance does not meet the standards established for the position, employees should seek assistance from their supervisor or manager to attain an acceptable level of performance. If employees fail to respond to or fail to make positive efforts toward improvement, corrective action may ensue, including termination of employment.

It is the policy of the Company to regard discipline as an instrument for developing total job performance rather than as punishment. Corrective action is one tool the Company may select to enhance: job performance. The Company is not required to take any disciplinary action before making an adverse employment decision, including discharge. Corrective action may be in the form of a written or oral reprimand, notice of inadequate job performance, suspension, discharge or in any combination of the above, if the Company so elects. The Company reserves its prerogative to discipline, and the manner and form of discipline, at its sole discretion.

If employees violate established Company procedures, guidelines, or exhibit behavior that violates commonly accepted standards of honesty and integrity or creates an appearance of impropriety, the Company may elect to administer disciplinary action.

Disciplinary Action & Write-Ups

Minor violations to Company policy that need to be addressed will be discussed by management with the employee using the Mention, Invitation and Conversation aspects of The Accountability Dial. These infractions or topics are informal in nature, but still reflect an issue or pattern of behavior that needs to be corrected by the employee.

The first two steps of the Accountability Dial (Mention and Invitation) are typically handled by the Shift Leads. If a behavioral pattern persists and an issue is escalated to the Conversation or beyond, the GM will be involved.

All disciplinary action will be recorded as part of the employee's file and will transfer with that employee, should they work at another café within the Foxy Family.

Incurring 3 write-ups in total, regardless of topic, results in immediate termination upon the third write-up. Write-ups will expire from the employee's record one year from the date issued, if and only if the topic which caused the write-up has been fully resolved or rectified.

Problematic behavior that will result in the need for disciplinary action includes, but is not limited to, the following examples:

- Uniform violations
- Negative attitude affecting the café and/or customer service
- Not keeping a clean work station (*especially kitchen*)
- Failure to date/label product properly
- Improper storage of employee drinks/food
- Improper storage of rags (*on food safe surface, too many out on floor, etc.*)
- Improper handling/storage of Company product
- Excessive cell phone use/on cell phone while on the clock
- Interacting with friends and customers to an extent that employee is distracted and/or otherwise neglects their duties (*especially those that are time sensitive - brewing coffee, attending creamer station, bottle cooler, portioning items, preparing or serving food, etc.*)
- Drinking alcohol while clocked in without permission
- Repeated clock-in/clock-out errors
- Checklist violations

- Time clock abuse (*clocking in then going on smoke break before working, staying clocked in while other coworkers on shift are docked out and all work is completed, etc.*)
- Intentional failure to deliver requested product

Conduct and behavior which will result in an automatic write-up includes, but is not limited to, the following examples:

- Harassment (*refer to Conduct & Behavior and Harassment policies*)
- Reporting to work under the influence
- Misconduct (*foul or offensive language, disrespectful treatment of staff or customers, negligent food safety practices, etc*.)
- Refusing to complete responsibilities/tasks
- Not showing up for scheduled shift ("*No call/ No show" - refer to Attendance & Tardiness policy on job abandonment. May result in immediate termination, per manager discretion.*)
- Theft of Company property or goods (*may result in immediate termination, per manager discretion.*)

Solicitation & Distribution

The Company prohibits solicitation and the distribution of literature during the working time of either employee; the solicitor or the employee being solicited. In addition, the Company prohibits solicitation and distribution in working areas at all times. This does not preclude employees from using their approved breaks and rest periods to solicit or distribute literature outside of working areas.

Individuals not employed by the Company are prohibited from soliciting or distributing literature on Company property at all times.

Failure to adhere to this policy may result in discipline, up to and including termination of employment.

Conduct & Behavior

General Guidelines

Orderly and efficient operation of the Company requires that employees maintain proper standards of conduct and observe certain procedures. These guidelines are provided for informational purposes only and are not intended to be all-inclusive. Nothing here is intended or will be construed to change or replace, in any manner, the "at-will" employment relationship between the Company and the employee. Nothing here is intended to infringe upon employee rights under Section 7 of the National Labor Relations Act (NLRA). The Company views the following as inappropriate behavior:

1. Failure to follow the policies outlined in this handbook.

2. Negligence, carelessness or inconsiderate treatment of Company clients and/or their matters/files.
3. Theft, misappropriation or unauthorized possession or use of property, documents, records or funds belonging to the Company, or any client or employee; removal of same from Company premises without authorization.
4. Divulging trade secrets or other confidential business information to any unauthorized person{s) or to others without an official need to know.
5. Obtaining unauthorized confidential information pertaining to clients or employees.
6. Changing or falsifying client records, Company records, employment application, medical or employment history, personnel or pay records, including time sheets without authorization.
7. Willfully or carelessly damaging, defacing or mishandling property of a customer, the Company or other employees.
8. Taking or giving bribes of any nature, or anything of value, as an inducement to obtain special treatment, to provide confidential information or to obtain a position. Acceptance of any gratuities or gifts must be reported to a supervisor or manager.
9. Entering Company premises without authorization or allowing non-employees access to restricted, employee-only areas of premises at any time.
10. Willfully or carelessly violating security, safety, or fire prevention equipment or regulations.
11. Unauthorized use of a personal vehicle for Company business or unauthorized use of Company vehicle for any reason.
12. Conduct that is illegal under federal, state, or local law.
13. Creating a disturbance on Company premises.
14. Use of abusive language.
15. Any rude, discourteous or un-businesslike behavior, on or off Company premises, which is not protected by Section Seven of the National Labor Relations Act (NLRA) and which adversely affects the Company services, operations, property, reputation or goodwill in the community or interferes with work.
16. Insubordination or refusing to follow instructions from a supervisor or manager; refusal or unwillingness to accept a job assignment or to perform job requirements.
17. Failure to observe scheduled work hours.
18. Unauthorized absence from assigned work area during regularly scheduled work hours.
19. Sleeping during regular working hours.
20. Recording time for another employee or having time recorded to or by another employee.
21. Use or possession of intoxicating beverages or illegal use or possession of narcotics, marijuana or drugs {under state, federal or local laws), on Company premises during working hours or reporting to work under the influence of intoxicants or drugs so as to interfere with job performance, or having any detectable amount of illegal drugs in an employee's system.
22. Unauthorized possession of a weapon on Company premises.
23. Illegal gambling on Company premises.

24. Soliciting, collecting money, vending, and posting or distributing bills or pamphlets during working hours in work areas. These activities are closely controlled in order to prevent disruption of Company services and to avoid unauthorized implication of Company sponsorship or approval. However, this general rule is not intended to hinder or in any way curtail the rights of free speech or free expression of ideas. Therefore, such activity by employees during non-working time, including meal and rest periods, is not restricted so long as such activity does not interfere with the orderly and regular conduct of the Company business, is lawful, in good taste, conducted in an orderly manner, and does not create safety hazards or violate general good housekeeping practices. Any person who is not an employee of the Company is prohibited from any and all forms of solicitation, collecting money, vending, and posting or distributing bills or pamphlets on Company property at all times.

Social Media

The Company understands that social media can be a fun and rewarding way to share an employee's life and opinions with family, friends, and coworkers around the world. However, use of social media also presents certain risks and carries with .it certain responsibilities. To assist employees in making responsible decisions about their use of social media, we have established these guidelines for appropriate use of social media. This policy applies to all employees of the Company.

Guidelines

In the rapidly expanding world of electronic communication, social media can mean many things. Social media includes all means of communicating or posting information or content of any sort on the internet, including to an employee's own or someone else's web log or blog, journal or diary, personal website, social networking or affinity website, web bulletin board, group messaging platforms, or a chat room, whether or not associated or affiliated with the Company, as well as any other form of electronic communication.

The same principles and guidelines found in Company policies apply to employee activities online. Ultimately, employees are solely responsible for what they post online. Before creating online content, employees should consider some of the risks and rewards that are involved. Employees should keep in mind that any conduct that adversely affects an employee's job performance, the performance of fellow employees, or otherwise adversely affects members, customers, suppliers, people who work on behalf of the Company, or the Company's legitimate business interests may result in disciplinary action up to and including termination.

Know and Follow the Rules

Carefully read these guidelines, the General Conduct Guidelines, the Sexual and Other Unlawful Harassment and Abusive Conduct policies, and ensure your postings are consistent with these. Inappropriate postings that may include discriminatory remarks, harassment, and threats of violence or similar inappropriate or unlawful conduct will not be tolerated.

Be Respectful

Employees should always be fair and courteous to fellow employees, customers, members, suppliers or people who work on behalf of the Company. Also, employees should keep in mind that they are more likely to resolve work-related complaints by speaking directly with their coworkers or by utilizing our Complaint Procedure than by posting complaints to a social media outlet. Nevertheless, if an employee decides to post complaints or criticism, they should avoid using statements, photographs, video or audio that reasonably could be viewed as malicious, obscene, threatening or intimidating; that disparage customers, members, employees, or suppliers; or that might constitute harassment or abusive conduct. Examples of such conduct might include offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment based on race, sex, disability, religion or any other status protected by law or Company policy.

Be Honest and Accurate

Employees should make sure they are always honest and accurate when posting information or news and if they make a mistake, it should be corrected quickly and they should be open about any previous posts they have altered. The internet archives almost everything; therefore, even deleted postings can be searched. Employees should never post any information or rumors that they know to be false about the Company, fellow employees, members, customers, suppliers and/or people working on behalf of the Company or competitors.

Post Only Appropriate and Respectful Content

Employees should maintain the confidentiality of Company trade secrets and private or confidential information. Trades secrets may include information regarding the development of systems, processes, products, know-how and technology. Employees should not post internal reports, policies, procedures or other internal business-related confidential communications.

Financial disclosure laws must always be respected. It is illegal to communicate or give a "tip" on inside information to others so that they may buy or sell stocks or securities.

Employees should not create a link from their blog, website or other social networking site to a Company website without identifying themselves as a Company employee.

Only personal opinions should be expressed. Employees should never represent themselves as a spokesperson for the Company. If the Company is a subject of the content they are creating, they should be clear and open about the fact that they are an employee and make it clear that their views do not represent those of the Company, fellow employees, members, customers, suppliers or people working on behalf of the Company. If an employee does publish a blog or post online related to the work they do or subjects associated with the Company, they should

make it clear that they are not speaking on behalf of the Company. It is best to include a disclaimer such as "The postings on this site are my own and do not necessarily reflect the views of the Company."

Using Social Media at Work
Employees must refrain from using social media while on work time or on Company equipment, unless it is work-related as authorized by a manager or consistent with the Electronics Assets Usage policy. Employees may not use Company email addresses to register on social networks, blogs, or other online tools utilized for personal use.

Retaliation is Prohibited
The Company prohibits taking negative action against any employee for reporting a possible deviation from this policy or for cooperating in an investigation.

Media Contacts
Employees should not speak to the media on the Company's behalf without contacting the General Manager. All media inquiries should be directed to them.

DECISION AND ANALYSIS

THE ALLEGED UNFAIR LABOR PRACTICES

Counsel for the General Counsel argues that, on August 5, Respondent (1) violated Section 8(a)(3) and (1) of the Act by discharging employees who were on strike; (2) violated Section 8(a)(1) of the Act by making, in July and August, through Jenkins and Kaufman, statements of futility, threats of loss of access to management, prohibitions against sharing the company's financial information, and attributing the discharge of its employees to their union activities; (3) violated Section 8(a)(1) of the Act by maintaining an overly broad social media policy; and (4) violated Section 8(a)(1) of the Act by applying facially neutral rules to discipline and discharge employees in retaliation for their union activities. (GC Br. 1.) As noted above, Respondent denies that it violated the Act in any manner.

A. Absalom Jackson was Not Discharged for His Union Activity on August 5

Counsels for the General Counsel and Respondent agree that Jackson's discharge should be analyzed under the Board's *Wright Line*, 251 NLRB 108 (1980),[17] enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied, 455 U.S. 989 (1982), burden shifting framework (GC Br. 47-50; R. 25.)—as do I because "the General Counsel alleges that discipline or discharge was motivated by the employer's animus toward Section 7 activity, while the employer contends that it was motivated by a legitimate business reason." *Lion Elastomers LLC*, 372 NLRB No. 83, slip op. at1-2 (2023), vacated and remanded, 108 F.4th 252 (5th Cir. 2024).

[17] To establish a violation of Section 8(a)(3) under *Wright Line*, the General Counsel must make an initial showing that the employee's union activity was a motivating factor in the employer's adverse action against that employee. To meet that burden, the General Counsel must show that the employee engaged in union activity, that the employer was aware of that activity, and that the employer had shown animus toward protected conduct. *Wal-Mart Stores*, 340 NLRB 220, 221 (2003).

The General Counsel's brief argues that Jackson engaged in protected concerted activity when he "agree[d] to have his name added to the strike notice and participat[ed] in the strike by not working his shifts on August 5." (GC Br. 48.) Knowledge (and animus, the General Counsel argues obliquely) is found in the close timing of Respondent's decision to discharge Jackson after being notified that he was on strike. (GC Br. 49-50.) Animus, per the General Counsel, is also found in the lack of pre-existing comparators and in Respondent's failure to follow its own disciplinary procedures with regard to no call-no show absences in this instance. (GC Br. 49-51.) I infer that the General Counsel maintains that these two asserted deficiencies also establish Respondent's inability to carry its burden to show that its conduct was motivated by a legitimate business reason.

Respondent's brief does not directly address whether Jackson engaged in protected concerted activity by signing the strike notice but asserts that he engaged in misconduct such as to legitimately justify his discharge by not following Respondent's call-off protocol. (R. Br. 25.) Further, Respondent's brief maintains that Respondent had no knowledge of Jackson's participation in the strike at the time the discharge decision was made, nor did Respondent bear any animus toward "the affected employee's protected activities." (R. Br. 25.)

Despite not having offered a Board case to establish this proposition, the General Counsel is correct that Jackson engaged in protected concerted activity. "The Act protects the right of employees to engage in concerted activities, including the right to strike without prior notice." *Bethany Medical Center*, 328 NLRB 1094 (1999) (citing *NLRB v. Erie Resistor Corp*., 373 U.S. 221 (1963)). Further, the Board has recognized that an employee's demonstration of support for the strike activity of others is itself concerted protected activity. *Triangle Elec. Co*., 335 NLRB 1037 (2001), revd. on other grounds by 78 Fed.Appx. (6th Cir. 2003). Thus, Jackson, by signing the strike notice and withholding his labor in solidarity with his coworkers, engaged in protected concerted activity. However, the lawfulness of Jackson's discharge hinges next on Respondent's timely knowledge of that protected concerted activity.

I find that Respondent learned of Jackson's participation in the strike no earlier than 11:21 a.m. Jackson testified that he spoke to supervisor Sims about 11:00 a.m. when Sims "insinuated" that Jackson would be fired for no call, no show for his 7:00 a.m. to Noon shift; Kaufman testified without contradiction that, after discussing the matter with her, Sims decided to discharge Jackson prior to 11:21 a.m.

Yet, the General Counsel argues that Respondent's unexplained failure to present Sims' testimony warrants an unspecified adverse inference—presumably that, had he been presented, Sims would have contradicted Kaufman's testimony as to timing. While I can certainly appreciate that Sims would have been a helpful witness as to when he made his decision on August 5, I do not agree that an adverse inference is therefore warranted on that point. Kaufman is certainly competent to testify to her own conversation with Sims, which is not hearsay because it goes to Respondent's motive in discharging Jackson. See Fed.R.Evid. 803(3).

The General Counsel also argues (GC Br. 49.) that Kaufman's testimony as to timing should be discredited because the State of Georgia Department of Labor Separation Notice and the Disciplinary Action Write Up reference Jackson having missed two shifts—not just one.

Therefore, according to General Counsel, the reasoning on these two documents that comprise Joint Exhibit 4 (missing two shifts) is different than the reasoning Kaufman gave at hearing (missing one shift). Essential to the reasoning behind the General Counsel's argument (GC Br. 50.) here is that Jackson's second shift, beginning at Noon, did not start until after Respondent was notified by emails from Ashley to Jenkins that Jackson was on strike.

I do not agree that either argument[18] forms the basis of a reason to discredit Kaufman as to when Sims decided to discharge Jackson. Jackson testified that three hours into his first shift and an hour before his second shift he told Sims that he was not coming to work because he was sick and Sims "insinuated" that Jackson would be fired as a result. And, indeed, Jackson did not report for either shift. It seems to me that the General Counsel is imposing an obligation on Sims to change his mind about his earlier decision after Jenkins and Kaufman were notified that Jackson was on strike—even though Sims obviously did not know that Jackson was on strike because Jackson lied to him about why he had not reported for work. I credit Kaufman regarding the substance and timing of her own conversation with Sims regarding his decision to discharge Jackson.

The Board generally infers knowledge to a respondent as a whole where it can be shown that *any* supervisor knew that an alleged discriminatee was engaged in union or protected concerted activity. *Goldens Foundry & Machine Company*, 340 NLRB 1176, 1177 (2003) (attributing knowledge to respondent where the higher level supervisor who made the discharge decision had no knowledge of union activity but a lower level supervisor did). Yet, Kaufman was not asked as to what time she received Ashton's e-mail notice that Jackson was on strike or what time she completed Jackson's disciplinary notice. Jenkins did not testify at all. The General Counsel simply asserts without proof that as Ashton sent the notice at 11:21 a.m., Kaufman and/or Jenkins would have read it before Jackson's second shift began at 12:00 p.m. (GC Br. 50.) Given the General Counsel's failure to establish the timing of Kaufman's knowledge, I find that the General Counsel has not satisfied the second necessary element of a prima facie case and end my analysis of Jackson's discharge here.[19]

Paragraphs 13(a), 14(a-c) and 21-23 are dismissed as to Absalom Jackson.

B. The Remaining August 5, 2023 Discharges Were Unlawful

Respondent asserts that *General Motors*, 369 NLRB No. 127 (2020), which overruled *Clear Pine Mouldings*, 268 NLRB 1044 (1984),[20] 765 F.2d 148 (9th Cir. 1985) and other cases

[18] I additionally reject the General Counsel's argument that Kaufman's testimony should be discredited because it was inconsistent with Respondent's handbook policy on attendance. The handbook states in pertinent part that "Not showing up for scheduled shift…[*m*]*ay result in immediate termination, per manager discretion.*)" (JX 1.)

[19] I realize that Kaufman and Jenkins knew that Jackson signed the demand letter. However, I find that there is insufficient evidence of animus against Jackson, individually, or against those employees who signed the demand letter, generally. Rather, as explained below and admitted by Respondent, it was employees' conduct *during the strike—specifically, entering the cafés*—that engendered Respondent's ire. (R. Br. 23.)

[20] A compliance case originally applied to determine whether an employer was obliged to reinstate striking employees, where there were verbal threats by strikers directed at fellow employees: "whether the misconduct is such that, under the circumstances existing, it may reasonably tend to coerce or intimidate employees in the exercise of rights protected under the Act." Id. at 1046 (quoting *NLRB v. W. C. McQuaide, Inc*., 552 F.2d 519, 527 (3d Cir.

that governed specific types of alleged employee misconduct, remains good law and therefore the discharges of Juno Ambrose, Zach Boykin, Sabrina Clausen, Kole Cox, Jonathan Garmendez, Chrush Jalen, Isabella Mashack, Troy Nelson, and Rose Waldron should be analyzed pursuant to *Wright Line* because the Court of Appeals for the Fifth Circuit vacated and remanded to the Board *Lion Elastomers LLC*, 372 NLRB No. 83 (2023) (overruling *General Motors, LLC*, supra), vacated and remanded, 108 F.4th 252 (5th Cir. 2024). (R. Br. 22.) In vacating, the Fifth Circuit determined that the Board exceeded the scope of the court's original remand in overruling *General Motors*. *Lion Elastomers*,108 F.4th at 259.

Respondent reasons that *General Motors* applies here because the Board's policy of nonacquiescence is inapplicable in this case. (R. Br. 22, fn 8.) This is so, according to Respondent, because nonacquiescence applies only to those cases where the court of appeals expressed a view on the merits that was contrary to the Board's. Ibid. Yet, the Board has not left it to the discretion of its judges whether to follow the Board's case law or not. In the words of my colleague, Judge Ira Sandron, the Board:

> …instructs its administrative law judges to follow Board precedent, not court of appeals precedent. *Gas Spring Co.,* 296 NLRB 84, 97 (1989) (citing, inter alia, *Insurance Agents (Prudential Insurance),* 119 NLRB 768 (1957), revd. 260 F.2d 736 (D.C. Cir. 1958), affd. 361 U.S. 477 (1960), enfd. 908 F.2d 966 (4th Cir. 1990), cert. denied 498 U.S. 1084 (1991)).

SF Markets, LLC, 363 NLRB 1415, 1425 (2016), 691 Fed.Appx. 815 (5th Cir. 2016). Therefore, to the extent that it is relevant to my decision and recommended order in these cases, as far as I am concerned, *Lion Elastomers II* is in full force and effect.

1. The Appropriate Legal Standard

The Board has specifically held that the analysis set forth in *Wright Line* is not appropriate when an employer discharges employees for "their act of 'going on strike,'" because motivation is not at issue in that instance since "'the very conduct for which employees are disciplined is itself protected concerted activity.'" *CGLM, Inc*., 350 NLRB 974, 974 fn.2 (2007) quoting *Burnup & Sims, Inc*., 256 NLRB 965, 976 (1981)), enfd. mem. 280 Fed. Appx. 366 (5th Cir. 2008); accord *EYM King of Missouri*, 365 NLRB No. 16, slip op. at 1 fn. 4 (2017), enfd. 726 Fed. Appx. 524 (8th Cir. 2018). Respondent, through Jenkins' Slack message to all employees on August 5, admitted that it fired the strikers because of their protected concerted activities. (GCX 9.) Thus, I will not apply *Wright Line* to these discharges of employees that involve alleged employee misconduct while on strike.

The General Counsel maintains (GC Br. 34.) that the striking employees discharges should be analyzed pursuant to *Clear Pine Mouldings*, supra. I disagree. The post-*Clear Pine Mouldings*[21] cases cited by the General Counsel (GC Br. 37-46.) demonstrate that to determine

1977), denying enf. in part to 220 NLRB 593 (1975)) (internal quotation marks omitted).

[21] The key for when to use *Clear Pine Mouldings* versus *Atlantic Steel* appears to be whether there was alleged striker conduct that reasonably tended to coerce or intimidate other employees during the strike. The General Counsel's analysis mixes these lines of cases together without distinction. To illustrate, for an application of the *Clear Pine Mouldings* standard in a case cited by the General Counsel, see *Universal Truss*, 348 NLRB 733 (2006)

whether an employee's conduct in the course of the strike, or other protected activity, caused him or her to forfeit the Act's protection, the Board uses the analysis set forth in *Atlantic Steel*. 245 NLRB 814 (1979); see *Lion Elastomers II*, supra (reaffirming the *Atlantic Steel* standard); see also *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (where an employee is discharged because of otherwise protected conduct, "the only issue is whether [the] conduct lost the protection of the Act because" the conduct "crossed over the line separating protected and unprotected activity"), enfd. 63 Fed.Appx. 524 (D.C. Cir. 2003). If it is determined that the misconduct alleged by the employer did not cause the employee to forfeit the protection of the Act, the causal connection between the discipline and the employee's protected activity is established and "the inquiry ends." *Nor-Cal Beverage Co.*, 330 NLRB 610, 611-612 (2000).

2. The Discharges

The fundamental right to strike is not only encompassed within the guarantees set forth in Section 7 of the Act but is expressly recognized by Section 13 of the Act. *Iron Workers Local 783* (*BE & K Constr.*), 316 NLRB 1306, 1309 (1995) (the right to strike is "a fundamental right guaranteed by Section 7 and 13 of the Act"). When "'employees are protesting working conditions…those employees can protest by any legitimate means, including striking,"' even if "some lesser means of protest could have been used." *New York Presbyterian Hudson Valley Hospital*, 372 NLRB No. 15, slip op. at 5 (2022) (quoting *Trompler*, *Inc*., 335 NLRB 478, 480 and fn. 26 (2001)). Each of the August 5 alleged discriminatees signed the strike notice and participated in picketing (except Jackson) Respondent's cafés. Thus, it is beyond question that the discharged employees engaged in protected concerted activity. *Bethany Medical Center*, supra. The next issue is whether the alleged discrimatees somehow lost the protection of the Act by their conduct during the strike. I find that they did not.

To determine whether an employee loses the protection of the Act in these circumstances, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. This multifactor framework enables the Board to balance employee rights with the employer's interest in maintaining order in its workplace. *Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB 308 (2014), enfd. 629 Fed.Appx. 33 (2d Cir. 2015); See *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), enfd. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB No. 117 (2014).

When an employee engages in abusive or indefensible misconduct during an activity that is otherwise protected, the employee forfeits the Act's protection. See *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (profanity in front of other employees, used towards supervisor simply asking to schedule a meeting, lost the protection of the Act). The Board, however, has held that the standard is high for forfeiting the protection of the Act, stating that there must be egregious or offensive conduct to lose the Act's protection. *Consolidated Diesel*, 332 NLRB

(Board majority finds that physical violence, threats, and vandalism aimed at non-striking employees was misconduct such as to deprive strikers of the Act's protection as it "reasonably tended to coerce or intimidate employees in the exercise of rights protected under the Act"). For an application of the *Atlantic Steel* standard in a case cited by the General Counsel, see *Crown Plaza LaGuardia*, 357 NLRB 1097 (2011) (applying four factor balancing test to striking employees using an individualized inquiry into each employee's conduct and finding that only those employees who physically restrained a supervisor lost the protection of the Act.)

1019, 1020 (2000) (citations omitted), enfd. 263 F.3d 345 (4th Cir. 2001); see also *Trus Joist Macmillan*, 341 NRLB 369, 371 (2004).

In this case, the first *Atlantic Steel* factor, the place of the discussion, weighs in favor of protection. The entrance of employees and their supporters inside the cafés for five minutes, at most, was not accompanied by violence or loud, disruptive chanting, and had only a minimal, if any, adverse impact on operations as customers and employees observed the picketers enter and then continued to carry out their business. See *NLRB v. National Furniture Mfg. Co.,* 315 F.2d 280, 284-286 (7th Cir. 1963); *Chrysler Corp.,* 228 NLRB 486, 490 (1977); *Service Employees Local 525 (General Maintenance Service),* 329 NLRB 638 (1999); *Allied Aviation Service Co. of New Jersey,* 248 NLRB 229 (1980).

Further, to the extent that Respondent contends (R. Br. 20.) that the striking employees committed misconduct outside the cafés, I find that the momentary blocking of the Foxy Loxy walkway by Cox while the picketers were outside was not intentional. The knocking over of a bicycle chained to a bike rack in front of Foxy Loxy was also obviously unintentional and quickly remedied. Such ephemeral and incidental mistakes certainly do not rise to the level of egregious and offensive conduct warranting the loss of the protection of the Act. Nor does nonviolent chanting and carrying signs on a public sidewalk where customers are able to enter and exit freely, as occurred here, cause employees to lose the protection of the Act. Cf. *Restaurant Horikawa*, 260 NLRB 197, 198 (1982) (a group of 30 initially engaged in a protected demonstration outside the restaurant but lost the Act's protection when they entered the restaurant and "paraded boisterously about" during the dinner hour for 10 to 15 minutes).

The second *Atlantic Steel* factor, the subject matter of the discussion, also weighs in favor of protection. The August 5 strike apparently had at least two different objectives. Employee witnesses testified that the employees decided to strike to protest Respondent's refusal to meet with them to discuss their demands. The signs carried by the striking employees and their chants, however, suggest that the employees also sought to advise the public of the strike and gain their support. Both objectives were unquestionably protected. See *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978) (employees are also protected under the "mutual aid or protection" clause of Section 7 when they seek to "improve their lot as employees through channels outside the immediate employee-employer relationship.").

The third *Atlantic Steel* factor concerns the alleged discriminatees' conduct during the strike. "[T]he question is an objective one; i.e. whether the alleged misconduct is so serious that it deprives the employees of the protection the Act normally gives for engaging in concerted activity." *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd., 652 F.3d 22 (D.C. Cir. 2011).

Respondent states that by entering its cafés and seeking to "encourage[] other employers, who were on work time in work areas, to walk off the job", the alleged discriminatees violated Respondent's no-solicitation rule. (R. Br. 24.) (citing *UPS Supply Chain Solutions, Inc.*, 357 NLRB 1295, 1296 (2011)). Respondent does have a no-solicitation handbook rule.[22] There was

[22] Enforcement of this rule itself is, of course, also alleged as a separate 8(a)(1) violation in complaint paragraphs 8(a)(iv) and 20(c) with regard to Alice Ross.

no evidence introduced at hearing that the alleged discriminatees were on working time or that they distributed literature when they entered the cafés. Respondent's no-solicitation policy is clearly inapplicable to the striking employees.

My review of the record discloses no misconduct by the striking employees during the strike. There was no shouting, no cursing, no violence, and no threats. See *Thalassa Restaurant*, 356 NLRB 1000 fn. 3 (2011) (protection of the Act was not lost where an employee, along with a group of nonemployees, briefly entered the restaurant during evening dining hours to deliver a letter protesting the Respondent's alleged labor law violations) (citing *Goya Foods of Florida*, 347 NLRB 1118, 1119, and 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (finding peaceful letter delivery by employees, accompanied by nonemployees, protected); *Saddle West Restaurant*, 269 NLRB 1027, 1041-1043 (1984) (restaurant employee did not lose the Act's protection by concerted activity near two or three customers where there was no evidence of disruption) and distinguishing *Restaurant Horikawa*, 260 NLRB at 198 (a group of 30 demonstrators "seriously disrupted" the employer's business by " invading the restaurant en masse and parading boisterously about during the dinner hour when patronage was at or near its peak." (internal quotation marks omitted)). I find that the striking employees and their supporters peacefully[23] entered Respondent's cafés to present a strike notice on August 5 with signs and a bullhorn and asked on-duty employees if they would like to join the job action before leaving. This was not misconduct.

Regarding the fourth *Atlantic Steel* factor, whether the conduct at issue was provoked by the Respondent's unfair labor practices, there was no unremedied unfair labor practice pending at the time of the discharges—nor were the employees assertedly striking in protest of an unfair labor practice. This factor is neutral. *Fresenius USA Mfg*., 358 NLRB 1261, 1267 (2012).

I find, based on the above analysis, that employees Juno Ambrose, Zach Boykin, Sabrina Clausen, Kole Cox, Jonathan Garmendez, Chrush Jalen, Isabella Mashack, Troy Nelson, and Rose Waldron did not lose the protection of the Act through their conduct on August 5. I therefore find that Respondent violated the Act as alleged in paragraphs 13(a), 14(a-b), and 21-23 with regard to employees Juno Ambrose, Zach Boykin, Sabrina Clausen, Kole Cox, Jonathan Garmendez, Chrush Jalen, Isabella Mashack, Troy Nelson, and Rose Waldron.

C. *The August 8, 2023 Discharges of Andrea Guzman and Kai Kennedy Were Unlawful*

The General Counsel argues that Andrea Guzman and Kai Kennedy were discharged for their protected concerted activity of going on strike on August 5—specifically by being absent without notice on that day. (GC Br. 51-53.) Further, the General Counsel contends that the facially neutral work rules applied to Guzman and Kennedy to effect their discharges were "selectively and disparately" enforced against these employees' union activity. (GCX 1(o); GC Br. 53.) Respondent counters that Guzman and Kennedy were discharged not for their absences on August 5 but for their conduct on August 8. (R. Br. 25.) Further, Respondent contends that Kennedy is a statutory supervisor and therefore excluded from protection under the Act.

[23] That one customer and her children may have been upset by the protest does not change this conclusion. See *Saddle West Restaurant*, 269 NLRB 1027, 1042-1043 (1984) (a complaint by a customer was not enough to remove the protection of the Act).

As with Jackson, because Respondent contends that it was not Guzman's and Kennedy's participation in the strike that caused their discharges[24] but their post-strike conduct on August 8, *Wright Line* is the proper analytical framework to examine whether the discharges were lawful.

There can be no question that both Guzman and Kennedy, by signing the strike notice and withholding their labor in solidarity with their coworkers, engaged in protected concerted activity. See *Bethany Medical Center*, 328 NLRB at 1094; *Triangle Elec. Co*., 335 NLRB at 1037. Unlike with Jackson, when Respondent discharged Guzman and Kennedy on August 8, it unquestionably had knowledge that they engaged in the protected concerted activity of striking on August 5 because their names were included in every email sent by Ashton to Jenkins and Kaufman that day. Guzman and Kennedy were not fired until August 8.

As to animus, the General Counsel does not make a specific argument on brief as to either Guzman or Kennedy. Yet, it is clear to me that Respondent's disciplinary documents issued to both employees rely on "No call, no show. Improper call out procedure"[25] as the reason for their discharges. (JX 2, 3.) There is no question that this language refers to Guzman and Kennedy missing work on August 5 without following Respondent's call out policy due to their participation in the strike. Thus, these documents function as admissions and establish animus and a connection between the protected concerted activity and the discharge in that they explicitly punish the employees because they did not follow the policy—and the employees did not follow the policy because they were on strike, which Respondent knew at the time the disciplines issued on August 8.

Finally, the General Counsel contends that Respondent failed to show that it would have terminated Guzman or Kennedy absent their protected concerted activity. (GC Br. 52.) The only possible comparator here is Jackson, whom Respondent, through Sims, discharged three days earlier for no call, no show without knowledge that he was on strike. Although Respondent refers to its handbook policies as proof that the discharges were not discriminatory, Respondent does not rely on Jackson as a comparator.

Rather, Respondent contends, contrary to its disciplinary documents issued to Guzman and Kennedy, that the real reason why these employees were discharged was *not* their no call, no show on August 5 but their failure to observe workplace standards and displaying poor attitudes on August 8, in addition to a "social media" policy violation by Guzman that appears to have been using her cell phone "excessively" and "blasting" the company on social media, according to Kaufman. (Tr. 640; R. Br. 14, 25.)

With regard to Kennedy, Kaufman's testimony is plainly inconsistent with the reasoning provided on the disciplinary notice she signed on August 8. Based on this discrepancy and the close timing of the discharge to Kennedy's strike activity, I conclude that at least part of the reason for Kennedy's discharge was, in fact, that she did not follow Respondent's call off policy on August 5. This demonstrates animus against Kennedy's participation in the strike; it also establishes a causal relationship between that animus and Kennedy's discharge. See *Tschiggfrie*

[24] Respondent admits that they were both discharged. (GCX 1(q); R. Br. 25.)

[25] Guzman's discipline also relies on asserted "[s]ocial media policy violations". (JX 2.)

Properties, 368 NLRB No. 120, slip op. at1 (2019) (proof of animus may be direct or circumstantial based on the record as a whole). Therefore, I reject Respondent's articulated reason for discharging Kennedy on August 8.

I also reject Respondent's claimed reasons for discharging Guzman. The same disparity exists between the disciplinary notice that Respondent issued Guzman and Kaufman's testimony at hearing. And, claiming that Guzman's discharge was not discriminatory because she did not follow the call off policy amounts to nothing more than an admission that Guzman was discharged, at least in part, because she was on strike on August 5. Respondent presented insufficient evidence that it would have discharged Guzman solely because she violated Respondent's social media policy. Further, the social media policy relied upon by Respondent to discharge Guzman is overly broad, and therefore unlawful, as explained below.

I find that Respondent's discharges of Guzman and Kennedy violated Sections 8(a)(1) and (3) of the Act as alleged in paragraphs 13(b), 14(a-d),[26] and 21-23.

D. *Respondent's Social Media Policy is Overly Broad*

In evaluating handbook rule allegations, the Board considers whether an employer violates Section 8(a)(1) of the Act by maintaining a work rule 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). If the rule explicitly restricts Section 7 rights, it is unlawful. *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). If it does not, the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section7 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 647.

Thus, an employer violates Section 8(a)(1) of the Act when it maintains workplace rules or policies that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, supra. The Board has long held that the mere maintenance of rules may violate the Act without regard for whether the employer ever applied the rule for unlawful purposes. *Rio All-Suites Hotel & Casino*, 362 NLRB 1690, 1698 (2015). With respect to facially neutral work rules that may be reasonably interpreted to restrict Section 7 activity, the Board interprets these rules "from the perspective of an employee who is subject to the rule and economically dependent on the employer, and who also contemplates engaging in protected concerted activity." *Stericycle, Inc*., 372 NLRB No. 113, slip op. at9 (2023).

Accordingly, if an employee could reasonably interpret the rule to have a coercive meaning, the General Counsel will carry their burden, even if a contrary, noncoercive

[26] I note that complaint paragraphs 14(c) and (d) plead that Respondent enforced its rules against Guzman and Kennedy "selectively and disparately". The General Counsel did not present evidence nor make arguments in its brief in support of a finding of disparate treatment, which would, in my view, necessarily require the General Counsel to establish the existence of comparators who engaged in the same or similar conduct as that assertedly relied on by Respondent for discharging Guzman and Kennedy, but who were not discharged. The General Counsel introduced no such evidence at hearing. Therefore, my findings do not include adoption of a theory of disparate treatment as to these two discharges.

interpretation of the rule is also reasonable. Ibid. The Board in *Stericycle* made clear that *Lafayette Park Hotel*, supra, and *Lutheran Heritage Village-Livonia*, supra, set forth the proper interpretive focus for determining the perspective of a reasonable employee subject to a challenged work rule. *Stericycle*, 372 NLRB No. 113 at 7–8. A "typical employee interprets work rules as a layperson rather than as a lawyer." Ibid. Moreover, any ambiguity in a rule is interpreted against the drafter. See, e.g., *Lafayette Park Hotel*, 326 NLRB at 828 & fn. 22 (citing *Norris/O'Bannon*, 307 NLRB 1236, 1245 (1992)).

Thus, if the General Counsel carries their burden, the rule is presumptively unlawful. *Stericycle*, 372 NLRB No. 113, slip op. at 9. That is so even if the rule could also be reasonably interpreted not to restrict Section 7 rights and even if the employer did not intend for its rule to restrict Section 7 rights. Id. at 9–10. However, the employer may rebut that presumption by proving 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. at 10. If the employer proves its affirmative defense, then the work rule will be found lawful to maintain. Ibid.

The General Counsel argues (GC Br. 62-63.) that Respondent's social media policy is unlawfully overly broad as to two provisions:

> Employees should keep in mind that any conduct that adversely affects an employee's job performance, the performance of fellow employees, or otherwise adversely affects members, customers, suppliers, people who work on behalf of the Company, or the Company's legitimate business interests may result in disciplinary action up to and including termination.
>
> Employees should keep in mind that any conduct that adversely affects an employee's job performance, the performance of fellow employees, or otherwise adversely affects members, customers, suppliers, people who work on behalf of the Company, or the Company's legitimate business interests may result in disciplinary action up to and including termination.

I find that an employee would reasonably interpret both of these provisions to restrict Section 7 activities.

The Board has held that an internet/blogging policy that prohibits "inappropriate discussions about the company, management, and/or co-workers" would be reasonably construed by employees to prohibit protected social media posts. *Triple Play Sports Bar & Grill*, 361 NLRB at 313. It has also consistently held that rules that prohibit conduct or speech that embarrasses or harms the reputation of the company are unlawful. *The Sheraton Anchorage*, 362 NLRB 1038 fn. 4 (2015); see *First Transit, Inc*., 360 NLRB 619, 620 fn. 5 (2014) (finding facially unlawful a rule prohibiting employees from participating in "outside activities that are detrimental to the Company's image or reputation, or where a conflict of interest exists"); *Costco Wholesale Corporation*, 358 NLRB 1100 (2012) (prohibiting electronic posting statements that "damage the Company . . . or damage any person's reputation.").

I find that the social media rules at issue in the complaint would reasonably be interpreted by employees to prohibit discourse on social media that criticizes Respondent and therefore they are overly broad. Any ambiguity in the social media rules "must be construed against the employer as the promulgator of the rule." *Triple Play Sports*, 361 NLRB at 313 (citing *Hyundai America Shipping Agency*, 357 NLRB 860, 870 (2011) (citing *Lafayette Park Hotel*, 326 NLRB at 828).

Relying on the overruled cases *Bemis Company, Inc.*, 370 NLRB No. 7 (2020) and *Medic Ambulance Service, Inc*., 370 NLRB No. 65 (2021), Respondent argues (R. Br. 28.) that the Board has found a social media policy lawful where:

> Read in its entirety, the rule makes clear that, to safeguard the reputation and interests of the company, employees referring to the company on social media must be respectful and professional, must not disclose proprietary information, must respect their coworkers, and must not harass, disrupt, or interfere with another person's work or create an intimidating, offensive, or hostile work environment. Employees would reasonably understand that adhering to those specific expectations would support the general expectations described in the rule's first paragraph without infringing on their Section 7-protected rights to discuss, criticize, or complain about working conditions with coworkers or the public when using social media.

The Board made that determination in *Bemis*, 370 NLRB No. 7 , slip op. at 3, using now-overruled cases, *The Boeing Co*., 365 NLRB No. 154 (2017) and *LA Specialty Produce Co*., 368 NLRB No. 93 (2019). The Board has since concluded that the *Boeing* standard "permits employers to adopt overbroad work rules that chill employees' exercise of their rights under Section 7 of the Act"; "gives too much weight to employer interests"; and "condones overbroad work rules by not requiring the party drafting the work rules—the employer—to narrowly tailor its rules to only promote its legitimate and substantial business interests while avoiding burdening employee rights." *Stericycle, Inc.,* 372 NLRB No. 113, slip op. at 1 (2023). *Boeing* and its progeny are no longer relevant to work rule analyses under the Act.

The General Counsel having carried their burden, under the current Board rule, it is Respondent's burden to demonstrate that its social media policy advances a legitimate and substantial business interest, and that the Respondent is unable to advance that interest with a more narrowly tailored rule. Ibid. Respondent has failed to do so.

Therefore, I find that Respondent violated Section 8(a)(1) of the Act through the mere maintenance of its overly broad social media policy as alleged in complaint paragraphs 9 and 21.

E. Alice Ross was Unlawfully Disciplined and Discharged

The General Counsel alleges that Ross was disciplined on August 9 and then discharged on September 19 because of her participation in the August 5 strike. As to the August 9 discipline, the General Counsel asserts that Respondent discriminatorily applied to Ross the neutral call out rule, the unlawful social media policy, and the neutral no-solicitation policy. (GC Br. 54.) With regard to Ross' September 19 discharge, the General Counsel asserts that

Respondent relied on the unlawful August 9 discipline to place Ross on a final warning, upon which Respondent then relied to discharge Ross based upon Ross's alleged refusal to perform her job duties, poor performance, and failure to clock out when instructed to do so. (GC Br. 55, 59.)

Respondent counters (R. Br. 26.) that Ross had a long history of workplace infractions, which culminated in a disastrously poor performance and failure to follow directions on September 19. Respondent argues (R. Br. 27.) that its workplace policies were not discriminatorily applied because there were no comparable employee actions to the August 5 strike. Further, specifically as to solicitation, Respondent argues (R. Br. 27.) that Ross' promotion of her band, which Respondent freely allowed, was not comparable to Ross' "solicitation and coercion" of employees "during work hours."

1. August 9, 2023 Discipline

The proper lens through which to view Ross' discipline and discharge is the *Wright Line* burden shifting analysis. There is no question that Ross showed support for going on strike on July 26 in a company-wide Slack message and that she participated in the August 5 strike. Nor is there any question that Respondent was aware that Ross engaged in these protected concerted activities. What is at issue in the General Counsel's prima facie case for Ross' discipline and discharge is animus.

Unlike striking employees Ambrose, Boykin, Clausen, Cox, Garmendez, Jalen, Mashack, Nelson, and Waldron, who entered Respondent's cafés during the strike, Ross was not explicitly fired for her protected concerted conduct. Yet, in the timing of Ross' August 9 discipline; in Respondent's use of its overly broad social media policy to discipline Ross; and in Respondent's reliance on its no-solicitation policy to forbid only protected concerted activity, I infer Respondent's animus against Ross' protected concerted activities.

The timing of Respondent's discipline of Ross shows animus in two ways. First, in that Respondent waited from April 2023 to August 2023 to discipline Ross for violation of the neutral attendance policy, and second, in that Respondent issued the discipline a mere four days after the strike. Respondent has not explained the timing of the August 9 discipline, which was its burden to bear. See *Bliss Clearing Niagara, Inc*., 344 NLRB 296, 306 (2005) (timing of adverse action shortly after an employee has engaged in known union protected activity provides "reliable competent evidence of unlawful motive").

Respondent also disciplined Ross on August 9 for an asserted violation of its social media policy. I credit Ross' testimony that the reason provided by Kaufman and Tarnowsky during her disciplinary meeting was that she had spoken ill of the company, rather than Kaufman's testimony that it was Ross' use of social media on the clock that was the basis for this asserted violation of the handbook's rules. I credit Ross over Kaufman because Ross' testimony is consistent with the reason provided by Sims to Kaufman for discharging Guzman—"blasting the company" on social media. Such consistency, affirmed by Kaufman herself at hearing in her report of Sims' reasoning, tends to show that the two employee witnesses are telling the truth. As I found above that the social media policy's restrictions on complaining about Respondent violate Section 8(a)(1) of the Act, Respondent's resort to a violative rule tends to show animus.

Finally, Respondent's August 9 discipline of Ross for violation of the handbook's facially neutral no-solicitation policy also tends to show animus because Respondent chose to interpret the policy to only prohibit Ross' protected concerted activity. It does not appear to be in dispute that Respondent allowed Ross and her coworkers to advertise their bands and music at work and to use Respondent's Slack platform for such advertisements but disciplined Ross for allegedly soliciting and coercing employees when she discussed the union. This is disparate treatment based solely on the subject of Ross' speech, which was a protected concerted activity.

Further, it is an established Board principle that

> Employers may ban solicitation in working areas during working time but may not extend such bans to working areas during nonworking time. See, e.g., *Restaurant Corp. of America v. NLRB*, 827 F.2d 799, 806 (D.C. Cir. 1987) ("[A]n employer may not generally prohibit union solicitation … during nonworking times or in nonworking areas.") (citing *NLRB v. Babcock & Wilcox Co*., 351 U.S. 105, 112-113 (1956); *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-798 (1945)).

UPS Supply Chain Solutions, Inc., 357 NLRB 1295, 1296 (2011).

The two witnesses' testimony on the point of *when* Ross discussed the strike and/or the union provided little informative detail about the circumstances surrounding Ross' discussions at work about the strike and/or the union. However, in the absence of any dispute that Respondent allowed Ross and her coworkers to advertise their bands and music at work and to use Respondent's Slack platform for such advertisements but disciplined Ross for allegedly soliciting and coercing employees when she discussed the union, I find there is an adequate showing by the General Counsel to establish that the neutral no-solicitation rule was disparately enforced[27] with regard to Ross. As such, it also tends to show that Respondent harbored animus against Ross because of her protected concerted activities.

The General Counsel has established a prima facie case that Respondent disciplined Ross on August 9 because of her protected concerted activities. Respondent, meanwhile, has failed to show that it would have disciplined Ross regardless of those activities. Further, the General Counsel has also established that Respondent discriminatorily applied its social media, attendance, and no-solicitation policies. Finally, the social media policy being overly broad, its application to Ross was also a violation of the Act. As such, I find that Respondent violated Section 8(a)(1) and (3) of the Act as alleged in complaint paragraphs 19(a), 20(a-e), and 21-23.

1. Alleged 8(a)(1) statements by Kaufman on August 9

The General Counsel alleges that Kaufman made two statements that violated Section 8(a)(1) of the Act during the August 9 meeting with Ross where she was disciplined. In the first statement, it is alleged, Kaufman threatened employees with store closure and a reduction in

[27] Respondent's declaration (R. Br. 27.), based on a court of appeals case, that union solicitation is different from other types of solicitation, is not supported by Board case law.

benefits if they supported the Union. In the second statement, it is alleged that Kaufman informed employees that it would be futile for them to select the Union as their bargaining representative.

The Board's general standard for assessment of employers' statements that are alleged to constitute unlawful threats is as follows:

> An employer violates Section 8(a)(1) by acts and statements reasonably tending to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. The Board employs a totality of circumstances standard to distinguish between employer statements that violate Section 8(a)(1) by explicitly or implicitly threatening employees with loss of benefits or other negative consequences because of their union activity, and employer statements protected by Section 8(c).

Empire State Weeklies, 354 NLRB 815, 817 (2009) (citations and internal punctuation omitted).

The Board has also observed that, "[t]he test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303 (2003) (footnote omitted). Finally, "in considering whether communications from an employer to its employees violate the Act, the Board applies an objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006) (citation and internal quotation marks omitted).

More specifically, unreasonable interference with employees' Section 7 rights includes facility closure threats connected to union activity. *Mid-South Drywall Co., Inc.*, 339 NLRB 480 (2003).

In testimony that was led, Ross testified, first:

> Q: Going back to the conversation with Julie and Steph on August 9th, do you remember there being any threats of the store closing?
>
> A: Yes.
>
> Q: Do you remember what specifically was said?
>
> A: I remember that specifically, you know, Julie had stated that Fig should have closed years ago because it's been operating at a loss for so long and like, you know, it's only open because we – they – they wanted to keep everybody's jobs on the line and everything.

I credit Ross' recollection of Kaufman's words; Kaufman did not deny them at hearing. However, there was little context elicited from Ross as to how the subject of Fox & Fig's finances came about during the disciplinary meeting. Yet, the record contains evidence that,

faced with the employees' demands, the financial viability of the cafés was also raised by Respondent earlier via a Slack message to all employees. Further, the record shows that chants by employees during the strike included "We work. We sweat. Put 25 on my check." (Tr. 145.); "Seven twenty-five ain't enough. Come on, and rise up. Put your fist up." (RX 14.); and "If we don't get it, shut it down." (Tr. 102). These chants from four days prior to the disciplinary meeting referred to the employees' demand for increased wages.

It is not surprising, then, that discussion of the financial status of Fox & Fig arose following the strike. Yet, without more context of how Kaufman came to utter the words she did, I conclude that her language "created the impression in the minds of employees that there was an inevitable linkage between unionization and job loss." *Homer D. Bronson Co.,* 349 NLRB 512, 513 (2007), enf. 273 Fed. Appx. 32 (2d Cir. 2008) (internal punctuation omitted). Kaufman's words were especially coercive because the discipline given during the meeting was in itself an unfair labor practice as explained below.

Impliedly threatening the loss of existing benefits if employees join a union is unlawful. *Starbucks Corp.*, 374 NLRB No. 9, slip op. at 14 (2024). Such implied threats are given force where an employer "combines its 'right to say no,' or demand reductions in benefits, with an implied threat to remove its plant when the inevitable disagreement and strike ensued." *Riley-Beaird, Inc.*, 253 NLRB 660, 673 (1980) (through speeches, slides, and posters, employer conveyed an implied threat to reduce benefits of the employees if they selected the union as their collective-bargaining representative). To stress the risk of losing benefits "…exploit[s] the fears of employees about losing existing benefits…." *Hasbro Industries, Inc.*, 254 NLRB 587, 592 (1981).

Ross further testified, again, being led:

> Q: Were there any statements regarding a reduction of benefits in unionizing?
>
> A: Yes. Yes. There was a statement that pertained to the benefits plan that was already available, and you know, as though it was a compromise for our demands that we had not asked for.

I do not find that this "statement" was a threat or implied threat of loss of benefits. Rather, despite the General Counsel's prompting and characterization of Kaufman's words, Ross conveyed a "statement that pertained to benefit plan that was already available", which, considering the context appears to me to be yet another reference to Respondent's inability to afford to give more economic benefits—not a threat to take away what benefits employees already have. Accordingly, I dismiss paragraphs 18(a) and 21 as to a reduction in benefits.

The legality of any particular statement depends upon its context. Here, Ross, admittedly paraphrasing, testified that Kaufman said, "something along the lines of, like, you know, if we can't agree then you'll just have to find another job in regard to the strikers who had been fired." (Tr. 201.) Respondent did not rebut this testimony.

The Board has long held that statements by an employer telling employees to find another job if they did not like the employer's terms and conditions of employment implicitly threaten

discharge because they convey the impression that the employer considers complaining about working conditions and engaging in union activity incompatible with continued employment. *Equipment Trucking Co., Inc*., 336 NLRB 277 (2001) (citing *Padre Dodge*, 205 NLRB 252 (1973) and *Stoody Co*., 312 NLRB 1175, 1181 (1993)).

With these principles in mind, I find that employes would reasonably interpret Kaufman's remark as indicating that Respondent controls all terms and conditions of employment, would fire anyone who did not agree with Respondent's management of those terms and conditions, and that, therefore, union representation would be futile.

Accordingly, with regard to threats of store closure, I find that Respondent violated Section 8(a)(1) of the Act as alleged in paragraphs 18(a) and 21 of the complaint. I also find that Respondent conveyed to employees the impression that union organizing would be futile as alleged in paragraphs 18(b), 21, and 23. With regard to the alleged threat of reduction in benefits, paragraphs 18(a), 21, and 23 of the complaint are dismissed.

1. September 19, 2023 Discharge

Using the same facts as to protected concerted and union activity and knowledge as relevant to Ross discipline on August 9, the General Counsel asserts (GC Br. 59.) that Ross was discharged on September 19 in retaliation for her participation in the strike and support for the union. Respondent does not dispute the underlying facts establishing either of these elements of a *Wright Line*, supra, prima facie case. It is as to animus where the parties' views differ again.

Without citing to any Board cases, the General Counsel argues (GC Br. 59.) that animus is evident in that Respondent tolerated Ross' poor performance without escalating her discipline prior to August 5; failed to "speak with Ross about these issues prior to terminating her by email"; and proffered no proof that it had ever disciplined other employees for poor performance, refusal to perform their job duties, and failure to clock out. Respondent's position (R. Br. 26.) is that Ross was simply a bad employee with a long history of poor performance whose misconduct on September 19 was the final straw.

Alternatively, the General Counsel argues that Ross' discharge was unlawful because Respondent purported to rely on its progressive discipline policy in Ross' discharge notice: as the August 9 disciplines were unlawful, the September 19 discharge was also unlawful.

In considering whether animus is present, "an employer fails to meet its burden where the evidence affirmatively shows a lack of consistency in the employer's application of its disciplinary rules, and where the case for unlawful motive is substantial." *Publix Supermarkets*, 347 NLRB 1434, 1439 (2006). However, where there is no evidence that such comparator employees exist, it cannot be established that the employer changed its practices due to animus. *Allied Med. Transp., Inc.*, 360 NLRB 1264, 1272 (2014) (no inference of unlawful discrimination arises from differences in treatment between or among employees who are not similarly situated) (citing *Syracuse Scenery & Stage Lighting Co*., 342 NLRB 672, 674 (2004) and *Hoffman Fuel Co.*, 309 NLRB 327, 329 (1992)), enfd. 805 F3d 1000 (11th Cir. 2015). The Board has also found that toleration of poor performance that suddenly ends in the face of protected concerted or union activity can be indicative of animus. *The Holding Company*, 231

NLRB 383, 397 (1977) (employee's "conduct prior to her discharge was no more unsatisfactory than it had been in the past"). Finally, an employer's failure to follow its progressive discipline policy can lead to an inference of animus. *Embassy Vacation Resorts*, 340 NLRB 846, 849 and 870 (2003).

The General Counsel did not establish that other employees engaged in the same or similar conduct as Ross but were not disciplined or discharged. As such, that Respondent did not show comparable discipline to similarly situated employees does not raise the inference of animus here. And, although Respondent tolerated Ross' poor performance and flouting of policy until August 9, she was apprised that day that her performance was unsatisfactory. More importantly, because the August 9 warning was tainted by union animus, Ross was previously warned about lesser breaches of policy and her failure to meet Respondent's expectations. I find the animus rationales advanced by the General Counsel unsatisfactory.

Yet, I find that the animus relevant to Ross' August 9 discipline is not so stale or remote as to be inapplicable only six weeks later when Ross was fired. See *Fluor Daniel, Inc.*, 311 NLRB 498 (1993) (motive may be inferred from the total circumstances and the Board will infer animus in the absence of direct evidence). For this reason, I find that the General Counsel has produced sufficient evidence of animus to establish a prima facie case under *Wright Line* as to Ross' discharge.

Finally, I agree with the General Counsel that Respondent's defense that Ross' poor performance on September 19 was the last straw does not evince a legitimate, non-discriminatory reason justifying her discharge because I found above that the August 9 predicate discipline was unlawful. *Red Rock Casino Resort Spa*, 373 NLRB No. 67, slip op. at 5 and fn. 29 (2024).

I find that Respondent, by the conduct alleged in paragraphs 19(b), 20(a), 20(b), 20(d),[28] 20(e), and 21-23, violated Sections 8(a)(1) and (3) of the Act.

F. Respondent's Application of the Facially Neutral Rules to the Discriminatees

An employer violates Section 8(a)(1) of the Act when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB at 825. In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. Id. at 825, 827. Thus, the first step in evaluating the lawfulness of work rules is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful.

If the rule does not explicitly restrict activity protected by Section 7, a violation is dependent upon a showing that: (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

[28] In contrast with Guzman and Kennedy, the General Counsel showed at hearing the existence of disparate treatment with regard to enforcement of Respondent's solicitation rule as applied to Ross. The record does not establish disparate treatment with regard to the other rules as alleged to have been applied to Ross in the complaint, however. Therefore, my finding of disparate treatment with regard to Ross is limited to paragraph 8(a)(iv).

rule has been applied to restrict the exercise of Section 7 rights. *Lutheran Heritage Village—Livonia*, 343 NLRB at 646-647.

In addition to the overly broad social media policy applied to Guzman and Ross, Respondent applied five other handbook rules to discriminatees. While not alleged by the General Counsel to be discriminatory on their face, overly broad, or promulgated in response to union activity, the complaint alleges that these rules were discriminatorily applied against Guzman, Kennedy, and Ross in order to retaliate against union and protected concerted activity.

The employment at-will, attendance and tardiness, and disciplinary action rules were applied in Guzman and Kennedy's unlawful discharges on August 8, and to Ross' unlawful discharge on September 16. The conduct and behavior policy[29] was applied to Ross upon her discharge. The solicitation and distribution policy was applied only to Ross upon her discharge. Finally, the conduct and behavior rule was applied to Ross upon her discharge.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act through the conduct alleged in complaint paragraphs 14(c), 14(d), 20(c), and 20(d), 21, and 23.[30]

G. Owner Jenkins' Slack Messages to Employees

The complaint alleges that Respondent violated Section 8(a)(1) of the Act via the Slack messaging application on three occasions: (1) about July 26, Jenkins informed employees that it would be futile for them to select the Union as their bargaining representative and threatened employees with loss of access to management if they supported the Union; (2) about August 4, Jenkins prohibited employees from using profit and loss summaries for union and other concerted activities; and about August 5, Jenkins informed employees that the strikers were fired because of their protected concerted or union activities.

Taking each of these statements in turn, the General Counsel first argues that Jenkins' July 26 Slack message informed employees that it would be futile for them to select the Union as their bargaining representative. Jenkins message stated that the Union of Southern Service Workers was new and unproven, that employees would have little say in how the union is run and many things could be decided that employees would not like. Jenkins also wrote that a union could not get more than a company is willing to give.

The General Counsel claims support (GC Br. 65.) for its theory in *North Star Steel Co*., 347 NLRB 1364, 1365 (2006) (inference of futility where lead negotiator told the employees in a captive audience meeting that he would not allow the Union to "succeed" and that if employees "were to get the Union in and get a contract…we would consider that … succeeding and we do not want that to happen because we're afraid of the domino effect [on] other nonunion plants"), *North Texas Investment Group*, 371 NLRB No. 122, slip op. at 1 (2022) (affirming judge's finding that management text messages to employees incorrectly declaring that wages and

[29] The complaint does not explicitly allege that the application of the conduct and behavior policy to the August 5 strikers was a violation of Section 8(a)(1) of the Act.

[30] Paragraph 22 alleges that the application of the handbook rules was a violation of Section 8(a)(3) of the Act. However, only the discipline and discharges here violate Section 8(a)(1) and (3); application of the rules is an independent violation of Section 8(a)(1) of the Act.

benefits were not open to negotiation because they were capped at the rates set by the federal government's prevailing wage schedule was unlawful) and *E.I. Dupont De Nemours*, 263 NLRB 159, 165-166 (1982) (management statements to employees that the company would negotiate with the union by listening to union proposals, making a final overall package proposal, which the union could accept—or a strike would result—found to be unlawful statements of futility), enfd. 750 F.2d 524 (6th Cir. 1984).

These cases do not support the General Counsel's cause—the cited cases involve management language that is quite definitive in expressing that the employers did not intend to bargain in good faith with the union. This is distinct from Jenkins' generalized criticism of the Union as untested and unaccountable to members, and the proposition advanced by Jenkins that terms and conditions of employment must be agreed upon by both the union and the employer.

I find that Jenkins did not make an unlawful statement of futility by her July 26 Slack message and therefore dismiss complaint paragraphs 10(a), 21, and 23 in this regard.

In her July 26 Slack message, Jenkins also opined that Respondent did

> not need a union, with its fees and dues for employees, coming between us. We believe that keeping a direct relationship between the company and our employees is fundamental to the well-being of employees and our business that we have built together.

(GCX 3.)

In seeking to establish the complaint allegation that Jenkins threatened employees with loss of access to management if the employees became union, the General Counsel's brief sought the overrule of *Tri-Cast, Inc*., 274 NLRB 377 (1985) (respondent employer's statements predicting economic consequences that would hurt the company if the union were voted in were not threats but permissible campaign comments). Yet, in *Starbucks*, 373 NLRB No. 135, slip op. at 1, fn 3 (2024), on November 8, 2024, the Board *prospectively* overruled *Tri-Cast, Inc*., which deemed "lawful nearly any employer statement to employees touching on the impact that unionization would have on the relationship between individual employees and their employer." In so doing, the Board held that statements concerning employees' loss of a direct relationship with management were unlawful. As *Starbucks* is to be applied prospectively, at the time that the statement was made (July 23, 2023), Jenkins' statement was lawful.

Accordingly, I dismiss the allegation that Respondent violated Section 8(a)(1) of the Act by threatening the loss of access to management by employees if the Union were selected to represent employees as alleged in complaint paragraph 10(b) and the relevant portions of paragraphs 21 and 23.

With regard to Jenkins' Slack message on August 4 regarding profit and loss summaries, I find that the complaint fundamentally mischaracterizes the nature of the message Jenkins sent. The Slack message begins with a statement that Jenkins is aware that the "confidential" profit

and loss statements are being passed around and then goes on to identify the summaries by title,[31] explain in detail the sources of the funds reflected in the summaries, and to explain how the funds have been spent. Jenkins assures the employees that she is not lying about anything or hiding anything in the numbers. The message ends with Jenkins informing the employees of her father's terminal illness and that she will be absent from the business to care for her parents.

Jenkins' August 4 Slack message does not forbid employees from sharing Respondent's profit and loss statements. Her message, while noting that she considers the statements to be confidential, simply explains the meaning of the income and expenses reflected in the statements. Accordingly, I am dismissing complaint paragraph 11 and the relevant portions of paragraphs 21 and 23.

Finally, it is well-settled that informing employees that another employee was disciplined for engaging in union or protected concerted activities is unlawful. *Extreme Building Services Corp.*, 349 NLRB 914, 928 (2007) (informing employee that another employee was fired because he was with the union is unlawful because it is an implied threat of discharge for engaging in union activities) (citing *Watts Electric Corp.*, 323 NLRB 734, 735 (1997)). On August 5, shortly after conducting a mass discharge of striking employees, Jenkins informed all remaining employees that the strikers were fired because of the strike. Knowing that their co-workers had been fired for participating in the August 5 strike, employees subjected to Jenkins' Slack message that evening could not but conclude that participating in a strike would result in discharge.

Accordingly, I find that Respondent violated Section 8(a)(1) of the Act as alleged in complaint paragraphs 15, 21, and 23 of the amended consolidated complaint by Jenkins' August 5 Slack message.

CONCLUSIONS OF LAW

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

2. The Charging Party is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Chrush Jalen; Troy Nelson; and Rose Waldron because they engaged in protected concerted and union activity.

4. Respondent violated Section 8(a)(1) and (3) of the Act by discharging employees Andrea Guzman and Kai Kennedy because they engaged in protected concerted and union activity.

[31] Contrary to the General Counsel's contention, by simply reading GCX 5 and Jenkins' Slack message, it is clear to me that Jenkins' message was referring to documents that were distinct from the ones Kaufman provided to the employees via Slack on August 1.

5. Respondent violated Section 8(a)(1) and (3) of the Act by disciplining employee Alice Ross and, about September 19, 2023, discharging Alice Ross because she engaged in protected concerted and union activity.

6. Respondent violated Section 8(a)(1) of the Act by maintaining an overly broad social media policy in its employee handbooks.

7. Respondent violated Section 8(a(1) by discriminatorily applying its at-will employment, disciplinary action, attendance and tardiness, solicitation and distribution, social media, and conduct and behavior policies to employees.

8. Respondent violated Section 8(a)(1) of the Act by threatening employees with store closure if they select union representation.

9. Respondent violated Section 8(a)(1) of the Act by threatening employees that it would be futile for them to select union representation.

10. Respondent violated Section 8(a)(1) of the Act by informing employees that employees were disciplined for engaging in union or protected concerted activities.

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

12. Respondent did not violate the Act in any other manner alleged in the complaint.

REMEDY

Respondent, having unlawfully discharged Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron, is ordered to make them whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms they may have suffered as a result of the discrimination against them.

Respondent, having unlawfully disciplined Alice Ross, is ordered to make her whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms she may have suffered as a result of the discrimination against them.

The make whole remedy shall be computed in accordance with *F.W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), Respondent shall compensate Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron for search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra,

compounded daily as prescribed in *Kentucky River Medical Center*, supra. In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB 101 (2014), Respondent shall compensate Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron for the adverse tax consequences, if any, of receiving lump sum backpay awards, and, in accordance with *AdvoServ of New Jersey, Inc.,* 363 NLRB 1324 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 10 a report allocating backpay to the appropriate calendar year for each employee. The Regional Director will then assume responsibility for transmission of the report to the Social Security Administration at the appropriate time and in the appropriate manner.

Respondent shall also be required to remove from its files any references to the unlawful discipline of Alice Ross and the discharges of Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron and to notify them in writing that this has been done and that the discipline and discharges will not be used against them in any way.

In the complaint and in the brief, the General Counsel seeks additional remedies including the 60-day recission of the unlawfully applied rules; a request for a notice reading; and a letter of apology from Jenkins to the discriminatees.[32] Because the General Counsel has not shown that the Board's standard remedies are insufficient to remedy the unfair labor practices found herein, I find that these additional remedies are not necessary.

Respondent shall post an appropriate informational notice, as described in the attached appendix. This notice shall be posted in Respondent's facilities in Savannah, Georgia wherever the notices to employees are regularly posted for 60 days without anything covering it up or defacing its contents. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed a facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 5, 2023. When the notice is issued to the Employer, it shall sign it or otherwise notify Region 10 for the Board what action it will take with respect to this decision.

[32] The General Counsel also seeks the overrule of *AT&T Mobility, LLC*, 370 NLRB No. 121, slip op. at 7 (2021), in which the Board held that an employer is not required to rescind a rule that is facially lawful, but has been unlawfully applied. (GC Br. 53-54, 57.) *AT&T Mobility* overruled the Board's prior approach that an employer's continued maintenance of a work rule was unlawful when the rule has been applied to restrict the exercise of Sec. 7 rights. As a *Boeing* case in which the Board categorically found a recording rule unlawful, the Board overruled *AT&T Mobility* in *Stericycle*, 372 NLRB No. 113, slip op. at 6 fn. 12. However, because the issue of remedy when work rules that are lawful to maintain have been unlawfully applied was not presented in *Stericycle*, the Board did not revisit the remedy for such violations. Id. at 2 fn. 3. Rather, in *Phillips 66 Co*., 373 NLRB No. 1, slip op. at 1 fn. 2 (2023), the Board declined the General Counsel's request to overrule the *AT&T Mobility* remedy. Under current law, which as to remedy for the rules discussed in this section of my decision, is *AT&T* Mobility, work rules applied in an unlawful manner that are lawful to maintain are not required to be revised or rescinded. *Apple, Inc.*, 373 NLRB No. 52, slip op. at1, fn 2 (2024).

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

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[33]

ORDER

Respondent, Foxy Loxy Print Gallery & Café, LLC, Foxy Loxy Bakery, LLC d/b/a Henny Penny Art Space & Café, and Fox & Fig, LLC, a single employer, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Issuing disciplinary notices to employees for engaging in union or other protected concerted activity.

(b) Discharging employees for engaging in union or other protected concerted activity.

(c) Maintaining an overly broad social media policy that restricts Section 7 activity in its employee handbook.

(d) Discriminatorily applying its at-will employment, disciplinary action, attendance and tardiness, solicitation and distribution, social media, and conduct and behavior policies to employees.

(e) Informing employees that union representation would be futile.

(f) Informing employees that their coworkers were discharged because they engaged in union or other protected concerted activity.

(g) Informing employees that their places of employment would close if they chose to seek union representation.

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

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

(a) Rescind the social media policy in its employee handbook.

[33] 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.

Furnish employees with an insert for the current employee handbook that (1) advises that the unlawful provisions have been rescinded, or (2) provide lawfully worded provisions on adhesive backing that will cover the unlawful provisions; or publish and distribute to employees revised employee handbooks that (1) do not contain the unlawful provisions, or (2) provide lawfully worded provisions.

(b) Make employees Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

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

(d) Within 14 days from the date of this Order, offer Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(e) Compensate employees Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 10 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year for each employee.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discipline, and within 3 days thereafter, notify Alice Ross in writing that this has been done and that the discipline will not be used against her in any way.

(g) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and within 3 days thereafter, notify Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson;

Alice Ross; and Rose Waldron in writing that this has been done and that the discharges will not be used against them in any way.

(h) Within 14 days after service by the Region, post at its Savannah, Georgia facilities, copies of the attached notice marked "Appendix B."[34] Copies of the notice, on forms provided by the Regional Director for Region 10 after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facility involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent at any time since August 5, 2023.

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

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

Dated at Washington, D.C., July 9, 2025.

Renée D. McKinney
Administrative Law Judge

[34] 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 A

CORRECTIONS TO TRANSCRIPT ERRORS

Henny Penny Art Space & Cafe, and Fox & Fix, LLC as a Single Employer, Cases 10-CA-323297, 10-CA-324201, and 10-CA-326729

p. 1, "via Zoom videoconference" deleted

p. 161, line 15 "jail" corrected to "chill"

p. 161, line 15 "jail" corrected to "chill"

p. 237, line 25 "joint" corrected to "Jencks"

p. 247, line 15 attributed to Mr. Sopp but corrected to be attributed to Mr. Brandner

p. 294, line 6 "about" corrected to "without"

p. 307, line 13 attributed to Ms. Kim but corrected to be attributed to Mr. Sopp

p. 313, line 16 "37" by Mr. Brandner was a stray comment not related to the witness examination

p. 361, line 11 "I did. t" corrected to "I did."

p. 365, line 25 "Fox and Faith" corrected to read "Fox and Fig"

p. 475, line 19 attributed to Mr. Brandner but corrected to be attributed to Judge McKinney

p. 484, line 4 "Nipper" corrected to "Niffer"

p. 538, line 25 through p. 576, line 23 references to "Hearing Officer" corrected to "Judge McKinney"

p. 671, line 24 "manage" corrected to "manager"

p. 673, line 2 starting with "If" attributed to Judge McKinney corrected to be attributed to the witness

p. 675, line 21 "call on" corrected to "call in"

p. 692, line 2 "urge" corrected to "urged"

APPENDIX B

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT tell you that choosing union representation is futile.

WE WILL NOT tell you that we fired employees for their union activities or protected concerted activities.

WE WILL NOT threaten you with business closure if you choose to be represented by or support a union.

WE WILL NOT discipline or fire you because you exercise your right to strike or because you choose to be represented by or support a union.

WE WILL NOT maintain an overly broad social media policy that stops you from using social media to post or share information relating to any protected concerted or union activities protected by Section 7 of the National Labor Relations Act.

WE WILL NOT discriminatorily apply our call out policy, attendance and tardiness policy, disciplinary action policy, employment at-will notice policy, no solicitation policy, social media policy, or conduct and behavior policy to stop you from exercising your rights under Section 7 of the National Labor Relations Act.

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

WE WILL, within 14 days of the date of this Order, offer full reinstatement to Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron their former jobs, or if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms resulting from his discipline and suspension, less any net interim earnings, plus interest and **WE WILL** also make them whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL, within 14 days from the date of the Board's order, remove from our files any references to the discharges of Juno Ambrose; Zach Boykin; Sabrina Clausen; Kole Cox; Jonathan Garmendez; Andrea Guzman; Kai Kennedy; Chrush Jalen; Troy Nelson; Alice Ross; and Rose Waldron, and **WE WILL**, within 3 days thereafter, notify them in writing that this has been done and these discharges will not be used against them in any way.

WE WILL, within 14 days from the date of the Board's order, remove from our files any reference to the discipline issued on August 9, 2023, to Alice Ross, and **WE WILL** notify Alice Ross in writing that this has been done, and this disciplinary action will not be used against her in any way.

WE WILL file with the Regional Director for Region 10, within 21 days of the date that the amounts 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 the corresponding W-2 forms reflecting the backpay awards.

WE WILL rescind or revise our social media policy, and **WE WILL** notify you in writing that the policy has been rescinded or revised; if revised, **WE WILL** provide you with a copy of the new policy.

Foxy Loxy Print Gallery & Café, LLC, Foxy Loxy Bakery, LLC d/b/a Henny Penny Art Space & Café, and Fox & Fig, LLC, a single employer

(Employer)

Dated _____ By _____

(Representative) (Title)

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

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

The Administrative Law Judge's decision can be found at https://www.nlrb.gov/case/10-CA-323297 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940

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

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