

JD-18-26
CHICAGO, IL

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

STARBUCKS CORPORATION

and

CASES 13-CA-322871 and 13-CA-327142

**CHICAGO AND MIDWEST REGIONAL
JOINT BOARD, WORKERS UNITED/SEIU**

Raifael Williams, Esq., for the General Counsel.
Graciela Nira, Esq., for the Charging Party.
Ethan Balsam, Esq. and Jacob D. Multer, Esq., for the Respondent.

DECISION

Statement of the Case

KELTNER W. LOCKE, Administrative Law Judge: The Respondent maintains a dress code which prohibits employees on duty from wearing clothing bearing logos, including union insignia, other than those of the garment's manufacturer, but does allow employees to wear one union pin or button. Because special circumstances exist which warrant this limitation on the exercise of Section 7 rights, the Respondent did not violate the Act either by maintaining the dress code or by enforcing it.

Procedural History

This case began on July 31, 2023, when the Chicago and Midwest Regional Joint Board, Workers United/SEIU (referred to below as the Charging Party of the Union) filed an unfair labor practice charge against Starbucks Corporation (referred to below as the Respondent). The Board's staff docketed the charge as Case 13-CA-322871. The Union amended this charge on September 19, 2023, and filed a second amended charge on June 24, 2024.

On October 2, 2023, the Union filed another charge against the Respondent. The Board's staff docketed this charge as Case 13–CA–327142.

5 On August 16, 2024, after an investigation, the Regional Director for Region 13 of the Board issued an Order consolidating cases, complaint, and notice of hearing. In doing so, the Regional Director acted for, and pursuant to authority delegated by the Board's General Counsel (referred to below as the General Counsel or the government).¹ The Respondent filed a timely answer.

10 On March 4, 2025, a hearing opened before me in Chicago, Illinois. The parties presented evidence on that day, on March 5, 2025, and on March 6, 2025, when the hearing closed. The parties submitted posthearing briefs which have been carefully considered.

Admitted Allegations

15 The Respondent's answer admits certain allegations. Based on those admissions, I find that the General Counsel has proven the allegations discussed below.

20 The Respondent partially admitted the allegations raised in complaint subparagraphs I(a), I(b), I(c), and I(d). More specifically, the Respondent's answer admits that the Union filed the charges and amended charges as alleged in those complaint subparagraphs. However, the Respondent stated it lacked "the requisite knowledge to admit or deny" the remaining allegations, which concerned the dates on which the charges were filed and served.

25 Based on the admissions in the Respondent's answer, I find that the charges and amended charges were filed as alleged. Further, based on the affidavits of service, the absence of any evidence contradicting those affidavits and the presumption of administrative regularity, I find that the charges and amended charges were filed and served on the dates alleged. Therefore, I conclude that the General Counsel has proven the allegations raised in complaint subparagraphs I(a), I(b), I(c), and I(d).

30 Complaint subparagraph II(a) alleges that at all material times, Respondent has been a Washington corporation with headquarters in Seattle, Washington, and facilities located throughout the United States, including a facility located at 116 South Halsted Street, Chicago, Illinois 60661, and has been engaged in the retail sale of food and beverages. The Respondent's answer states:

35 Respondent admits it has been a Washington corporation headquartered in Seattle, Washington and is engaged in operating retail stores selling food and beverages throughout the United States. Respondent admits that it operates a store located at 116 South Halsted Street, Chicago, IL 60661. As to the allegation that the above was true "at all material times," Respondent lacks the requisite knowledge to admit or deny the

¹ Where context permits without confusion, the attorney representing the General Counsel in these proceedings also will be referred to simply as the General Counsel.

remaining allegations in this paragraph as "all material times" is a vague term and therefore denies the allegation to that extent.

5 The last quoted sentence leaves uncertain the scope of the Respondent's admission. However, at hearing, the parties entered into the following stipulation:

10 Since at least March 3, 2023, Respondent has been a Washington corporation with headquarters in Seattle, Washington, and facilities located throughout the United States, including a facility located at 116 Halsted Street, Chicago, IL 60661 (Respondent's facility) and has been engaged in retail sale of food and beverages.

(Jt. Exh. 2.)

15 The complaint does not allege that the Respondent committed any unfair labor practice before April 8, 2023. Accordingly, the Respondent's stipulation covers all times material to the complaint. Therefore, based on the stipulation, I conclude that the General Counsel has proven the allegations raised in complaint subparagraph II(a).

20 Complaint subparagraph II(c) similarly includes a reference to "all material times" and the Respondent's answer again characterizes that phrase as "vague." More specifically, complaint subparagraph II(c) alleges that, at all material times, the Respondent had been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. The Respondent's answer to this allegation states:

25 The allegations contained in paragraph II(c) of the Consolidated Complaint constitute legal conclusions and argument for which no answer is required. To the extent an answer is required, Respondent admits Respondent has been an employer engaged in commerce within the meaning of §§ 2(2), (6), and (7) of the Act. As to the allegation that the above was true "at all material times," Respondent lacks the requisite knowledge to admit or deny
30 the remaining allegations in this paragraph as "all material times" is a vague term and therefore denies the allegation to that extent.

35 However, during the hearing, the parties stipulated that since "at least March 3, 2023, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act." (Jt. Exh. 2, Tr. 45-46.) Based on the stipulation, I find that the General Counsel has proven the allegations raised in complaint subparagraph II(c).²

²The Respondent's answer admitted without limitation the allegations, raised in complaint subparagraph II(b), that during the 12-month period preceding issuance of the complaint, the Respondent derived gross revenues in excess of \$500,000 and received goods valued in excess of \$5000 directly from points outside the State of Illinois. Therefore, I find that the General Counsel has proven these allegations. Further, based on this admission, I conclude that the Respondent satisfies the Board's discretionary standards for the exercise of its jurisdiction.

Complaint paragraph III alleges that at all material times, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act. The Respondent's answer again takes issue with the "at all material times" phrase. However, during the hearing, the parties stipulated that since "at least March 3, 2023, the Charging Party has been a labor organization within the meaning of Section 2(5) of the Act." (Jt. Exh. 2, Tr. 45-46.)

Because the complaint does not allege that any unfair labor practice occurred before March 3, 2023, I conclude that the Respondent has admitted, by stipulation, that the Charging Party has been a labor organization within the meaning of Section 2(5) at all material times. I so find.

Complaint paragraph IV alleges that store managers Colin Campbell and Tamara McDonald, and District Manager Lesley Davis, were supervisors and agents of the Respondent "at all material times." Again, the Respondent's answer takes issue with this phrase. However, during the hearing, the parties stipulated as follows:

Colin Campbell, Lesley Davis, and Tamara McDonald are or were 2(11) supervisors and 2(13) agents of the Respondent. Campbell was a supervisor and agent under the Act from March 27, 2023, through May 19, 2023. Davis is a supervisor and agent under the Act and has been since August 22, 2022, through the present. McDonald is a supervisor and agent under the Act and has been since August 21, 2023, through the present.

(Jt. Exh. 1, Tr. 45-46.)

Based on the stipulation, I find that Colin Campbell was Respondent's supervisor and agent³ from March 27, 2023, through May 19, 2023, that Lesley Davis has been Respondent's supervisor and agent since August 22, 2022, and that Tamara McDonald has been Respondent's supervisor and agent since August 21, 2023. Further, I find that Davis and McDonald continued to be supervisors and agents of the Respondent at least through March 5, 2025, when the parties entered into the stipulation.

Paragraph VI of the complaint, which issued on August 16, 2024, alleges that, since "at least April 18, 2023, and within the last six months," the Respondent has maintained the following rule:

Shirts may have a small manufacturer's logo, but must not have other logos, writings or graphics. The base shirt color must be within the color palette (black, gray, navy blue, brown, khaki or white). These same colors may be the base color for a subdued, muted pattern. Starbucks-issued promotional shirts may be worn for events or when still relevant for product marketing.

³When the term "supervisor" is used in this decision, it connotes a supervisor within the meaning of Sec. 2(11) of the Act. When the term "agent" is used in this decision, it connotes an agent within the meaning of Sec. 2(13) of the Act.

The Respondent admits this allegations. I so find.

5 Based on the admission in the Respondent's answer, I find that the General Counsel has proven, as alleged in complaint subparagraph VII(b), that about April 22, 2023, the Respondent disciplined employee Russell Dahlman.

10 The Respondent also has admitted, and I find, that on about October 1, 2023, it disciplined employee Dahlman. However, the Respondent denied the remaining allegations in complaint subparagraph VII(c). Specifically, the Respondent denied that it imposed the discipline, and ordered Dahlman to leave work, for engaging in union activity, including wearing union insignia.

15 The Respondent denies the remaining allegations in the complaint. Those matters will be discussed below.

Facts

20 On Valentine's Day 2023, a dozen employees sent a missive to three of the Respondent's management officials. The recipients were Chief Executive Officer Howard Schultz, District Manager Lesley Davis, and Angela Beverly, who then was manager of the Chicago store at which they worked. The employees' letter began:

25 We, the workers of Starbucks Greektown at Monroe and Halsted (Store #11719) in Chicago, Illinois, are writing to inform you that we—in solidarity with the unionized workers across the country and all working people of the world—intend to unionize.

(GC Exh. 5.)

30 The letter complained about various terms and conditions of employment, including work schedules, "selective enforcement of store policies," wage rates, health insurance coverage, and the accrual of sick leave and vacation time.

35 On the same date as this letter, the Union filed a representation petition with the Board's regional office in Chicago. Board staff docketed the petition as Case 13–RC–312119.⁴

On March 3, 2023, the Respondent and the Union entered into a Stipulated Election Agreement. Following the election, the Board issued a tally of ballots on March 31, 2023. It stated that there had

⁴See <https://www.nlr.gov/case/13-RC-312119>. Rule 201 of the Federal Rules of Evidence provides that judicial notice may be taken of adjudicative facts. Similarly, in administrative proceedings, the Board may take notice of its own decisions, which are capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. See, e.g., *Painters Local 1447 (Hargrove)*, 306 NLRB 97 at fn. 1 (1992).

been 17 employees eligible to vote and that 15 of them actually cast ballots. One of the 15 voted against representation. The other 14 voted in favor of the Union. On April 11, 2023, the Board issued a Certification of Representation.⁵

5 Complaint Subparagraph V(a)

Complaint subparagraph V(a) alleges that about April 8, 2023, Respondent, by Colin Campbell, interfered with an employee's Section 7 rights by informing the employee that if it were Campbell, he would not want the Union knowing about his business. The Respondent denies this allegation.

10 Employee Russell Dahlman not only had been an active union supporter during the organizing campaign but also had been the individual who started the drive to unionize the Respondent's "Greektown" store, where he worked. In December 2022, Dahlman contacted the Union and, in January 2023, hosted a meeting to acquaint employees with the Union.

15 Dahlman, a barista, was scheduled to begin work at 5:30 a.m. on April 1, 2023. However, he testified that morning he overslept. About an "hour or two" after his shift began, he called in to the shift supervisor. (Tr. 296–297.)

20 The Respondent's work rules require an employee who is not coming to work to call in before the start of his scheduled shift. By failing to call before the shift began, Dahlman had violated the rule.

25 A week later, Dahlman was at work when the shift supervisor told him that the store manager wanted to speak with him. The manager was in the back of the store.

30 Dahlman feared that the manager wanted to talk about his earlier failure to call in before the start of his shift. In recent weeks, he had learned much about labor law and knew that an employee working in a unionized bargaining unit has a right to have a shop steward present during a discussion with a supervisor, if the employee reasonably believes that the discussion could lead to discipline. Dahlman also knew that this right was called a "*Weingarten* right" after the name of the Supreme Court decision which upheld it.⁶

⁵Id. The Board certified the Union as exclusive bargaining representative of employees in the following unit:

Included: All full-time and regular part-time Baristas and Shift Supervisors employed by the Employer from its facility currently located at 116 S. Halsted St., Chicago, Illinois.

Excluded: Store managers, office clerical employees and guards, professional employees and supervisors as defined by the Act.

⁶*NLRB v. J. Weingarten*, 420 U.S. 251 (1975). The right does not extend to a workplace where the employees are not represented by a union. *IBM Corp.*, 341 NLRB 1288 (2004). When Dahlman made the request for representation on April 8, 2023, the employees at the Greektown store already were represented

5 Dahlman described the conversation he had with Colin Campbell, who was then store manager. Dahlman testified, "I asserted my Weingarten rights" and that Campbell replied, "I don't know what that is. I don't think that is right,' things—things like that, and—and I—you know, the conversation kind of fizzled out." (Tr. 297.) Dahlman further testified:

10 A little while later in the shift, he approached me again and said, "You know, I really don't think your Weingarten rights apply in this situation. Only if you have an elected shop steward."

And he said, "You know, if it was me, I wouldn't want anyone knowing my business." I wouldn't, you know, meaning the Union, he wouldn't want the Union knowing his business.

15 (Tr. 298.)⁷

20 The complaint alleges that Respondent interfered with Dahlman's rights when he said, "You know, if it was me, I wouldn't want the *Union* knowing my business." (Italics added.) Dahlman's testimony, however, quotes Campbell as saying that he wouldn't want *anyone* knowing his business. Dahlman interpreted "anyone" to mean the Union,

25 The government argues, in its posthearing brief, that "Campbell's statement to Dahlman that, if it were him (Campbell), he would not want anyone knowing his business was an attempt to dissuade, coerce and restrain Dahlman from exercising his Weingarten rights in violation of Section 8(a)(1) of the Act."

30 However, the General Counsel does not cite any case to support this argument. The brief also does not discuss how an employee reasonably would understand Campbell's words, that he did not want anyone knowing his business, to be coercive. Moreover, the General Counsel has not rebutted the presumption that Campbell's words enjoy the protection of the First Amendment to the United States Constitution.

In *NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 617 (1969), the Supreme Court held that "an
by a union. Less than 2 weeks earlier, on March 31, 2023, the Board had issued a tally of ballots showing that a majority of bargaining unit employees had chosen the Union to represent them. However, it should be noted that the present complaint does *not* allege a *Weingarten* violation. There is no allegation that the Respondent unlawfully denied a request for the presence of a union representative. Complaint subparagraphs V(a) and V(b) only allege that supervisors made unlawful remarks after Dahlman made such requests.

⁷See also Dahlman's testimony during cross-examination. (Tr. 359.) Campbell did not recall saying the words attributed to him. (Tr. 538.) A witness's testimony that he could not remember a particular statement or event does not constitute a denial. Based on my observations of the witnesses, I believe that Dahlman was testifying truthfully when he quoted Campbell and I credit that testimony.

employer's free speech right to communicate his views to his employees is firmly established, and cannot be infringed by a union or the Board." The Court further stated:

5 [A]n employer is free to communicate to his employees any of his general views about unionism or any of his specific views about a particular union, so long as the communications do not contain a "threat of reprisal or force or promise of benefit."

395 U.S. at 618.

10 The General Counsel has not shown how Campbell's words—"if it was me, I wouldn't want anyone knowing my business"—communicate any threat of reprisal or force or promise of benefit. In my view, no employee reasonable would understand those words, or any others which Campbell spoke in this conversation with Dahlman, to be such a threat or promise.

15 Accordingly, I conclude that the Respondent did not violate the Act as alleged in complaint subparagraph V(a).

Complaint Subparagraph V(b)

20 Complaint subparagraph V(b) alleges that about April 8, 2023, Respondent, by Lesley Davis, interfered with an employee's Section 7 rights by telling the employee that she would let employees know when they needed union representation. The Respondent denies this allegation.

25 This allegation, like the allegation raised in complaint subparagraph V(a), concerns what a supervisor supposedly said after employee Dahlman requested the presence of a union representative. Dahlman testified that, towards the end of his shift on April 8, 2023, the Respondent's district manager, Lesley Davis, came to the Greektown store. According to Dahlman, after he learned that Davis wanted to talk with him, he told her, "If this conversation could lead to my discipline or affect my working conditions, I'd like my Union rep to be present." (Tr. 298.)

30 Dahlman testified that Davis replied, "We're not going to be asking questions." Dahlman said that he then asked, "that we at least speak in front of people." (Tr. 299.) Dahlman further testified:

35 So, we went to the cafe and we had a conversation in the cafe.

She said that she was informing me that I wasn't meeting the correct number of hours per week. And she said, "You know, don't worry. We will let you know when it comes to that point."

40 To me, that was weird, and so I said, "What—what—what point? What do you mean?"

And she said, "We'll let you know when it comes to the point where you need representation," and then she started talking about me not meeting the hours.

(Tr. 299.)

5 Davis denied ever telling Dahlman "we'll let you know" in response to his request for a union representative. (Tr. 448–449.) For the following reasons, I do not credit this denial but instead find that she made the statement Dahlman attributed to her.

10 When Davis was asked if she remembered any time when Dahlman asked for a union representative, she paused for a notably long time before answering the question. However, this was not the only instance when she seemed to have some difficulty with recollection.

15 On April 17, 2023, employees at the Greektown store went on a 1-day strike to protest Respondent's discharge of employee Lillie Hanneghan about 3 weeks earlier. When asked why the Respondent had discharged Hanneghan, Davis testified it was because "Lillie tweeted they that they were going to harm our CEO, Howard Schultz, at the time." (Tr. 451.)

20 When asked if Hanneghan had said how they were going to harm Schulz, Davis answered "They did." However, when asked what Hanneghan had said, Davis answered that she did not "recall exactly." Those words, that she did not recall *exactly*, suggest that she at least remembered the gist of what Hanneghan had written. However, when asked if Hanneghan had made a threat to Schultz' life, Davis replied, "I don't remember. It was a violent act." (Tr. 451.)

25 Discharging any employee for making a threat against the employer's chief executive officer is a rather rare event, and one so dramatic it would likely be remembered. Moreover, as manager of the district in which Hanneghan worked, Davis would had been well aware of the reasons for the discharge. Her testimony, that Hanneghan was discharged for threatening a violent act but that she, Davis, could not remember what it was, is a bit difficult to believe. However, if Davis was unable to remember even the substance of a violent threat, she might well have forgotten telling Dahlman "we'll let you know" when he needed union representation.

30 In sum, I believe that Dahlman's testimony is more likely correct and I credit it. Therefore, I find that Davis did tell him "We'll let you know when it comes to the point where you need representation" or words to that effect.

35 The government argues that the statement attributed to Davis—"We'll let you know when it comes to the point where you need representation"—violates Section 8(a)(1) of the Act. The General Counsel's brief states:

40 District Manager Davis' statement to Employee Dahlman that they would let him know when it came to the point where he needed representation constituted a directive to Dahlman that the Respondent, rather than him, would determine whether and when he was entitled to Union representation pursuant to *Weingarten*. Davis made this statement despite the fact that *Weingarten* rights are only held by employees and only employees can exercise or initiate those rights. *Appalachian Power*, 253 NLRB 931, 933 (1980), enfd. mem. 660 F.2d 488 (4th Cir. 1981). See *NLRB v. Weingarten, Inc.*, 420 U.S. 251 (1975).

Thus, Davis' statements to Dahlman clearly interfered with Dahlman's *Weingarten* rights in violation of Section 8(a)(1) of the Act.

5 The General Counsel's theory of violation thus rests on the premise that Davis' words "constituted a directive to Dahlman that the Respondent, rather than him, would determine whether and when he was entitled to union representation pursuant to *Weingarten*. "However, Davis did not tell Dahlman that he could request the presence of a union representative *only* when the Respondent told him. If Davis' words communicated such a message, they did so by implication.

10 In determining whether a supervisor's statement violates Section 8(a)(1), the Board considers what message those words *reasonably would communicate* to an employee. This objective process does not depend on how the employee who heard the words interpreted them. Instead, the Board considers what message the words reasonably would communicate to typical employees under the totality of circumstances. See, e.g., *Westwood Health Care Center*, 330 NLRB 935, 940 fn. 17
15 (2000).

An employee only has the right to the presence of a union representative if the employee has a reasonable belief that the interview could result in discipline. *Southwestern Bell Telephone Co.*, 338 NLRB 552 (2002). An employee does not have such a right if the purpose of the interview is not
20 investigative but rather to inform the employee of a disciplinary decision already made. *Meceli & Oldfield, Inc.*, 357 NLRB 505 (2011).

25 According to Dahlman, when he said that he would like his union representative to be present if the "conversation could lead to my discipline," Davis replied that she would not be asking questions. Her reply communicated, in effect, that there would be no interview which could lead to disciplinary action.

30 If she had then said, "if an interview could lead to disciplinary action we will let you know," that clearly would have been lawful. Those words do not suggest that the Respondent was forbidding Dahlman from requesting a representative any time he wished. They do not convey a message that Dahlman could request the presence of a representative only when the Respondent approved.

35 Instead, Davis told Dahlman, "We'll let you know when it comes to the point where you need representation." She made that statement after informing him that she was not going to ask any questions.

40 In that context, Davis's "we'll let you know" statement reasonably would be understood to mean that the Respondent would let Dahlman know when a meeting had an investigative purpose, that is, when it would include questions which could lead to disciplinary action. Promising to inform an employee when an interview could lead to discipline is not unlawful.

Such a statement would not reasonably be understood as prohibiting an employee from requesting the presence of a union representative at other times. It would not communicate to an employee that the Respondent was taking charge of when an employee could request a union

representative.

Therefore, I conclude that Davis's statement did not interfere with, restrain or coerce an employee in the exercise of Section 7 rights. Further, I recommend that the Board dismiss the allegations raised in complaint subparagraph V(b).

Complaint Subparagraph VI(a)

Complaint subparagraph VI(a) concerns the Respondent's dress code. It alleges that since at least April 18, 2023, and within the last 6 months, Respondent has maintained the following rule:

Shirts may have a small manufacturer's logo, but must not have other logos, writings or graphics. The base shirt color must be within the color palette (black, gray, navy blue, brown, khaki or white). These same colors may be the base color for a subdued, muted pattern. Starbucks-issued promotional shirts may be worn for events or when still relevant for product marketing.

Complaint subparagraph VIII(a) alleges that "[b]y the conduct described in paragraphs V and VI, Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act."

The Respondent admits it has maintained the rule described in complaint subparagraph VI(a) but denies that doing so violates the Act, as alleged in complaint subparagraph VIII(a). The Respondent's denial thus *seems* to raise a clear question of law: Does or does not the Respondent's dress code, *on its face*, violate the Act?

However, to that last question, the Respondent might reply "Not so fast!" The Respondent contends that the complaint itself raises no issue about the lawfulness of the dress code on its face but only alleges that on specific occasions it was applied in an unlawful manner.

According to the Respondent, the General Counsel is making a last minute change in the government's theory of violation. But, the Respondent argues, the language in the complaint does not place it on notice that the General Counsel intends to argue that simply having the rule in effect violates the Act. Rather, the Respondent asserts, the complaint only alleges that it applied the rule in a discriminatory fashion.

The General Counsel disputes that the government has changed legal theories and argues that the complaint clearly alleges that merely maintaining the rule violates the Act. This difference of opinion reveals that the parties are looking at complaint paragraph VI in two different ways.

Complaint paragraph VI includes two subparagraphs. The Respondent, reading them together, believes they describe a single violation. The General Counsel, reading them separately, sees two alleged violations.

Both subparagraphs of complaint paragraph VI describe conduct. Subparagraph VI(a) alleges that the Respondent maintained a rule and quoted that rule. Subparagraph VI(b) alleges that the Respondent selectively and disparately enforced the rule on a particular date. Neither subparagraph alleges that the conduct violated the Act. That legal conclusion comes later, in complaint
5 subparagraph VIII(a), which simply alleges, in pertinent part, that the Respondent violated Section 8(a)(1) of the Act by the conduct described in complaint paragraph VI.

When complaint subparagraphs VI(a) and VIII(a) are viewed in isolation, without considering other portions of the complaint, it appears that the government is alleging that the Respondent violated
10 the Act simply by maintaining in effect the dress code rule. The Respondent argues that this interpretation is incorrect because it fails to consider the impact of complaint subparagraph VI(b).

The Respondent would interpret complaint subparagraphs VI(a) and VI(b) as being two parts of a single allegation: Subparagraph VI(a) describes the rule and subparagraph VI(b) describes how
15 the Respondent applied it unlawfully on a particular occasion. Complaint paragraph VIII(a) does not single out either complaint subparagraph VI(a) or VI(b) but instead only alleges that the Respondent violated Section 8(a)(1) by the conduct alleged in complaint paragraph VI.

In the Respondent's view, this signifies that subparagraph VI(a) should not be read in isolation.
20 In effect, the Respondent argues that paragraph VI(a) merely lays a foundation or "sets the stage" by describing the rule, and then subparagraph VI(b) alleges the violative conduct, wielding the rule in a selective and disparate way.

Such an interpretation would not be frivolous. Complaint subparagraph VI(b) alleges that the
25 Respondent "enforced the rule described above in paragraph VI(a) selectively and disparately. . ." If the rule described in complaint subparagraph VI(a) were unlawful on its face, then *any* application of it would be a violation and the words "selectively and disparately" would be superfluous. The inclusion of these words might suggest that the rule, on its face, was lawful and that only its discriminatory enforcement violated the Act.

30 However, the Respondent's argument rests on more than such an analysis of the words in the complaint. The Respondent also argues that the General Counsel's *actions* failed to place it on notice that the government was alleging that simply having the rule in effect interfered with, restrained or coerced employees in the exercise of their statutory rights.

35 The Respondent's arguments go beyond the analysis discussed above, which concerned language actually in the complaint. The Respondent also ascribes great significance to words the drafter of the complaint left out. The Respondent's brief quotes language from unfair labor practice complaints in other cases, which concerned stores other than the store in the present case. In each of
40 these cases, the complaint had alleged that Respondent violated the Act by *maintaining* the dress code. The Respondent's brief notes that each such complaint described the rule as "overly-broad and discriminatory."

The Respondent treats this phrase, "overly-broad and discriminatory," as a kind of flag which appears in a complaint whenever it alleges that the mere maintenance of a rule constitutes an unfair labor practice. In other words, the Respondent contends that the phrase "overly-broad and discriminatory" signals that the complaint is alleging that just having the rule in effect violates the Act and notes that the complaint in this case does *not* include those words. The Respondent's brief attaches great significance to their absence:

Of course, similar language is **nowhere to be found** within the Complaint here. Paragraph VI alleges only "Respondent has maintained the following rule..." Nowhere does the Complaint [state] that the rule is overbroad or discriminatory--language used in every single other complaint which has alleged Starbucks' Dress Code is facially unlawful. And such necessary language only makes sense. If the allegation is Starbucks' Dress Code is facially unlawful, the Complaint must also state *how* it is unlawful. Is it overly broad? Is it facially discriminatory? Here, the government would have Starbucks simply guess and hope for the best.

(Emphasis in original.)

The Respondent does not cite any precedents to support its position that, if the complaint alleges the dress code to be facially unlawful, it must also state how it is unlawful. Its brief does quote the Board's decision in *DHSC, LLC d/b/a Affinity Medical Center, Community Health Systems, Inc. and/or Community Health Systems Professional Service Corp., LLC*, 364 NLRB 878, 879 (2016), which in turn quotes Section 102.15 of the Board's Rules and Regulations. That section provides that a complaint shall contain:

- (a) A clear and concise statement of the facts upon which the Board asserts jurisdiction, and
- (b) A clear and concise description of the acts that are claimed to constitute unfair labor practices, including, where known, the approximate dates and places of such acts and the names of Respondent's agents or other representatives who committed the acts.

29 CFR § 102.15.

Notwithstanding the absence of the phrase "overly-broad and discriminatory," I conclude that the present complaint satisfies the requirements of Section 102.15 and sufficiently pleads that the rule facially violates the Act. The complaint clearly alleges the facts upon which the Board asserts jurisdiction, which the Respondent has admitted. Additionally, complaint subparagraph VI(a) states that the Respondent maintained a rule and quoted the rule. Maintaining the rule is the act that is "claimed to constitute" an unfair labor practice.

Adding the adjectives "overly-broad" and "discriminatory" would make complaint subparagraph VI(a) less concise but would not add any information, not inferable from the complaint itself, about the General Counsel's theory of violation.

Additionally, I am not sure that the term "overly-broad" would be appropriate. This is not a

5 case involving a dress code which does not refer explicitly to the wearing of union insignia but is written with such broad language that it *arguably* might be read to prohibit them. To the contrary, the dress code at issue here specifically addresses the wearing of apparel referring to unionization. It states what union-related items may be worn—namely, a pin or button—and by clear implication prohibits wearing other union-related items.⁸

10 The General Counsel's brief provides another indication that the government is not alleging that the dress code violates the Act because facially neutral language is drafted in an overly broad manner which reasonably could be interpreted to limit the exercise of Section 7 rights. If the General Counsel were proceeding on such a theory, the government's brief would likely cite an important precedent, *Stericycle Inc.*, 372 NLRB No. 113 (2023), but the brief does not. In *Stericycle*, the Board stated: "The approach we adopt here applies only to facial challenges to the maintenance of work rules that do not expressly apply to employees' protected concerted activity." 372 NLRB No. 113, slip op. at 2, fn. 3.

15 The Respondent also argues that, because the complaint allegation does not include the word "discriminatory," it does not make clear that the complaint was alleging that maintaining the rule, by itself, violated the Act. However, the Respondent has not cited any case authority for the proposition that it is necessary to use either the word "discriminatory" or the phrase "overly-broad and discriminatory" to allege, in a complaint, that the maintenance of a particular work rule violates the Act.

20 In subparagraph VI(a) of the present complaint, adding the word "discriminatory" would not have been particularly illuminating. The complaint does not allege that the conduct described in paragraph VI violates Section 8(a)(3), which prohibits discrimination, but only alleges that such conduct violates Section 8(a)(1), which prohibits interference with, restraint or coercion of employees in the exercise of Section 7 rights.

25 Moreover, as the Board stated in *DHSC, LLC*, above, "The General Counsel is not required to plead his evidence *or the theory of the case* in the complaint." 364 NLRB at 879, citing *Boilermakers Local 363 (Fluor Corp.)*, 123 NLRB 1877, 1913 (1959)(italics added). The language of the complaint does allege that the conduct described in VI(a) violates Section 8(a)(1) of the Act and I conclude that this language suffices. Accordingly, I reject the Respondent's argument.

30 Additionally, the Respondent contends that the General Counsel initially did not claim that the

35 ⁸A portion of the dress code not quoted in the complaint expressly permits an employee to wear "one reasonably sized and placed button or pin that identifies a particular labor organization or a partner's support for that organization, except if it interferes with safety or threatens to harm customer relations or otherwise unreasonably interferes with Starbucks public image." (GC Exh. 2.) By prescribing what union-related item *may* be worn, as an exception to the general "no logo" rule, the dress code clearly communicates that other apparel mentioning the Union may not be worn. Thus, the rule explicitly focuses on and restricts the exercise of Sec. 7 rights.

rule itself violated the Act but took that position for the first time during the hearing. However, the Respondent has not identified any particular statement of the General Counsel which would create that impression and I discern none.

In sum, for all the reasons discussed above, I conclude that complaint subparagraphs VI(a) and VIII(a), read together, sufficiently place the Respondent on notice that the General Counsel is alleging that merely maintaining the rule in effect violates Section 8(a)(1) of the Act. Before reaching the merits of those allegations, however, one additional procedural matter must be addressed.

Peyton Packing Issue

Respondent operates many stores across the country and its dress code applies to employees at all of them. It has been involved in significant unfair labor practice litigation concerning a number of these other stores. In such cases, the General Counsel has alleged that the Respondent's dress code, or portions of it, violate Section 8(a)(1). Citing *Peyton Packing Co.*, 129 NLRB 1358 (1961), the Respondent argues that it is not required to litigate the lawfulness of its dress code again and again.

The Respondent's brief states that the General Counsel is not entitled to privileges not accorded to other litigants. It argues that a private litigant who sued a defendant in many different courts, but raising the same claims, would be subject to sanctions. The brief continues:

Despite those principles, then-General Counsel Abruzzo took multiple bites of the apple on this issue, pursuing dress code maintenance claims in numerous cases, including the five referenced above (Case Nos. 10-CA-291616, 29-CA-305960, 29-CA-308059, Consolidated Case 28-CA-289622, et al., and in Consolidated Case 12-CA-308848, et al.) as well as the instant case here. By allegedly pursuing the exact same claim -- the General Counsel's allegation [that] Starbucks' Dress Code is unlawful on its face on multiple fronts, the General Counsel has wasted the time and energy of this Board, those who practice before it, the parties, and witness, all when this could have been distilled to a single case (as Consolidated Case 28-CA-289622, et al. was designed to be).

The Respondent noted that in Case 12-CA-308848, the administrative law judge already had issued a decision:

The Board should allow that decision to be fully litigated, including with any exceptions briefing and appeals, so the final outcome there governs the ultimate determination as to whether Starbucks' dress code is lawful.

The Respondent's brief cites *Peyton Packing Co.*, above, for the principle that "it is unfair for the General Counsel to litigate the same conduct in two cases." In that decision, the Board stated that "Generally speaking, sound administrative practice, as well as fairness to respondents, requires the consolidation of all pending charges into one complaint. The same considerations dictate that, wherever practicable, there be but a single hearing on all outstanding violations of the Act involving the same respondent. To act otherwise results in the unnecessary harassment of respondents." *Peyton Packing Co.*, 129 NLRB at 1360 (footnote omitted).

5 The facts in the present case differ somewhat from those in *Peyton Packing Co.*, which concerned the General Counsel, having already litigated the respondent's withholding of a bonus as a violation of one section of the Act, attempting to relitigate this same action as a violation of another section of the Act. However, the Respondent has not claimed that the General Counsel alleged in one case that the dress code violated one section of the Act while here alleging that it violates a different section.

10 The problem here does not arise from the General Counsel attempting to relitigate the lawfulness of the dress code under a different section of the Act, but rather from the General Counsel litigating the lawfulness of the dress code as applied to different groups of employees at different locations. When a charge is filed concerning alleged unfair labor practices at a particular store and, after investigation, the General Counsel issues a complaint, such a complaint sometimes includes an allegation that the Respondent violated Section 8(a)(1) by maintaining a dress code governing the attire worn by employees *at that particular store*. For each such case it is irrelevant that the Respondent imposes the same dress code on employees at other stores.

20 Each complaint focuses on conduct at a particular store and, from the "local" viewpoint of that complaint, the Respondent is no different than a "mom and pop" coffee shop operating only at that one place. From the Respondent's more global perspective, its many stores are not islands unto themselves but part of a whole and the General Counsel is waging the same war against its dress code on many different fronts.

25 Objecting to the repeated litigation of its dress code, the Respondent relies on the *Peyton Packing Co.* precedent but, as noted above, that case has a different fact pattern. It concerns the General Counsel relitigating the lawfulness of the same conduct, affecting the same employees, under different sections of the Act.

30 The Board has not enlarged the *Peyton Packing* rationale to encompass other situations. In *Service Employees Local 87 (Cresleigh Mgmt.)*, 324 NLRB 774 (1997), the Board stated:

[E]xcept in the specific circumstances presented in *Peyton Packing* and *Jefferson Chemical*⁹, where the General Counsel has attempted to "twice litigate the same act or

⁹*Jefferson Chemical Co., Inc.*, 200 NLRB 992 (1972), concerns another situation in which the General Counsel may be foreclosed from proceeding. However, the bar to litigation arose in that case not because the General Counsel previously had sought to prove that the same conduct by the same respondent had violated a different section of the Act, but rather because the General Counsel had failed to include the allegation in earlier litigation with the same respondent.

In *Jefferson Chemical*, the administrative law judge heard a case involving an allegation that the respondent had made unilateral changes in terms and conditions of employment, and thereby violated Sec. 8(a)(5) of the Act. Later, the General Counsel issued a complaint based on a charge filed and investigated after the hearing in the earlier case. This charge alleged that the respondent had violated the same section of the Act but under a different theory of violation, engaging in surface bargaining.

conduct as a violation of different sections of the Act," *NLRB v. Plaskolite, Inc.*, 309 F.2d 788, 790 (6th Cir. 1962) (emphasis in original), or to relitigate the same charges in different cases, the Board has recognized that such a blanket rule in favor of consolidation would improperly interfere with the General Counsel's discretion and, in some cases, could unduly delay the disposition of pending cases. *Marymont*, 249 NLRB [216 (1980)] at 217; *Harrison Steel Castings*. 255 NLRB [1426 (1981)] at 1427.

324 NLRB at 775.

Here, the General Counsel has not attempted to multiply litigate the same conduct as a violation of *different sections of the Act*. The Respondent is not claiming that, in one case, the General Counsel alleged that the dress code violated Section 8(a)(1) of the Act and in another case alleged that it violated some other section. Likewise, the Respondent is not contending that, in different cases, the General Counsel advanced different theories of violation.

The administrative law judge follows Board precedent and, for the reasons discussed above, I believe that the Board has not extended *Peyton Packing Co.* to cover the present fact pattern. Such an extension may be warranted but that is for the Board to decide. However, it may be noted that, at this juncture, before the Board has ruled on the lawfulness of the dress code, it imposes relatively little burden on the Respondent for the issue to be litigated in more than one case. The dress code is the same in each instance and the legal arguments regarding its lawfulness remain the same.

To summarize, I conclude that *Peyton Packing Co.* is distinguishable and note that, in *Service Employees Local 87 (Cresleigh Mgmt.)*, the Board has cautioned against extending this precedent to other fact patterns. Therefore, *Peyton Packing Co.* does not bar considering whether the Respondent's dress code interferes with, restrains or coerces employees in violation of Section 8(a)(1) of the Act.

Substance of Dress Code

Complaint subparagraph VI(a) quotes a small portion of the Respondent's dress code but the entire code is considerably longer. It has separate headings titled "General Appearance, Colors and Materials," "Shirts, Sweaters and Jackets," "Pants, Shorts, Skirts and Dresses," "Footwear," "Jewelry and Body Piercings," "Tattoos" and "Pins." The dress code begins:

General Appearance, Colors and Materials

Granting the respondent's motion to dismiss, the judge held that, at the time of the hearing in the earlier case, the General Counsel knew or should have known about the events which formed the basis for the surface bargaining allegation. By failing to litigate the surface bargaining allegation in the earlier case, the judge held, the General Counsel forfeited the opportunity to do so later. The Board majority adopted the judge's decision to dismiss the complaint.

Clothing colors must fall within a general color palette that includes white (for tops only), black, gray, navy blue, brown or khaki (tan). Other colors are only allowed as a small accent on shoes or for accessories (ties, scarves, socks, etc.)

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(GC Exh. 2.)

The dress code sets general parameters but within those parameters each employee has considerable choice. In other words, the rules do not require employees to wear what amounts to a uniform, as would be the case, for example, if it required all employees to wear black pants and white shirts.

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Complaint subparagraph VI(a) quotes a portion of the dress code which appears under the heading ""Shirts, Sweaters and Jackets." It states, in part, that shirts "may have a small manufacturer's logo, but must not have other logos, writings or graphics."

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Employees clearly would understand that this prohibition extends to wearing shirts bearing Union insignia. Another provision of the dress code leaves no doubt. Under the heading "pins," the dress code states, in part:

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Partners¹⁰ may only wear buttons or pins issued to the partner by Starbucks for special recognition or for advertising a Starbucks-sponsored event or promotion; and *one reasonably sized and placed button or pin that identifies a particular labor organization or a partner's support for that organization*, except if it interferes with safety or threatens to harm customer relations or otherwise unreasonably interferes with Starbucks public image.

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(GC Exh. 2, italics added.)

The dress code does not make a similar exception to allow the wearing of clothing bearing a union logo. Moreover, as will be discussed below, the Respondent disciplined employees for wearing shirts with union insignia.

30

Citing the Supreme Court's decision in *Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), the government notes the Board's role in weighing the employees' Section 7 right to wear union insignia against the employer's right to make and enforce work rules. The General Counsel's brief states:

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In balancing these principles, the Board applies a presumption that an employer's limitations on the display of union insignia is unlawful and the burden is on the employer to establish special business circumstances that outweighs employees' right under Section

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¹⁰The Respondent refers to its employees as "partners."

7 of the Act to display union insignia. *Tesla, Inc.*, 371 NLRB No. 131, slip op. at 6 (2022). This test is used for various types of insignia such as union stickers, hats, pins, buttons, and T-shirts. *Id.* at slip op. at 7; *Great Plains Coca-Cola Bottling Co.*, 311 NLRB 509, 515 (1993). Any prohibition against wearing union insignia, including the maintenance of facially neutral, nondiscriminatory dress codes and uniform policies which limit or restrict the display of union insignia, must be justified by legitimate business interests that outweigh employees' right to display union insignia and must be narrowly tailored to meet those interests. *Tesla*, supra, at 7, 17; *Wal-Mart Stores*, 340 NLRB 637, 638 (2003), *enfd.* in relevant part 400 F.3d 1093 (8 Cir. 2005). Furthermore, contact with customers or the public, or uniform requirements alone do not establish special circumstances. *Floridian Hotel of Tampa, Inc.*, 137 NLRB 1484 (1962); *Long Beach Memorial Medical Center, Inc.*, 366 NLRB No. 66, slip op. at 3 (2018); *P.S.K. Supermarkets*, 349 NLRB 34, 35 (2007).

When the Board weighs the employees' Section 7 right to wear union insignia against an employer's right to make and enforce work rules, the process begins with a presumption which tips the scales in the employees' direction. The employer must place on its side of the balance some serious "special circumstances" to overcome the presumption and tilt the balance in favor of the restriction. However, in 2019, the Board lightened the presumption when a rule restricted what employees could wear while working in the public areas of a retail store.

In *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 (2019), the Board considered a retail employer's rule allowing workers to wear union insignia no larger than the name badges the employees also wore. But, although the employer allowed this limited display of union insignia, it did not permit employees to wear either union insignia or other badges or buttons which were larger than the name tags.

The Board majority found this restriction lawful when applied to employees working in the parts of the store where customers shopped but not lawful when applied to employees working in nonpublic areas.¹¹ If the *Wal-Mart Stores* precedent remained good law, there would be little doubt that the limitation in the Respondent's dress code was lawful. However, in 2022, the Board overruled the *Wal-Mart Stores* decision. *Tesla, Inc.*, 371 NLRB No. 131 (2022).

In *Tesla*, the employer required employees to wear black pants and black shirts imprinted with the company logo. The employer did not allow employees to wear black shirts with the union's logo but it did permit them to put pro-union stickers on the shirts. The Board held that the employer had not proven that there were special circumstances which would justify a prohibition on employees wearing union t-shirts.

¹¹Dissenting, Member McFerran decried that "it seems that employers are now presumptively *permitted* to restrict the wearing of union insignia (so long as they do not ban such activity altogether) based on any legitimate justification." *Wal-Mart Stores, Inc.*, 368 NLRB No. 146 at p. 6 (italics in original). The majority had cited for support the Board's then-recent decision in *Boeing Co.*, 365 NLRB 1494 (2017). The Board overruled *Boeing* in 2023. *Stericycle, Inc.*, above.

5 Concluding that the employer had violated Section 8(a)(1) of the Act, the Board stated:
"Plainly, an employer interferes with and restrains employees in the exercise of their Section 7 right
to display union insignia by maintaining a uniform policy or dress code that limits employees' ability
to display union insignia *even if the policy does not completely prohibit employees from doing so.*"
Tesla, Inc., 371 NLRB No. 131, slip op. at 8, fn 21 (italics added).

10 In *Tesla*, the Board did not find that special circumstances justified the prohibition on wearing
union shirts and the General Counsel argues that, in the present case, the Respondent likewise has
failed to establish the existence of such special circumstances. In its brief, the Respondent vigorously
disagrees:

15 [T]he Board's 2022 *Tesla* case is no longer good law. On November 14, 2023, the United
States Court of Appeals for the Fifth Circuit issued a decision and order vacating the
Board's decision in *Tesla*. See *Tesla, Inc. v. NLRB*, 86 F.4th 640 (5th Cir. 2023). The
Fifth Circuit found that the Board exceeded its statutory authority and failed to properly
balance employee interests in self-organization with equal employer interests in
maintaining discipline in their establishments. *Id.* at 651-652. The Fifth Circuit further
20 found it was irrational for the Board to require employers that only partially restricted
union insignia to face the same "special circumstances" burden as an employer that fully
banned all union insignia and adornments on employee dress. *Id.* at 653.

25 The Respondent's argument that the *Tesla* decision "is no longer good law" is incorrect, at least
with respect to the present case. It is true that the United States Court of Appeals for the Fifth Circuit
denied enforcement of the Board's decision, but that court's jurisdiction extends only to Louisiana,
Mississippi, and Texas. The events in this case took place in Chicago, Illinois, which is in the
Seventh Circuit.¹²

30 The Respondent has not cited any decision from any other Federal appellate court, or from the
Supreme Court, which rejects the analytical framework the Board articulated in its *Tesla* decision.
The Board continues to apply the principles set forth in *Tesla* and I will do so here.

35 Essentially, the Respondent argues that if an employer allows *some way* for employees to
display their support for a union, it should not have to meet the same high "special circumstances"
requirement to justify other restrictions on the wearing of union insignia. Arguably, the "reasonably
sized" button permitted by the Respondent's dress code would communicate the pro-Union message
as effectively, or almost as effectively, as a larger emblem on a shirt.

¹²The Respondent's brief includes a section titled "The ALJ should not disregard the Fifth Circuit's *Tesla* decision under the Board's non-acquiescence policy." However, the brief doesn't address the question of whether failing to apply Fifth Circuit precedent in the Seventh Circuit would constitute "non-acquiescence." In any event, the judge does not have authority to change Board policy and the Respondent's arguments should be addressed to the Board.

That argument seems plausible, assuming that the message is short enough to squeeze onto a button and still be readable. However, may this argument—that wearing a button suffices to communicate the employee's message—even be considered? A portion of the Board's decision in *Tesla, Inc.*, refers to this argument as "irrelevant." The Board stated:

Consistent with *Republic Aviation*, the Board has required an employer to establish special circumstances to justify restrictions on employees' right to display union insignia, even if the employer permitted employees to display union insignia in other ways, and has not analyzed whether the employer affords employees "a meaningful opportunity to display union insignia" before applying the special circumstances test in those situations. Thus, "[u]nder Board law, it is irrelevant that the [employer] allowed employees to wear other union insignia that it deemed acceptable." *Caterpillar*, 321 NLRB at 1181 fn. 10; see also *Page Avjet Corp.*, 275 NLRB 773, 777 (1985) (finding, in the absence of special circumstances, that the employer's "proposal to post photographs of the stewards on the union bulletin board [was] not an acceptable alternative to wearing steward badges" because "in the absence of a justification for the prohibition, there is no need for the [u]nion to accept any alternative").

371 NLRB No. 131, slip op. at 10 (footnote omitted).

The Board's holding that it is "irrelevant that the [employer] allowed employees to wear other union insignia" would appear to vault the analysis over the Respondent's "but we let them wear buttons" argument and land it squarely on the "special circumstances" issue. However, the Respondent cites *Labor Board v. Steelworkers*, 357 U.S. 357, 363 (1958), for the principle that the following question is not merely relevant but a vital consideration: Does the limitation on what insignia an employee may wear truly diminish the employee's ability to communicate, through apparel, a message about union?

In *Labor Board v. Steelworkers*, the Court observed that "the Taft-Hartley Act does not command that labor organizations as a matter of abstract law, under all circumstances, be protected in the use of every possible means of reaching the minds of individual workers, nor that they are entitled to use a medium of communication simply because the employer is using it." 357 U.S. at 364.

Neither the employees' Section 7 right to wear union insignia nor the employer's right to make rules about employee appearance is absolute and it falls to the Board to strike the appropriate balance. The Supreme Court has described the Board's function as "working out an adjustment between the undisputed right of self-organization assured to employees under the Wagner Act and the equally undisputed right of employers to maintain discipline in their establishments." *Republic Aviation Corp. v. Labor Board*, 324 U.S. 793, 797–798 (1945).

In the more than 8 decades since the *Republic Aviation* decision, the Board has "worked out an adjustment" between the competing rights on numerous occasions. From its extensive experience, the Board knows that the balancing process must be grounded in the totality of circumstances in each

particular case. It certainly would not have ignored this experience when it decided *Tulsa, Inc.*, above.

5 Therefore, I conclude that when the Board held it was "irrelevant" that an employer had allowed employees to wear some union insignia, it meant that this fact was irrelevant *to the threshold question* of whether the employer must show "special circumstances" that justified its restriction on apparel. In other words, *any* restriction on the employees' right to wear union insignia or a union-related message will trigger the requirement that an employer show "special circumstances" and the fact that the employer permits employees to wear a small union button doesn't matter.

10 Once the obligation to show "special circumstances" has been triggered, a showing that such special circumstances exist makes it necessary for the Board to balance the employer's legitimate business needs, and the rules it promulgates because of those needs, against the employees' Section 7 rights. In performing that balancing, it is appropriate for the Board to consider that the employer allows employees to wear a reasonably-sized button showing their support for a union.

15 That is true because the balancing weighs how much the employer's right to make work rules should be restricted versus how much the employees' right to convey union-related messages should be restricted. Such balancing necessarily entails considering how much the employer's existing rule limits the employees' ability to communicate about the union through the apparel they wear.

20 With these principles in mind I must now answer the following questions: (1) Is there a present limitation on employees' Section 7 rights which the Respondent must justify by showing there are "special circumstances" which warrant the restriction? (2) If so, do the "special circumstances" justify the limitation?

25 In answering the first question, the fact that employees may wear a union button is irrelevant. *Tesla, Inc.*, above. Because the record establishes that the Respondent's dress code significantly limits the freedom of employees to wear apparel with union-related messages, I conclude that the Respondent must show that "special circumstances" do justify the limitations.

30 Turning to the second question, whether "special circumstances" justify the restriction, it should be noted that an important circumstance distinguishes the present case from *Tesla, Inc.*, which concerned what employees could wear while working in a factory. In contrast, the Respondent's employees work in a retail store and interact with the public. The Respondent's brief stated:

35 Starbucks maintains a distinct and carefully cultivated public image through its Dress Code, which the United States Second Circuit Court of Appeals held constitutes sufficient "special circumstances" under the Act to justify the limitations contained in this exact version of Starbucks's Dress Code. See, e.g., *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012).

The dress code itself reveals the image which the Respondent wishes to cultivate. It does not require the type of uniform typically worn by fast food employees but gives the employees many

choices, within specified parameters. The dress code appears to approximate, or strive to approximate, the level of formality known as "business casual."

5 The dress code thus distinguishes Respondent's shops from fast food restaurants and appears to be part of a marketing strategy aimed at a particular demographic. Just as fast food uniforms would be inconsistent with that image, so would shirts laden with logos. The shirt manufacturer's own inconspicuous logo, which the dress code allows, is consistent with "business casual" and with the image Respondent seeks to project, but a shirt festooned with logos like a NASCAR racer would create a different ambience.

10 Customers judge a fast food restaurant by the answers to these two questions: Is it fast? How is the food? They might also ask whether the store, and particularly the restrooms, appeared clean.

15 However, the Respondent's customers likely would find those strictly utilitarian questions insufficient to judge one of the Respondent's stores because the Respondent is selling more than food. The environment itself may be considered a part of the product. In that case, the appearance of the servers - the baristas - is one of the product's ingredients. A change in their appearance changes the recipe.

20 From *Labor Board v. Steelworkers* and *Republic Aviation v. NLRB*, above, it is clear that neither the employer's right to make rules nor the employees' right to wear union insignia is absolute. An adjustment requires both sides to give a little. In determining how much each side should give, it is appropriate to consider the underlying purposes of the rule and the right.

25 The Respondent's purpose in limiting what employees can wear while serving the public is to create an environment attractive to the public or to a particular segment of the public. The purpose of the Section 7 right is to allow employees to communicate their views concerning union representation, or other matters related to terms and conditions of employment, to other employees and to the public.

30 The Respondent's dress code permits the wearing of a union button of reasonable size, but does not define what is "reasonable." Assuming that "reasonable size" means large enough for customers and other employees to read, it would appear that the Respondent's dress code does give employees a substantial and meaningful method of communication. Additionally, the Respondent hardly can claim that the dress code is inconsistent with its own interests because it implemented the dress code. Changing this balance would involve drawing a line so arbitrary it would be questionable.

35 In sum, I conclude that the Respondent has established the special circumstances necessary to justify its restriction on wearing union insignias or apparel in public areas of its store. Therefore, I find that the Respondent's dress code is lawful on its face and that, by promulgating it, the Respondent did not violate Section 8(a)(1) of the Act. Accordingly, I recommend that the Board dismiss the allegations raised in complaint subparagraph VI(a).¹³

¹³ The Respondent's brief includes a subheading titled "Forcing Starbucks to allow partners to wear

This conclusion extends only to the facial lawfulness of the dress code. Whether it has been applied in an unlawful manner will be discussed below.

5 Complaint Subparagraph VI(b)

Complaint subparagraph VI(b) alleges that on about April 18, 2023, the Respondent, by Colin Campbell, the store manager, "selectively and disparately" enforced the dress code "by prohibiting employees from wearing union insignia while permitting employees to wear other insignia." 10 Complaint paragraph VIII alleges that the Respondent thereby violated Section 8(a)(1) of the Act. The Respondent denies these allegations.

On April 17, 2023, employees at the Greektown store went on a one-day strike to protest the discharge of an employee, Lillie Hanneghan.¹⁴ The same day, the employees notified the Respondent by email that they were striking. Their email also stated: "We will conclude our strike at 5:00 A.M. TUESDAY, APRIL 18, 2023, and will unconditionally return to work at that time." 15 (GC Exh. 7, capitalization in original.)

additional Union graphics of their own choosing would be unconstitutional compelled speech." Because I conclude that the restriction on the wearing of logos is lawful on its face, it is not necessary to reach the constitutional issue. However, the argument troubles me to the extent it implies that employees become their employer's property, at least for the purpose of communicating about a union, during working hours.

The Respondent's argument rests on the principle that "the right of freedom of thought protected by the First amendment against state action includes both the right to speak freely and the right to refrain from speaking at all." *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

The Respondent contends that a ruling by the Board which invalidated parts of its dress code would be similar to a case in which a state regulatory agency required a private utility company to include, with the bill to each customer, some printed matter from an organization expressing views contrary to those of the company. The Court has held that the First Amendment prohibits a state from doing so. *Pacific Gas Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1996). However, in *Pacific Gas*, the state law required the company to bear the burden of inserting the organization's message in its customer bills. Allowing an employee to wear union insignia imposes no such burden on the employer.

Moreover, the Respondent's argument assumes that those who see an employee wearing a union logo will believe that the Respondent required it. That assumption seems unwarranted and the Respondent has offered neither evidence nor argument to support it.

It would be unlawful for an employer to require an employee to wear an antiunion shirt (or, for that matter, a prounion shirt). When the message is about unionization, an employee is not an employer's billboard. Likewise, no one who saw an employee wearing a prounion shirt would assume that the employee was the employer's billboard.

¹⁴The complaint does not allege that the discharge of Hanneghan violated the Act.

On April 18, 2023, at 4:30 a.m., employees Molly Maul, Joe Taylor, and Nathan Williams¹⁵ arrived at the store for their shifts. All wore union T-shirts. The shirts were black, with a union logo. (Tr. 169.)

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Wilson testified that Store Manager Colin Campbell arrived at about 7:30 a.m., noticed that Maul was wearing a union T-shirt and said that the employees would have to put on something else or go home. (Tr. 161.) When informed that the employees had no other shirts to wear, Campbell closed the store.

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Campbell's testimony generally is consistent with Wilson's account. However, one minor divergence from Wilson's testimony appears in an April 18, 2023, email which Campbell sent to an advisor in Respondent's labor relations department and several others, including his immediate supervisor, District Manager Lesley Davis.

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There is no doubt that Campbell's email describes events on April 18, 2023, and not the day earlier, when employees were on strike. However, the email begins, "I came in for my shift @ 6:30 am 4/17/23." If, as I believe, Campbell intended to write "4/18/23," then the statement that he arrived at 6:30 a.m. conflicts with Wilson's testimony that Campbell arrived at 7:30 a.m. on April 18. However, I believe this conflict is too inconsequential to affect the credibility either of Campbell or of his email.

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Campbell sent the email to the management and labor relations officials at 10:03 a.m. on April 18, 2023, just hours after the events it describes. Because the email is nearly contemporaneous with those events, I believe that it reliably relates what happened. Campbell's email states, in part, as follows:

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I came in for my shift @ 6:30 am 4/17/23.

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All partners were wearing Union Shirts turned backwards and their Starbucks Aprons were on.

All partners on the floor were scheduled (Camile¹⁶ I mistakenly looked at Monday schedule when sharing with you swaps)

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¹⁵Although Williams' title is "shift supervisor" the Board has not found him to be a supervisor within the meaning of Sec. 2(11) of the Act. He and other shift supervisors at the Greentown store are in the bargaining unit which the Board certified, on April 11, 2023, as the exclusive bargaining representative of the employees at that store. (Jt. Exh. 2.)

¹⁶The email is addressed to Camille Arnold. District Manager Davis testified that Arnold is "our labor relations partner" and that another addressee, Jim Zissler, was a legal advisor. (Tr. 490.)

Molly Maul—B¹⁷—4:30am shift
Edwin Ojeda—B—6:30am shift
Jo Taylor—B—4:30am shift
Wilson Wilson¹⁸ SSV—4:30am shift

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Between 7 & 9 Customers were in the store being served at this time.

I greeted all partners and then asked each partner if they would replace their non approved the [sic] shirt with approved clothing.

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Partner spokesperson Wilson Wilson said that they did not have additional clothing to replace and I then asked the partners collectively to end their shift and return home with instructions to return to their next shift when appropriately dressed in approved clothing.

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At this time 4 customers were on the floor and I shared that unfortunately we were closing the store and asked for their understanding and if they wanted seating the nearest Starbucks store was 2 blocks away at Madison and Morgan.

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Molly Maul then confronted me and told me that they had the collective right to wear this clothing under their Union rights with Wilson Wilson & Jo Taylor in physical straight line of defiance.

25

Wilson Wilson then read verbatim from their cell phone quoting Union article xxxx giving them the right to not conform to my request.

Edward Ojeda had his head down.

I asked the partners to complete the customer orders, as I then turned off MOP.

30

Molly Molly then demanded to know if they would be paid for their shift as they were being sent home for not conforming to dress code. I explained that if she texted me her specific question that I would let her know. She asked again to confirm that "you don't know" and I re-interated my response and thanked them all for their patience and understanding.

35

I thanked the partners for their help this morning and asked the partners to punch out as they had punched in. Jo Taylor did not punch in which had been a trend, Jo then completed the punch in Log stating Forgot and in a 4:35am out at 7:10am

¹⁷Presumably, "B" stands for barista and "SSV" means shift supervisor.

¹⁸Wilson Wilson is the same person as Nathan Wilson.

Punch Ins
Wilson Wilson—4:36am—7:09am
Molly Maul—4:35 am—7:10am
Edwin Ojeda—6:29am—7:09am

5

I then asked Wilson Wilson to set the alarm and led the partners out—locked the door.

I thanked the partners and shared I hoped to see them at their next shift wearing appropriately approved clothing.

10

(GC Exh. 9.)

A little less than 2 hours after Campbell sent this email, three more employees arrived at the store for the afternoon shift. They, too, were wearing union shirts. Campbell sent to higher management a second email concerning what had occurred after the first email. He identified the three workers who had just arrived as Shift Supervisor Chris Allen and Baristas Ruben Diaz and Z. Vickers.¹⁹ Campbell's follow-up email described their response when he asked if they had other clothing to wear:

15

Z Vickers was the spokesperson and challenged me with having the legal authority to ask this of them. I reminded Z that every partner was aware of the policy.

20

I asked them if they understood what I was politely asking - I asked again and Z continued stating that this was illegal. I kindly asked that they left and looked forward seeing them for their next shift wearing appropriate clothing.

25

And also asked if they would be willing to return home and change and then come back and Z said no as Chris and Ruben looked on,

Z then shared that she could not believe we would shut down our store over something so stupid as dress code.

30

SM partner Alicia Loyd was in the room as a witness to this interaction,

Partners are gathering at the front door and I am closing the store down.

35

I will provide corrective action reports on all partners today.

(GC Exh. 9.)

Campbell's use of the present tense—"Partners are gathering at the front door and I am closing

40

¹⁹All witnesses referred to Vickers as "Z. Vickers" without stating the name for which "Z" stood. Vickers did not testify.

the store down"—indicates that he was writing as events unfolded. Because contemporaneous, this account likely is the most reliable evidence and I credit it.

Was Enforcement Discriminatory?

5

For reasons discussed above, I have concluded that the Respondent's dress code is lawful on its face and that the Respondent did not violate the Act by prohibiting employees from wearing a shirt bearing a logo other than that of the shirt's manufacturer. The dress code similarly lawfully prohibits wearing such logos on other apparel, with the exception that the Respondent's own logo may be displayed.

10

However, a conclusion that the dress code is facially lawful does not rule out the possibility that the Respondent enforced it in a discriminatory manner, ignoring the dress code when employees wore shirts bearing some logos but clamping down when an employee wore a shirt with the Union logo. Such discriminatory enforcement, allowing some logos but not the Union's, would interfere with the exercise of Section 7 rights and would violate Section 8(a)(1) of the Act.

15

The General Counsel asserts that the Respondent failed to enforce the dress code on at least several occasions. In considering the instances cited in the government's brief, it should be noted that the Respondent's dress code prohibits more than wearing apparel with logos. It also forbids wearing jewelry on the hands or forearms (with the exception of one plain band such as a wedding ring) and allows only one "small facial piercing no larger than a dime." The dress code requires pants to be a solid color "within the color pallet," that is, black, gray, navy blue, brown, khaki, or white. The General Counsel's brief states, in part:

20

25

. . . Shift Supervisor Wilson testified he saw employees wear clothing which violated the Respondent's dress code policy. However, they were not disciplined. Specifically, he testified that he wore pants that were the wrong color. He also testified that he wore earrings to work. He was never disciplined (TR 164-165). Employee Elling testified that she saw Employee Dahlman wear a baseball hat with a Chicago White Sox logo on it to work on several occasions. She did not know if he was disciplined. She also testified that Employee Vickers were [sic] multiple facial piercings daily (TR 229-231). Employee Dahlman testified that, since April 2022, he wore a baseball hat with a Chicago White Sox logo on it to work daily. He was never disciplined (TR 307-310).

30

35

With respect to wearing pants that were not an approved color, Wilson testified: "There was one point in time that I wore pants that were the wrong shade of blue. The Dress Code is navy blue, and they were like more of an aqua." Wilson testified that he was not sent home and did not receive discipline. (Tr. 165.)

40

The dress code specifies that earrings be no larger than a quarter. (GC Exh. 2.) Wilson testified that there "was one day that I wore earrings that were too big, and I was just asked to take them off and I took them off and continued to work." (Tr. 165.)

5 However, just as the United States Code consists of many different laws, the Respondent's dress code is not one rule but a number of different rules brought together under one heading. Although wearing pants of an unapproved color or earrings larger than a quarter or multiple facial piercings would violate some parts of the dress code, they would not violate the rule at issue here, the provision which prohibits wearing a shirt or other apparel with a logo other than the manufacturer's logo. Even if the Respondent permitted an employee to break the rules regarding pants color and earring size, it would not constitute disparate enforcement of the rule restricting the wearing of logos and other emblems.

10 Wearing a baseball cap with a team logo would be a violation of the relevant rule. Barista Russell Dahlman testified that he often did that without receiving discipline:

15 Right when I started in April 2022, I didn't have non-slip shoes, which are out of Dress Code, and I didn't have non-slip shoes for like a month, and for like six months, like half a year, and Angela Beverly, my manager, would just be like, "Hey, reminder, you know, you need to get non-slip shoes that are out of Dress Code." I never received any discipline for it.

20 Around the same time, I started wearing a White Sox hat, you know, the same black baseball cap with a White Sox logo, and I wore that all the time. I never got disciplined for it. I wore it with Angela there, Colin there, with Tamara there, and no one disciplined me for my White Sox hat.

25 (Tr. 307–308.)

Elizabeth Elling corroborated Dahlman's testimony. Elling, who was a barista at the Greektown store from June 2022 until December 2024, testified that Dahlman would "regularly wear" a black baseball cap with a White Sox logo on it. (Tr. 229–230.)

30 However, other witnesses called by the General Counsel neither corroborated nor contradicted Dahlman's testimony. Ruben Tellez worked as a barista at the Greektown store from September 2022 until April 2024. When Tellez testified, none of the attorneys asked him whether he had seen Dahlman wear a White Sox.

35 Nathan Wilson worked at the Greektown store from July 2021 until the end of May 2023. (Tr. 150.) During his testimony, Wilson made no mention of Dahlman wearing a White Sox cap. Significantly, Wilson did testify about other violations of the dress code which did not result in discipline. Specifically, he stated that he had not received discipline for wearing earrings or for wearing pants of an unapproved color. Presumably, Wilson would have mentioned Dahlman's wearing the White Sox cap - a clear breach of the Respondent's dress code—if he had seen Dahlman do so.

The Respondent argues that neither Dahlman nor Elling gave credible testimony. The Respondent's brief states that "Dahlman gave two separate confidential witness affidavits to the Board

in the course of the Board's investigation of the Union's charge. *Neither affidavit mentions Dahlman or any other partner wearing a non-dress code complaint baseball hat.*” (Tr. 334–335.) (Italics in original.)

5 On cross-examination, Dahlman admitted that, although he mentioned the ill-fitting shoes in that affidavit, he did not mention wearing the White Sox baseball cap. He testified that he forgot:

10 I wore my baseball cap almost every shift. I mean, I forgot to include it in the affidavit. It's the case. You can ask, you know, my supervisors about it or my coworkers about it, if I wore the hat or not.

(Tr. 337.)

15 However, Dahlman's supervisors did not corroborate his testimony. Erin Leigh Goss, who had been store manager at the Greektown location during the month of March 2023, testified that she never saw Dahlman wearing a cap with a White Sox label. However, two factors affect the probative value of this testimony.

20 First, Goss only worked at the Greektown store about a month and Dahlman was a part-time employee. It is possible that Goss simply did not encounter Dahlman when he was wearing the White Sox cap.

25 Second, Goss worked at the Greektown store in March 2023, before the major league baseball season opened. Her service at the store ended at about the same time baseball season began.²⁰ It seems plausible that Dahlman would be less likely to wear the White Sox cap before opening day.

30 After Goss's departure, Colin Campbell managed the Greektown store through June 2023. (Tr. 527.) During his testimony, Campbell was not asked whether he had seen Dahlman wear a White Sox cap. His testimony neither corroborates nor contradicts Dahlman's.

35 At the end of August 2023, Tamara McDonald became manager of the Greektown store and remained in that position at the time she testified. She denied ever seeing Dahlman wearing a White Sox cap.(Tr. 552.) This testimony directly contradicts Dahlman’s testimony that “I wore it with Angela there, Colin there, *with Tamara there. . .*” (Tr. 308, italics added.)

However, two store managers did not testify. Those managers were Angela Beverly, who managed the Greektown store before Goss, and Deidre Anderson, who was interim manager from the

²⁰Rule 201(b) of the Federal Rules of Evidence permits judicial notice to be taken of a fact that is not subject to reasonable dispute because it: (1) is generally known within the trial court's territorial jurisdiction; or (2) can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned. The fact that major league baseball season began on March 30, 2023, satisfies the requirements of Rule 201(b)(1).

time of Campbell's departure in June 2023 until sometime in August 2023. (Tr. 288-289)

Anderson managed the Greektown store during the heart of baseball season, when someone most likely would wear a White Sox cap. Her testimony would have been particularly relevant.

5

In weighing the testimony, that of Dahlman and Elling rests on one side of the scales. They testified that Dahlman wore the White Sox cap regularly.

10

On the other side of the scales rests the testimony of Managers Goss and McDonald. They testified that they did not see him wear it.

15

At this point, the scales appear rather evenly balanced, but there are other factors to be considered. The fact that Dahlman did not mention wearing the hat in his pretrial affidavits detracts from the weight accorded his testimony. The fact that Elling answered a number of questions by stating that she did not remember raises doubts about the reliability of her testimony. However, the fact that two managers did not testify raises the possibility that their testimony might have corroborated that of Dahlman and Elling.

20

After considering those additional factors, the scales still remain rather evenly balanced. The deciding factor, that tips the scales against Dahlman's testimony, is what one witness did *not* say.

Nathan Wilson worked at the Greektown store from July 2021 until the end of May 2023 (Tr. 150) and was a union supporter. He testified, in part, as follows:

25

Q. Are you aware of any employee of the Greektown store that has worn clothing or any paraphernalia that wasn't in compliance with the Dress Code?

A. It definitely has happened, but like a specific example I couldn't think of.

(Tr. 164–165.)

30

If Dahlman had worn his baseball cap "almost every shift," as he testified (Tr. 337), it seems likely that Wilson would have noticed. However, Wilson's testimony does not corroborate Dahlman's. Moreover, Wilson's inability to remember any specific example when the dress code was not enforced is consistent with the conclusion that the Respondent did enforce the dress code diligently.

35

For two reasons, I believe that Wilson's failure to mention Dahlman wearing a White Sox cap should be accorded significant probative weight. First, Wilson was a union supporter. Testimony that he saw Dahlman wearing the White Sox cap would have benefitted the Union's case. Second, Wilson gave specific testimony about instances when employees were not in compliance with the dress code but received no discipline. Thus, he presumably knew that proving such instances of nonenforcement was important to the Union's case. Notwithstanding this motivation, he did not testify he saw Dahlman wear the White Sox cap.

40

If Wilson truthfully could have testified that Dahlman wore a White Sox cap while working, he most certainly would have given such testimony. The fact that Wilson did not weigh heavily against Dahlman’s testimony that he wore the cap “almost every shift.” To credit Dahlman’s testimony, I must find it more likely than not that he wore the White Sox cap to work. In view of Wilson’s failure to mention the White Sox cap, I do not conclude that Dahlman’s testimony about wearing the cap was more likely than not. Therefore, I do not credit it.

In other respects, Wilson’s testimony about enforcement of the dress code does not indicate that the Respondent was lax about enforcing its restrictions on wearing clothing with logos. Testimony suggesting that the Respondent did not strictly enforce other parts of its dress code would not prove disparate enforcement of the rule at issue. However, even that testimony, about portions of the dress code not relevant here, does not raise any doubts concerning the Respondent’s seriousness about employees following the dress code or the Respondent’s rigor enforcing it.

Wilson testified that on one occasion, he wore earrings larger than allowed by the dress code: "I was just asked to take them off and I took them off and continued to work." (Tr. 165.) By taking off the earrings, Wilson brought his apparel into compliance with the dress code and he was not sent home or otherwise disciplined. In comparison, the employees who wore union shirts to work on April 18, 2023, did not change into other clothing. Therefore, the fact that the Respondent did not send Wilson home does not constitute disparate treatment under similar circumstances.

The General Counsel bears the burden of proving, by a preponderance of the evidence, that the Respondent had allowed employees to wear clothing not in compliance with the dress code provision restricting the wearing of clothing with logos—except when such logo pertained to the Union. The "preponderance of evidence" standard requires proof sufficient to establish that an asserted fact is more likely than not. For the reasons discussed above, I conclude that credited evidence falls short of proving that this fact is more likely than not.

In sum, the credited evidence does not establish that the Respondent was lax about enforcing the dress code except when union insignia were involved. Therefore, I find that the Respondent did not enforce the dress code in a disparate or discriminatory manner.

Because of this finding, I further conclude that the government has failed to prove that, on about April 18, 2023, the Respondent enforced the dress code selectively and disparately by prohibiting employees from wearing union insignia while permitting employees to wear other insignia, as alleged in complaint subparagraph VI(b). Accordingly, I recommend that the Board dismiss the allegations in this complaint subparagraph.

Complaint Subparagraph VII(a)

Complaint subparagraph VII(a) alleges that about April 18, 2023, Respondent suspended its employees Lillie Elling, Molly Maul, Edwin Ojedo, Jo Taylor, Ruben Tellez, Z Vickers, and Wilson Wilson. Complaint subparagraph VII(d) alleges that the Respondent engaged in this conduct because its employees assisted the Union and engaged in concerted activities, and to discourage

employees from engaging in these activities. Complaint subparagraph VIII(b) alleges that the Respondent thereby violated Section 8(a)(1) and Section 8(a)(3) of the Act. The Respondent denies these allegations.

5 This allegation concerns the same facts discussed above in connection with complaint
subparagraph VI(b), which alleges that the Respondent violated the Act by prohibiting employees
from wearing union insignia. In comparison, the allegation raised in complaint subparagraph VII(a),
under consideration here, focuses not on the prohibition but on management's sending home the
10 employees who were wearing the union shirts. The General Counsel alleges that doing so constituted
discrimination in violation of Section 8(a)(3) of the Act.

Determining whether alleged conduct violates Section 8(a)(3) typically entails following the
analytical process described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir.
15 1981), cert. denied 455 U.S. 989 (1982). However, that is not always the case.

The Board has consistently held that where an employer undisputedly takes action against an
employee for engaging in protected activity, a *Wright Line* analysis is not appropriate. *Gross
Electric, Inc.*, 366 NLRB No. 81, slip op. at 2–3 (2018), citing *Phoenix Transit System*, 337 NLRB
20 510, 510 (2002), enfd. 63 Fed. Appx. 524 (D.C. Cir. 2003); *Nor-Cal Beverage Co.*, 330 NLRB 610,
611–612 (2000); *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2 (1994).

Here, there is no dispute that the Respondent sent employees home, thereby suspending them
for the day, because they wore apparel bearing union logos or insignia, which is quintessential
25 protected activity. Therefore, a *Wright Line* analysis would not be appropriate. *Gross Electric, Inc.*,
above.

Although it is not necessary to apply the *Wright Line* framework, it may be noted that were the
facts analyzed under this framework, the conclusion would be the same. Under *Wright Line*, the
General Counsel must first prove that employees engaged in protected activity, that the employer
30 knew about it, that the employer harbored animus, and that a connection existed linking the protected
activity to the decision to impose discipline. *Wright Line*, above; *Tschiggfrie Properties, Ltd.*, 368
NLRB No. 120 (2019). If the General Counsel meets this initial burden, the respondent, to prevail,
must show that it would have taken the same action in any event, even in the absence of protected
activity.

35 In the present case, the record clearly establishes the first two elements the General Counsel
must prove. Employees wore apparel with union insignia during working time and at least one of
the Respondent's managers saw them doing so. The General Counsel also must prove animus by
showing some manifestation of intent to discriminate because of the employees' protected activities
40 or to discourage employees from engaging in such activities.

Statements or conduct which violates Section 8(a)(1) of the Act may reveal the existence of
animus. In the present case, complaint subparagraphs V(a) and V(b) allege that two of the
Respondent's managers made statements which violated Section 8(a)(1). However, for reasons

discussed above, I have concluded that the Respondent did not violate the Act by such statements. Additionally, I conclude that the statements which the government alleged to be violative do not manifest any intent to discriminate unlawfully.

5 The General Counsel's brief discusses the evidence offered to establish each of the initial *Wright Line* elements. With respect to proof of animus, the brief contends that "the Respondent harbored animosity toward the employees' Union and protected concerted activities by disciplining them for wearing Union insignia." It is not clear whether the General Counsel is contending that the discipline itself constitutes evidence of animus. If the General Counsel is making such an argument, I would
10 reject it. The Supreme Court has held that when discriminatory conduct is "inherently destructive" of important employee rights no proof of anti-union motivation is necessary, but such evidence is required when the adverse effects of the discrimination are "comparatively slight." *NLRB v. Great Dane Trailers, Inc.*, 388 U.S. 26, 33–34 (1967). In the present case, the adverse effects of the discipline are comparatively slight. More evidence of animus is required than merely the allegedly
15 unlawful conduct itself.

 The General Counsel's brief also argues that "the record evidence demonstrates that the Respondent more strictly enforced its dress code by prohibiting employees from wearing of Union insignia during work in response to the Union's organizing effort." However, the present record does
20 not establish that the Respondent changed its dress code, or made enforcement more stringent, *in response to employees' union activities*.

 The General Counsel did offer evidence that the Respondent enforced its dress code disparately, allowing deviations from the rules when those deviations did not involve Union-related apparel.
25 More specifically, two witnesses—Dahlman and Elling—testified that Dahlman frequently or regularly wore while working a baseball cap with the White Sox logo and that he was never disciplined for wearing this cap or told to take it off. However, for reasons discussed above, I have not credited this testimony and have not found disparate enforcement of the dress code.

30 Therefore, I would conclude that the record fails to establish the third *Wright Line* element and, accordingly, the General Counsel did not meet the government's initial burden of proof. Moreover, even assuming that the General Counsel had carried the government's initial burden, I would conclude that the Respondent has rebutted the General Counsel's case by showing that it would have issued the same discipline even in the absence of protected activities.
35

 Respondent has introduced into evidence disciplinary notices it issued to other employees for dress code violations other than wearing union insignia. (R. Exhs. 18, 19, 20, 21, 22, and 23.) It is true that some of these disciplinary actions took place after the events in the present case. However,
40 taken together, they reflect a consistent attention to how employees appeared while working and a continuing effort to enforce the dress code. Therefore, I would conclude that the Respondent would meet its rebuttal burden.

 In sum, were I to perform a *Wright Line* analysis, I would conclude that the General Counsel had not carried the government's initial burden. Alternatively, even assuming that the General

Counsel had made the required initial showing, I would conclude that the Respondent had met its rebuttal burden. Therefore, I would recommend that the allegations in complaint subparagraph VII(a) be dismissed. However, in the present case, a *Wright Line* analysis is not appropriate. *Gross Electric, Inc.*, above.

5

Based on my conclusion that special circumstances justified the limitations in the Respondent's dress code, I further conclude that the Respondent did not violate the Act by engaging in the conduct alleged in complaint subparagraph VII(a). Therefore, I recommend that the Board dismiss these allegations.

10

Intermittent/Partial Strike Arguments

When employees wore union T-shirts to work on April 18, 2023, they did so after participating in a strike the previous day. The Respondent argues that they did so with the knowledge they would not be allowed to work because they were not in compliance with the dress code. The Respondent's brief characterizes this activity as being an unprotected partial and/or intermittent strike.

15

Above, I have concluded that the Respondent did not violate the Act by enforcing its dress code on April 18, 2023, and sending home the employees wearing union shirts. This conclusion makes it unnecessary to address the Respondent's intermittent/partial strike argument. However, should the Board disagree with my conclusions discussed above, I would analyze the Respondent's argument as follows.

20

Uncontradicted evidence establishes that, at some time before August 17, 2023, the employees held a meeting and that, at the meeting, they decided both to strike on April 17, 2023, and to report for duty the next day wearing the union shirts. Employee Elizabeth Elling referred to the latter as a "t-shirt action." (Tr. 221–222; see also Tr. 242–243.)

25

There is no doubt that the employees planned to wear the union shirts to work the day after the strike. Thus, employee Nathan Wilson testified: "Along with the strike, we planned on wearing Union T-shirts to work the next day." (Tr. 158.)

30

Clearly, wearing Union T-shirts to work on April 18, 2023, was concerted activity. However, the employees' intent in doing so is not so clear. Although both Elling and Wilson testified that the decision to wear the shirts was made at a meeting, neither explained why the employees decided to take this action.

35

The Respondent argues that the employees intended to be sent home. That seems possible. However, one of Store Manager Campbell's April 18, 2023, emails to higher management quotes employee Z Vickers saying, "she could not believe we would shut down our store over something so stupid as dress code." (GC Exh. 9.) So, possibly, at least some of the employees believed that the Respondent would relent and allow them to work while wearing the union shirts.

40

In arguing that the employees were engaged in an unprotected partial or intermittent strike, the

Respondent cites a case which, its brief states, it hopes the Board will overrule. In *Ohio Bell Telephone Co.*, 370 NLRB No. 29 (2020), certain employees installed telephones and other equipment in homes and businesses. The employer required these technicians to wear uniforms with the company logo while working.

5

To protest a shortage of uniforms, the employees reported to work wearing jeans and nonunion shirts. The supervisor told the employees to change into their uniforms before beginning work. Most of the employees had uniforms available but 6 had to return home to change. When they finally clocked in, they were from 1 to 2.5 hours later.

10

The employer issued disciplinary warnings to all the techs who showed up for work in street clothes and additional discipline to those who clocked in late. The General Counsel alleged that these disciplinary actions were unfair labor practices and the employer defended by asserting that the employees' admittedly concerted activity—reporting for work out of uniform—was unprotected. Thus, the facts bear more than a passing resemblance to the facts in the present case.

15

The Board rejected the employer's argument that the employees had been engaged in an intermittent strike. Citing *Valley City Furniture Co.*, 110 NLRB 1589, 1593–1595 (1954), *enfd.* 230 F.2d 947 (6th Cir. 1956), the Board stated that "an intermittent strike unprotected by the Act is a strike pursuant to 'a plan to strike, return to work and strike again.'" *Ohio Bell Telephone Co.*, 370 NLRB No. 29, slip op. at 2 (internal quotation marks omitted).

20

The present record does not establish that there was any plan to strike, return to work and then cease work again. Employee Elizabeth Elling, who attended the meeting at which the employees planned the April 17, 2023 strike, testified that "we discussed the strike on the 17th and our T-shirt action on the 18th." (Tr. 221.)

25

When asked to explain what she meant by "T-shirt action," Elling replied that they "discussed collectively wearing our union logo on T-shirts to work." (Tr. 221.) She did not mention any plan to wear the union shirts to work more than once. On cross examination, Elling testified, in part, as follows:

30

Q. Why—why did you guys, or I'm sorry, not you guys, but why did you, as a collective group, decide to engage in that action, to wear T-shirts on the 18th with Union logos?

35

A. Because we knew that it was our right to display our Union logo at our place of work.

Q. You knew that?

40

A. Yes.

Q. How did you know that?

A. Because as part of a labor union, we had specific rights that included wearing our union logo at our place of work.

Q. Lillie, did somebody tell you that you had this right?

A. I don't remember.

5 (Tr. 242.)²¹

10 Another employee who attended the prestrike meeting, Nathan Wilson, testified that "[a]long with the strike, we planned on wearing union T-shirts to work the next day." (Tr. 158.) However, nothing in his testimony suggests that the employees discussed making wearing union T-shirts to work a recurring event.

In sum, the evidence fails to prove that the employees either engaged in or planned to engage in an intermittent strike and I find they did not.

15 The Respondent also asserts that, by showing up for work wearing unacceptable attire, the employees were engaging in an unprotected partial strike. In such a strike, employees continue to perform some job duties but refuse to perform other job duties. The Board views such a strike as indefensible "because it constitutes an attempt by employees to set their own terms and conditions of employment while remaining on the job." *Electronic Data Systems Corp.*, 331 NLRB 343 (2000).
20 See also *Audubon Health Care Center*, 268 NLRB 135, 136–137 (1983); *Yale University*, 330 NLRB 246, 246 (1999).

25 If employees concertedly refuse to perform a required job duty, the employer lawfully may require them to leave the premises. The Board has held that such employees lose the protection of the Act only when they refuse either to work as directed or to leave the premises. *Ohio Bell Telephone Co.*, 370 NLRB No. 29, slip op. at 4.

30 In the present case, the employees refused to wear shirts in according with the Respondent's dress code. Is complying with the dress code a "required job duty"? The Board's decision in *Ohio Bell Telephone Co.* did not need to reach this question. The employees in that case did put on the required uniforms. The Board expressly left unanswered the question of whether wearing the uniforms constituted a required job duty. *Id.*

35 In the present case, the same special circumstances discussed above—circumstances which justify a rule limiting employees' Section 7 right to wear union insignia—also make compliance with the dress code a required job duty. Respondent is selling not merely coffee but also the experience of consuming it in a particular environment. The staff's appearance contributes to that experience. It is part of the presentation.

²¹Although Elling did not recall from whom she heard that the Act protected the wearing of union insignia on shirts, another employee, Russell Dahlman, took this position emphatically. He even cited the Board's decision in *Tesla, Inc.*, 371 NLRB No. 131 ((2020), to the store manager. (Tr. 294–296.) Dahlman displayed such familiarity with labor law it would not be too far wrong to think of him as the barrister barista.

The employees' job duties include not just brewing and serving coffee but also creating the ambience for its enjoyment. To do so, they must abide by the dress code. Clearly, compliance with the dress code constitutes a required job duty.

5

It follows that when employees refuse to follow the dress code, they are refusing to perform a required job duty and thereby engaging in an unprotected partial strike. Accordingly, were I to reach the partial strike issue, I would conclude that employees who wore the union T-shirts to work on April 18, 2023, were engaging in such a strike. Because the Act does not protect employees engaged in a partial strike, the Respondent did not violate it by imposing discipline.

10

Complaint Subparagraph VII(b)

Complaint subparagraph VII(b) alleges that on about April 22, 2023, Respondent disciplined its employee Russell Dahlman. Complaint subparagraph VII(d) alleges that the Respondent engaged in this conduct because its employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint subparagraph VIII(b) alleges that the Respondent thereby violated Section 8(a)(1) and Section 8(a)(3) of the Act. The Respondent admits it issued discipline to Dahlman on that date but denies that it did so for unlawful reasons and that it violated the Act.

15

20

On March 4, 2023, Dahlman wore to work a T-shirt with the Union's logo. Towards the end of his shift, the store manager, Angela Beverly, told him that his "shirt was out of Dress Code." He replied that the National Labor Relations Act gave him the right to wear the shirt. He told Beverly about the Board's decision in *Tesla, Inc.*, above, and offered to provide her a copy. (Tr. 295–296.)

25

Dahlman testified that Beverly replied, "No, I don't need that ruling. My bosses will know, and I need to bubble up the conversation." Dahlman asked her what "bubble up the conversation" meant and she replied that she needed to wrap up the conversation and bring it back to her supervisors. According to Dahlman, Beverly then thanked him for being respectful and the conversation ended. (Tr. 296.) Beverly did not testify and I credit Dahlman's testimony concerning the conversation. (Tr. 296.)

30

Between this incident on March 4, 2023, and when Dahlman received the discipline on April 22, 2023, store management changed. Erin Lee Goss managed the Greektown store for much of March 2023 and then Colin Campbell became store manager.

35

According to Goss, the "prior store manager" told her about Dahlman wearing the union T-shirt on March 4, 2023. Referring to Dahlman as "they," Goss testified: "They had come in wearing a non-Starbucks-issued graphic tee and stated that they were not willing to change it or comply with the dress code." (Tr. 522.)²²

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²²Goss's testimony about what Dahlman wore on March 4, 2023, is hearsay. Dahlman did not testify that Store Manager Beverly asked him to change into another shirt and also did not testify that he refused. Because

Goss drafted disciplinary language concerning Dahlman wearing the union T-shirt as well as other unrelated matters which Dahlman does not dispute.²³ She put the language on a standard disciplinary form (R. Exh. 26) but did not give the form to Dahlman.

Colin Campbell had become store manager before Dahlman received the discipline on April 22, 2026. The language on the disciplinary form which Dahlman actually received (GC Exh. 6) was similar to that drafted by Goss, with only minor changes which did not affect the substance. Store Manager Campbell and District Manager Lesley Davis signed this form.

The complaint only alleges that the Respondent violated the Act by disciplining Dahlman for wearing the union shirt on March 4, 2023. It does not allege a violation with respect to the other two infractions listed on the disciplinary form.

For the same reasons discussed above with respect to complaint subparagraph VII(a), I conclude that a *Wright Line* analysis would not be appropriate. *Gross Electric, Inc.*, above. Moreover, for the same reasons discussed above, I would conclude that under a *Wright Line* analysis the General Counsel would fail to prove a violation of the Act.

However, my reasoning here turns on the question of whether "special circumstances" exist which justify the Respondent's dress code. In view of my conclusion that "special circumstances" do warrant the Respondent's rule limiting the wearing of union-related apparel, I conclude that the Respondent did not violate the Act by imposing discipline for violation of this rule. Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph VII(b).

Complaint Subparagraph VII(c)

Complaint subparagraph VII(c) alleges that about October 1, 2023, Respondent disciplined Dahlman and ordered Dahlman to leave work for engaging in Union activity including wearing union insignia. Complaint subparagraph VII(d) alleges that the Respondent engaged in this conduct because its employees assisted the Union and engaged in concerted activities, and to discourage employees from engaging in these activities. Complaint subparagraph VIII(b) alleges that the Respondent thereby violated Section 8(a)(1) and Section 8(a)(3) of the Act. The Respondent admits that it "issued discipline to Dahlman for conduct Dahlman engaged in on about October 1, 2023," but denies any unlawful motivation and also denies that it violated the Act.

Goss's testimony that Dahlman was asked to change into another shirt and refused is hearsay, I do not credit it for the truth of the matter asserted.

²³As discussed above, Dahlman overslept on April 1, 2023, and failed to phone in before his shift began. (Tr. 296.) Additionally, he failed to work at least 12 hours per week, as the Respondent requires. (Tr. 353–354.)

According to Dahlman, he was working in the store on October 1, 2023, when, at 6:30 a.m., Store Manager Tamara McDonald arrived. "She saw that I was wearing a Union hat," Dahlman testified, "and so she asked me to step off and speak with her." Dahlman further testified that, McDonald said to him "You are wearing—your hat is out of Dress Code" and that he "reiterated to her, just like I did to Angela Beverly, that wearing union insignia is a critically protected right that has continuously been upheld by the NLRB, under the NLRA Section 7, and that there was a 2020 TESLA ruling about it, you know." (Tr. 302.)

Dahlman said that McDonald replied "okay" and ended the conversation. McDonald's version of events is similar except that she testified she could not recall whether the cap had a union logo:

Q. BY MR. WILLIAMS: Were you at work on October 1st, 2023?

A. Yes.

Q. Okay. And on that day, isn't it true that Russell Dahlman wore a union hat to work?

* * *

THE WITNESS: Russell showed up to work wearing a non-issued Starbucks hat.

Q. BY MR. WILLIAMS: What was he wearing?

A. It was a non-issued Starbucks hat.

Q. What was he wearing?

A. It was a non-issued Starbucks hat.

Q. Can you describe what he was wearing?

* * *

THE WITNESS: Yeah, so it was a black baseball cap that had orange stitching on the front of the hat, which violates our Dress Code Policy, because Partners are allowed to wear a plain hat, but it can't have a logo or stitching in front of the hat. It has to just be a plain cap.

Q. BY MR. WILLIAMS: Did that cap have a union logo on it? Yes or no?

A. I can't say it did. It had stitching.

Q. It had what?

A. It had stitching on the hat.

Q. Okay. Do you know what the stitching said?

A. I don't recall, but I do remember that it was not Dress Code.

(Tr. 126–127.)

5 Although lacking the details of Dahlman's account, McDonald's testimony is generally consistent with it. Her testimony that she could not remember what the stitching on the cap said does not contradict Dahlman's testimony that the cap bore union insignia. Based on my observations of the witnesses, I credit Dahlman's testimony.

10 Respondent issued Dahlman a written warning which was signed by Store Manager McDonald and District Manager Davis on October 11, 2023. Dahlman refused to sign the warning, which stated:

This serves as a written warning for ongoing violation of Starbucks dress code policy. On 4/22/23 Russell was given a documented for violation of Starbucks dress code policy.

15 On Sunday October 1, 2023, Russell came to work wearing a non Starbucks issued hat, resulting in failure to adhere to Starbucks dress code policy. Russell indicated that they were unwilling to adhere to [S]tarbucks dress code policy.

20 Moving Forward, Russell is expected to adhere to the Starbucks dress code policy which can be found on the partner Hub.

(GC Exh. 8.)

25 For the same reasons discussed above in connection with complaint subparagraphs VII(a) and VII(b), I conclude that, because the Respondent's dress code is lawful, this action enforcing it also is lawful. Also, for the same reasons discussed above, I conclude that a *Wright Line* analysis would not be appropriate, but were it conducted would lead to the conclusion that the Respondent did not violate the Act by the conduct alleged in complaint subparagraph VII(c).

30 Therefore, I recommend that the Board dismiss the allegations raised in complaint subparagraph VII(c).

Summary

35 For the reasons stated above, I recommend that the Board dismiss the complaint in its entirety. In view of this conclusion, it is not necessary to reach the affirmative defenses raised by the Respondent in its answer to the complaint,

Conclusions of Law

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

2. The Charging Party, Chicago and Midwest Regional Joint Board, Workers United/SEIU,

is and has been at all material times a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent did not violate the Act in any manner alleged in the complaint.

On these findings of fact and conclusions of law and on the entire record in this case, I issue the following recommended²⁴

Order

The complaint is dismissed.

Dated Washington, D.C. March 25, 2026



Keltner W. Locke
Administrative Law Judge

²⁴If no exceptions are filed as provided by Section 102.46 of the Board's Rules and Regulations, these findings, conclusions, and recommended Order shall, as provided in Section 102.48 of the Rules, be adopted by the Board, and all objections to them shall be deemed waived for all purposes.