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

STARBUCKS CORPORATION

and Cases 19-CA-296765

WORKERS UNITED LABOR UNION INTERNATIONAL, AFFILIATED WITH SERVICE EMPLOYEES INTERNATIONAL UNION 19-CA-310285
19-CA-315753

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DECISION

SHARON LEVINSON STECKLER, Administrative Law Judge. This case was tried in Portland, Oregon on August 28-31, 2023. The case deals with a Starbuck's store in the Portland area. The store's employees are represented by Charging Party Workers United Labor Union (the Union). The Second Consolidated Complaint alleges that Respondent Starbucks Corporation (Respondent) violated the Act by disparately enforcing the dress code, disparately removing Union literature from various bulletin boards, changed the employees' drink and food policy, and terminated two employees. Respondent denies all alleged violations.

General Counsel filed a motion to make numerous corrections in the transcript, which was unopposed and I grant that motion in full. General Counsel and Respondent filed briefs on November 6, 2023, which I carefully reviewed with the transcript. I find Respondent violated the Act by: disparately enforcing its dress code; telling an employee to remove her union t-shirt in a disparate enforcement of the dress code; removing union postings on the community bulletin board while allowing other outside information to be posted; telling an employee she could not post Union literature on the community bulletin board; and terminating two employees based upon their union activities and sympathies.

FINDINGS OF FACT[1]

I. PROCEDURAL HISTORY

The Union filed charge 19-CA-296765 on May 27, 2022 against Respondent Starbucks Corporation (Respondent), and the charge was served on Respondent by regular mail on June 1, 2022. (GC Exh 1(a)-(b).)[2] The Union filed charge 19-CA-299916 on July 22, 2022, and the charge was served by regular mail on July 22, 2022. (GC Exh. 1(c)-(d)); this charge was amended on December 6, 2022 and served on Respondent by regular mail on December 7, 2022 (GC Exhs. 1(e)-(f)). The Union filed charge 19-CA-310285 on January 13, 2023 and the charge was served by regular mail upon Respondent on the same date. (GC Exhs. 1 (g)-(h).)

On January 27, 2023, Region 19 issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing for the above charges, which was served electronically on the same date. (GC Exhs. 1(i)-(j).) Respondent filed its Answer to this complaint on February 10, 2023. (GC Exh. 1(k).)

On April 7, 2023, the Union filed charge 19-CA-315753, which was served on Respondent on April 10, 2023. (GC Exhs. 1(l)-(m).) On July 7, 2023, Region 19 issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing, which was electronically served upon Respondent on the same date. (GC Exhs. 1(n)-(o).) On July 20, 2023, the Regional Director for Region 19 issued an Order Rescheduling Hearing, which was electronically served upon Respondent on the same date. (GC Exhs. 1(p)-(q).) Respondent filed its Answer on July 21, 2023. (GC Exh. 1(r).)

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[1] Although I have included citations to the record to highlight particular testimony or exhibits, my findings and conclusions are not based solely on those specific record citations, but rather upon my review and consideration of the entire record for this case. My findings of fact encompass the credible testimony, evidence presented, and logical inferences. The credibility analysis may rely upon a variety of factors, including, but not limited to, the context of the witness testimony, the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 303–305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings regarding any witness are not likely to be an all-or-nothing determination and I may believe that a witness testified credibly regarding one fact but not on another. *Daikichi Sushi*, 335 NLRB at 622.
When a witness may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988). This is particularly true where the witness is the Respondent's agent. *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). Testimony from current employees tend to be particularly reliable because it goes against their pecuniary interests when testifying against their employer. *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978); *Georgia Rug Mill*, 131 NLRB 1304 fn. 2 (1961); *Gateway Transportation Co.*, 193 NLRB 47, 48 (1971); *Federal Stainless Sink Division*, 197 NLRB 489, 491 (1972). Where a witness was not questioned about potentially damaging statements attributed to him or her by an opposing witness, it is appropriate to draw an adverse inference and find the witness would not have disputed such testimony. *LSF Transportation, Inc.*, 330 NLRB 1054, 1063 n. 11 (2000); *Asarco, Inc.*, 316 NLRB 636, 640 n. 15 (1995), modified on other grounds 86 F.3d 1401 (5th Cir. 1996).

[2] The following abbreviations are used in this decision: GC Exh. for General Counsel exhibit; GC Br. for GC brief; R. Exh. for Respondent exhibit; R. Br. for Respondent brief; Jt. Exh. for Joint Exhibit; Sub. Exh. for documents in a subpoena file.

On August 19, 2023, Region 19 issued an Order Severing Case, Approving Withdrawal Request and Dismissing Allegations in the Consolidated Complaint regarding the allegation arising from charge 19-CA-299916 and was served electronically upon Respondent on the same date. (GC Exhs. 1(s)-(t).) On August 21, 2023, Counsel for the General Counsel notified the parties that it intended to amend the Second Consolidated Complaint regarding additions to paragraph 4. (GC Exh. 1(u).)

II. JURISDICTION

Respondent, a Washington corporation headquartered in Seattle, Washington and with a place of business located at 9610 SE 82nd Avenue, Portland, Oregon (Johnson Creek Crossing store), operates restaurants selling food and beverages through the United States.[3] During the 12-month period ending June 30, 2023, Respondent, in conducting its operations described above, derived gross revenues in in excess of $500,000 and sold and shipped goods valued in excess of $50,000 from the State of Oregon to points outside the State of Oregon. Accordingly, I find, and Respondent admits, that it is it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

I find, and Respondent admits, that the Union is a labor organization within the meaning of Section 2(5).

Based on the foregoing, I find this dispute affects commerce and that the Board has jurisdiction for this case pursuant to Section 10(a) of the Act.

III. SUBPOENA ISSUES

General Counsel issued a subpoena duces tecum and a subpoena ad testificandum to Respondent. Respondent filed a timely Petition to Revoke, upon which I ruled before hearing. Similarly, the Union issued a subpoena duces tecum to Respondent. Respondent filed a timely Petition to Revoke, upon which I ruled pre-hearing.

At hearing, Respondent did not produce all the documents that I ordered produced. Respondent also filed a special appeal of my ruling on its Petition to Revoke and had an additional motion to postpone the hearing until the Board could rule on Respondent's special appeal. I declined to postpone the hearing. On October 27, 2023, the Board ruled on Respondent's request of special appeal, finding interlocutory relief was unnecessary and therefore denied the special appeal because the hearing was closed. Respondent has the right to renew objections if exceptions are filed to my decision. At hearing, the admitted evidence includes a separate subpoena file for review.

As Respondent stated in the pre-hearing conference meeting and at hearing, it produced only "excerpts" of certain documents. For the field operations guide in particular, Respondent only produced excerpts it believed were relevant, in contrast to the judge's orders, and admitted that it was the party to determine what was relevant to the case. (Tr. 557.)

[3] Starbucks now serves customers in over 80 markets. https://stories.starbucks.com/press/2019/company-profile/ (last checked October 17, 2023).

The excerpts produced included policies on dress code and bulletin boards. It did not produce the entire manuals that were requested. A number of disciplinary actions relied upon the "barista approach" but Respondent did not produce these documents. Respondent maintained that those were trade secrets, yet made no effort to produce them under seal, as was suggested. As a result, certain procedures were not produced.

The disciplinary procedures and any requirements to seek assistance from "Partner Relations," the corporate branch that provided disciplinary advice and recommendations to the store managers and district managers was not produced. Similarly, Respondent's disciplinary actions cited Respondent's Mission and Values, yet apparently did not produce documents, from the store operations manual, or any documents from the store's operations manual, to General Counsel or the Union. (Tr. 198.) Although Respondent contended it only would produce relevant items from the operations manual because it contained confidential information, Respondent was offered the opportunity to offer the document under a protected order: It refused to do so. (Tr. 198-199.) I stated at hearing that Respondent's offer would be taken "with a grain of salt." (Tr. 199.)[4]

Another area that Respondent attempted to explore with a witness was the process for handling customer complaints. However Respondent had not produced any complete copies of policies or procedures to address those issues. (Tr. 216.)

In response to a number of these concerns, particularly related to shift supervisory duties, after alleged discriminatee Clark testified, Respondent supplied a job description that it believed addressed these issues. (Tr. 237.)

A party has an obligation to begin a good–faith effort to gather responsive documents upon service of a subpoena and a party who fails to do so does so at its peril. *McAllister Towing & Transportation Co*., 341 NLRB 394 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). General Counsel has two options in such instances. General Counsel may seek enforcement of its subpoena duces tecum in Federal district court pursuant to the Board's rules and regulations at Section 102.37 or the General Counsel may request sanctions as she did so here. When parties have failed to comply with duly issued subpoenas, the Board has found it appropriate to institute sanctions against offending parties, and such determinations have been met with approval in some federal courts. See *McAllister Towing*, 341 NLRB at 396–397. The Board has held that the appropriate sanction is within the discretion of the administrative law judge. Id. at 396.

The Board may impose a range of sanctions for subpoena noncompliance, "including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross–examining witnesses about it, and drawing adverse inferences against the noncomplying party." Id. However, the Board must balance the need to protect its processes against its Section 10(c) mandate to remedy unfair labor practices. See *Toll Mfg. Co*., 341 NLRB 832, 836 (2004). The Board is careful not to impose drastic sanctions disproportionate to the alleged noncompliance. See, e.g., *Teamsters Local 917 (Peerless Importers*), 345 NLRB 1010, 1011 (2005) (reversing judge's dismissal of the complaint as sanction for party's noncompliance with the subpoena, due to its harshness and "perhaps unprecedented" nature and the availability of lesser sanctions). The burden of establishing noncompliance lies

[4] Those documents Respondent produced to General Counsel and entered into evidence were marked as "confidential." However, Respondent never moved for a protective order for these documents. Despite Respondent's markings, these documents are not confidential.

with the party that directed issuance of the subpoena. See *R.L. Polk & Co*., 313 NLRB 1069, 1070 (1994), affd. mem. 74 F.3d 1240 (6th Cir. 1996).

General Counsel requests certain sanctions in its brief. Such a request presents a quandary in this instance as this matter arose in the Ninth Circuit where sanctions imposed by administrative law judges are not favored. In *NLRB v. International Medication Systems*, 640 F.2d 1110, 1116 (9th Cir. 1981), the court held that sanctions for failing to comply with a Board issued subpoena may not be imposed in administrative proceedings since enforcement of the subpoena must be pursued in Federal court. Other circuits have disagreed with the Ninth Circuit. See *Hedison Mfg. Co*., 643 F.2d 32, 34 (1st Cir. 1981); *NLRB v. C.H. Sprague & Son Co*., 428 F.2d 938, 942 (1st Cir. 1970); *NLRB v. American Arts Industries*, 415 F.2d 1223, 1230 (5th Cir. 1969), cert. denied 397 U.S. 990 (1970); *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972). While Ninth Circuit law is not controlling and I am required to follow Board law,[5] approving sanctions seems short sighted in this instance where the General Counsel may receive only a pyrrhic victory. However, permitting employers to refuse to comply with a valid subpoena that may result in a significant delay in the unfair labor practice proceeding also would undermine the goal of moving towards an expeditious hearing and decision.

However, absence of documents and certain testimony lead to the conclusion that divulging this information would have damaged Respondent's positions. Like nature, findings of fact abhor a vacuum. I narrowly apply sanctions based upon the adverse inference rule and best evidence rule. By its definition, the adverse inference rule states "when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." *Auto Workers v. NLRB*, 459 F.2d 1329, 1336 (D.C. Cir. 1972). The adverse inference permits the administrative law judge to proceed and find that the failure to produce documents is likely due to unfavorable information. Id. However, adverse inferences may also be drawn based upon a party's failure to introduce into evidence documents containing information directly bearing on a material issue. See *Metro-West Ambulance Service*, Inc., 360 NLRB 1029, 1030, and at fn. 13 (2014) cited in *Arbah Hotel Corp. d/b/a Meadowlands View Hotel & New York Hotel*, 368 NLRB No. 119, slip op. (2019).

As part of the credibility determinations, I find that Respondent's witnesses who fail to testify about certain issues did not do so because their testimonies would have damaged Respondent's case. *International Automated Machines*, 285 NLRB 1122, 1123 (1987), enfd. 861 F.2d (6th Cir. 1988); *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006). In addition, the best evidence rule also applies to situations where the documents would assist in determining whether Respondent was consistent in applying their policies, procedures and practices, such as disciplinary policies.[6]

[5]See, e.g., *Western Cab Co.*, 365 NLRB No. 78, slip op. at 1 n. 4 (2017), and *Pathmark Stores, Inc.*, 342 NLRB 378 n. 1 (2004).

[6] I also ordered Respondent to produce custodian(s) of record and it refused to do so. Respondent stipulated to the authenticity of the documents that it produced. General Counsel maintains it was prejudiced in its case presentation without Respondent's custodian(s). Given my ruling above, I do not address this issue.

IV. THE JOHNSON CREEK CROSSING STORE[7]

A. Store Information and Management

1. Management structure and employees at stores

Each store reports to a district manager, who is in charge of the several stores. The individual store has a store manager and an assistant store manager. During all events here, the store manager was Sarah North.[8] Kai Evans was the assistant store manager from April to August 2022;[9] Jake Cooper served as assistant store manager beginning about November 2022. For most of the events here, Josh Presler was the district manager.[10] About March 7, 2023, Ryan Affinito replaced Presler as district manager. District managers visit stores most of the weeks, rotating through the stores under their purview. (Tr. 577-578.)

Store managers are responsible for "maintaining the environment of the store and building culture." (Tr. 360.) Store managers hold employees accountable for following policies and practices. Shift supervisors report to the assistant store manager and the store manager. They maintain the store, whether opening or closing, hold keys, deploying employees to particular stations, and barista duties. A key holding supervisor is different from a shift supervisor: The key holding shift supervisor not only holds keys that open and lock doors, but also in charge of money and inventory. The shift supervisor may be the only supervisor present, even in the absence of an assistant store manager or store manager. If not acting as a key holder supervisor, the shift supervisor usually works as a barista. (Tr. 46-47, 189.)

The baristas, also called partners (or in this decision, employees), prepare beverages, food, take orders, operate the register and perform general cleaning duties. (Tr. 78.) The baristas and shift supervisors wear headsets, particularly if they are involved in taking or fulfilling drive-thru orders. The baristas can also hear what the other employees with headsets are saying through an interior function that is not audible to customers. (Tr. 80-81.)

Stores also may have "borrowed partners," when employees work at stores that are not their home stores. This practice seems common for the Johnson Creek Crossing store. (Tr. 222-223.)

2. Store layout and operation

The Johnson Creek Crossing store is located in a strip mall. It is adjacent to a Thai restaurant. The area has a diverse population, which includes shelters for the homeless and gentlemen's clubs.

This store operates a drive-thru window in addition to the physical café. It is considered a busy store. The store operates seven days a week, with baristas arriving at 4 a.m. for a 4:30 a.m. opening of the drive-thru window. The drive-thru window remains open until 10 p.m. The indoor café portion operates from 6:00 a.m. until 8:00 p.m. (Tr. 182-183.) It employs about 20 employees.

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[7] This store is also known as the Clackamas Crossing store, store 468. (Tr. 240.)
[8] North has been a store manager for 13 years and worked for Respondent for over 20 years. (Tr. 360.)
[9] At the time of the hearing, Evans was working at another store as the store manager. He erroneously identified the year he worked at this store as 2021. This error was corrected through cross-examination. (Tr. 516-531-532.)
[10] Presler was promoted to regional director of operations in late February or early March 2023.

Approximately 60 percent of the store's business is conducted through the drive-thru. (Tr. 139-140; 649-650.) Customers enter the drive-thru window from the north side of the building and then turn left to the drive-thru speaker, where the customers view a screen with the menu. The barista turns on the headset upon hearing a ding when a customer pulls up to the screen. Customers verbally place their orders and can see their orders on the screen. Customers then pull forward and left to the window where they pay and receive their orders. (Tr. 78-79.) One or two baristas staff the drive-thru window, depending on the time of day. Respondent monitors the amount of time taken to process customers through the drive-thru lane, which also included the time taken to obtain the customer's verbal order. (Tr. 181.)

The stores have a "back area," which includes manager's desk, bulletin boards, refrigerator and freezers. It also has sinks for washing and stacking dishes and an exit for taking out garbage. (Tr. 174.)

The store was remodeled around July 2022, for approximately 3-4 weeks. The employees began to pack up the store approximately one month before closing the store, finishing in late June or early July. The preparations included packing and moving products to other stores, decreasing orders, cleaning the store, and moving furniture. Before the store remodeling, the café interior had customer seating back to the restroom areas and in the front. After the remodeling most of the customer seating was removed.

B. Employees Organize the Johnson Creek Store

In the back room of the store, employees have access to the partner hub, which is a computerized portal for employee access. It keeps weekly updates, letters from the CEO, drink recipe cards, and other information. About December 2021, Shift Supervisor Heather Clark noticed that the weekly updates included information about union activities in the Buffalo stores. Clark believed that some employees at the Buffalo stores had been terminated. Clark was a 14-year employee with a few gaps in her tenure. She had been a shift supervisor for approximately 10 years.

After seeing the information about the Buffalo stores in December 2021, Clark discussed in the back room with coworkers her support of those workers and her hope that the unionization efforts in Buffalo would be successful. (Tr. 52-54.) On more than one occasion, Clark also had these discussions with Store Manager North approximately five to eight feet away. (Tr. 54.) North made no comments about these discussions. (Tr. 54.)

In March 2022, Clark and North had a discussion in the store's back room about the employees' group chats (per texts) and an employee who transferred from the Johnson Creek store. North told Clark that the transferred employee, who apparently was still in the Johnson Creek group chat, was now telling people at the new store that the Johnson Creek Crossing employees were talking about unionization for their own store. North suggested that the transferred employee be taken out of the conversation. This chat group later became the union organizing chat. (Tr. 55-56.)

In another conversation in later March 2022, after Store Manager North attended a district meeting, Shift Supervisor Clark asked North whether the district meeting included anything about the unionization movement. North said she told the meeting that she thought her store might be the next to file. (Tr. 56-57.)

Before the petition was filed, Clark applied for an assistant store manager position.[11] Clark undisputed testimony reflects that she interviewed with District Managers Josh Presler and Ryan Wolfe in the public seating area of the café. Towards the end of the interview, Presler asked Clark whether she had any questions. Clark asked Presler how he felt about the unionization efforts and "how are we supporting those partners?" (Tr. 61.) Presler said he did not understand why "we are talking about that or why they're doing that if we're already providing those things to people." (Tr. 61.)

After Clark did not receive the assistant store manager position, Clark spoke with Assistant Store Manager Evans about her interview and that she was disappointed she did not receive the job. Evans said to the effect that "they" were not looking for people who are organizing or involved in the union, making a circular motion with his index finger. (Tr. 61-62.) Clark's testimony was undisputed.

Fourteen partners and shift supervisors from this store, including Clark and employee Gail Kleeman, electronically signed a letter to then-CEO Howard Schultz about their unionization efforts. The letter cited that the Starbucks no longer followed its own partner-forward principles. The employees quoted Schultz about sharing success, but instead of sharing the success with partners, the company cuts hours and provided minimal resources. The letter maintained that the decreased hours also cut into the ability to complete training. The employees' letter explained that joining the labor movement should provide employees with a seat at the table so that they could change how they moved forward in "an honest partnership." The employees stated they stood with the unionizing efforts across the country. (Tr. 63-64; GC Exh. 2.)

Store Manager North and Assistant Store Manager Evans asked Clark whether she wrote letter to CEO Schultz during a 10-minute conversation that started about removal of union literature. Clark stated that she authored the letter. The managers said, "We knew it. We heard your voice the minute we read it. We knew that you were the one that wrote it." (Tr. 64-65.) Clark's testimony was undisputed.

On April 5, 2022, Clark signed a union authorization document. She assisted in obtaining additional employee signatures, which the employees signed online during break times. (Tr. 58.) As April progressed and the employees came closer to filing a petition for representation, Clark had another conversation with North in the back room. Clark told North that she realized the relationships in store might be awkward but the employees still had North's back. Clark told North that North was still their store manager and did not want anything to happen. Clark could not recall any response from North. (Tr. 59.)[12]

On May 2, 2022, the Union filed Petition 19-RC-295057 for a bargaining unit of all full-time and regular part-time baristas, shift supervisors and assistant store managers, excluding store managers, office clericals, guards and supervisors as defined by the Act. (Jt. Exh. 1.) On May 18, 2022, the parties reached a stipulated election agreement for a unit that did not include the assistant store managers. The election was held by mail ballot. (Jt. Exh. 2.)[13] The tally was held

[11] Respondent produced no documents related to Clark's application because none were found in her personnel file, despite the personnel file as the likely location of promotion applications. General Counsel then requested a subpoena duces tecum for those documents. (Tr. 234-236.)

[12] On cross-examination, Clark testified that she told North that the employees would be filing a petition. (Tr. 231-232.)

[13] The assistant store managers were permitted to vote by challenged ballots. The challenges were insufficient to change the outcome.

on July 8, 2022. Sixteen employees voted in favor of representation and two ballots were challenged. (Jt. Exh. 3.) After Respondent filed no objections, the Portland Subregional Office, Subregion 36, issued a Certificate of Representative, dated July 18, 2022. (Jt. Exh. 4.)

V. THE DRESS CODE

The Complaint alleges:

In or about early May 2022, Respondent by District Manager Presler and Assistant Store Manager Evans, selectively and disparately enforced Respondent's dress code policy by prohibiting employees from wearing t-shirts with Union insignia while permitting its employees to wear t-shirts with other insignia or to otherwise deviate from the dress code. (Complaint ¶8(a).)

In or about June 2022, Respondent, by District Manager Presler, Store Manager North and Assistant Manager Evans, selectively and disparately enforced Respondent's dress code policy in a discriminatory manner by prohibiting employees from wearing t-shirts with BLM insignia, which had been a permitted deviation from the dress code, only after employees began to wear t-shirts with Union insignia. (Complaint ¶8(b).)

In or about May 2022 or June 2022, Respondent, by Store Manager North, reminded employees of its dress code policy and had employees affirm, by signature, that they had reviewed the dress policy. (Complaint ¶8(c).)

A. Respondent Failed to Enforce Its Dress Code Until Shift Supervisor Clark Wore a Union T-Shirt

Respondent maintains a dress code policy. The employees wear green aprons that had adjustable neck loops and end above the knees, and tie in the back. The aprons have the company siren symbol in white and green. (Tr. 175, 326.) Any logos on shirts are supposed to be small and non-distracting. (Tr. 323.) Tops may only be white, black, gray, navy, brown or khaki. (GC Exh. 14.) Respondent presented no evidence that it enforced the dress code before the union petition was filed in May 2022.

Every week for two years before the union filed its petition for representation, Shift Supervisor Clark wore a t-shirt with a large "Black Lives Matter" logo on the front, which Respondent did not issue. The t-shirt was black with the logo printed in grey letters. (GC Exh. 3.) Clark was certain that Evans saw her wearing this t-shirt. (Tr. 67.) When Clark wore an apron, most of the logo was covered. No one in management told Clark that she was not in compliance with Respondent's dress code policies pre-petition or asked her to remove her "Black Lives Matter" t-shirt. (Tr. 67, 324.)[14]

Another shift supervisor recalled that one or two coworkers wore PRIDE shirts that were not issued by Respondent. The symbol was mostly covered by the apron. (Tr. 324-325.)

Clark began wearing a union t-shirt to work after the petition was filed. The shirt had a large green union logo on a black t-shirt. (GC Exh. 4.) As with "Black Lives Matter" t-shirt, the

[14] Clark testified that she did not know for sure that Store Manager North saw the shirt. However, she testified that Assistant Store Manager Evans saw her wearing the shirt pre-petition and never asked her to remove the shirt. (Tr. 67.)

union logo was visible around the apron by 2 inches, which covered the majority of the logo, including the language on it. Like the Black Lives Matter shirt, Respondent had not issued the union logo shirt.

Assistant Manager Evans confronted Clark about the union t-shirt in the back room. Evans asked Clark whether she had another t-shirt. When Clark said she did not, Evans said she could not wear the t-shirt. Clark said the NLRA said she could wear it. Evans asked whether it was "dress code." Clark repeated that the NLRA said she could wear it. (Tr. 69.)

After the conversation between Evans and Clark, Evans called Clark from working to speak by telephone with District Manager Josh Presler. Presler asked Clark what was going on. Clark told Presler, as she had told Evans, that the NLRA permitted her to wear the t-shirt. Clark raised that she wore the "Black Lives Matter" t-shirt without repercussions, so asking her to remove the union t-shirt was discriminatory Presler said he would check with Partner Resources, which acts as a human resources office. Clark continued to wear her t-shirt for the remainder of the shift. (Tr. 69-71.)

About May 2022, Store Manager North reviewed with employees and a printed version of the dress code. North told employees to initial the dress code. Employees had not been asked to initial the form in the previous six months. (Tr. 327.)

In June 2022, Clark wore her "Black Lives Matter" t-shirt to work.[15] Clark was called to talk to three managers: District Manager Presler; Store Manager North; and Assistant Store Manager Evans. (Tr. 72-73.) Clark testified all three managers in the store at any one time occurred only once per month pre-filing of the petition, but increased to once a week after the petition was filed. (Tr. 175.) Clark was asked whether she had a different t-shirt to wear, to which she responded she did not. Clark asked why the t-shirt suddenly was out of dress code since she had worn it so long without problem. Presler said if Clark did not have another t-shirt, he would offer Clark his shirt. Presler started to unbutton his plaid cotton overshirt to give her one of his shirts to wear. Clark declined, and realized actually had a back-up t-shirt. She excused herself for a 10-minute break and put on the different t-shirt. (Tr. 72-74, 176.)

Later that day, Store Manager North and Assistant Store Manager Evans pulled Clark aside in the area for customers near the restrooms. North asked Clark to a read a document about the dress code policy and then sign it. Later that day, the policy was posted so that all employees could sign the back. All shift supervisors were supposed to direct employees to sign the back of the policy, which hung on a clip board in the back room. (Tr. 74-75.)

A few days later, Clark had another conversation about the t-shirt with North and Evans.[16] They discussed the dress code and then Presler's offer about the t-shirt. Clark characterized the conversation as all agreeing Presler's behavior was abrupt. North and Evans disclosed that Presler was willing to buy a t-shirt for Clark to wear, which they found "weird." (Tr. 75-76.)

North and Evan later required Clark to sign the dress code policy. Later that day, the policy was posted in the break room with the requirement that all employees sign off on the policy. North instructed Clark to have the other employees sign the dress code policy. Although the record

[15] Another shift supervisor recalled that Clark wore her Black Lives Matter shirt a few more time after Clark wore her pro-union shirt. (Tr. 325.)

[16] The transcript stated General Counsel asked, "Was anyone else pleasant . . . " when the question should read, "Was anyone else present . . . ." (Tr. 75.)

reflects employees were required to sign off on certain policies from time to time, this one was precipitated when Respondent maintained Clark violated Respondent's dress code policies.

B. Analysis

Respondent's witnesses did not testify whether they enforced the dress code more strictly or that the dress code was enforced before the unionization campaign. They also did not dispute that employees wore PRIDE shirts that were not company compliant. *LSF Transportation, Inc.,* supra; *Asarco, Inc*., supra. Although Respondent contends it enforced the policy, the record does not support this conclusion. See, e.g., R. Br. at 3-4, 23. Respondent's witnesses also did not deny that they saw Clark wearing the Black Lives Matter shirt before the union campaign or enforce the policy about that shirt. Nor did they dispute that employees wore PRIDE shirts that Respondent did not distribute. General Counsel witnesses' testimony is unrefuted and therefore fully credited.

An employer cannot enforce rules more strictly in response to union activity. *Shamrock Foods Co*., 366 NLRB No. 107, slip op. at 2 fn. 1 (2018), enfd. 779 Fed. Appx. 752 (D.C. Cir. 2019); *Dynamics Corp. of America*, 286 NLRB 920, 921 (1987), citing *Keller Mfg. Co*., 237 NLRB 712, 713 fn. 7 (1978).[17] Respondent presented no evidence of special circumstances warranting disparate enforcement. *MEK Arden, LLC v. NLRB,* 755 Fed. Appx. 12, 18 (unpub.) (D.C. Cir. 2018), enfg. 365 NLRB No. 109, slip op. (2017). According to the credited testimony, Respondent did not attempt to apply the dress code to anyone, including Clark, until she wore a union t-shirt under her apron. An employer that disparately enforces the dress code after a union begins an organizing campaign violates Section 8(a)(1). *MEK Arden,* supra; *Be-Lo Stores*, 318 NLRB 1, 7 n. 19 (1995).

Respondent relies upon Tr. 68-73 to demonstrate that it consistently enforced the policies. (R Br. at 22-23.) However, that portion of Clark's testimony relates only to events occurring when Clark wore her union t-shirt and nothing before that time. That comparison does not demonstrate that Respondent consistently enforced its policy but instead reinforces that Respondent only began enforcement when Clark wore her union t-shirt.

Respondent raises the "special circumstances" in *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012), which Respondent reports as "the company adequately maintain[ed] the opportunity to display pro-union sentiment by permitting only one union button on workplace clothing and this one button restriction is a necessary and appropriate means of protecting its legitimate managerial interest in displaying a particular public image." (R. Br. at 23.) The court found that the Board's determination to invalidate a one button rule was a bridge too far. Id. at 78. Respondent misses the point here: As Respondent admits, General Counsel does not seek to invalidate a rule. Had Respondent evenly enforced its policy, it could have argued that the policy was necessary to protect its image. Respondent here only found it necessary to protect its image when the managers saw Clark wearing a union logo t-shirt.

An employer telling an employee that clothing with union insignia must be removed is coercive. *MEK Arden*, 755 Fed. Appx. at 18. Evans and Presler, by instructing Clark she could not wear her union t-shirt, each violated Section 8(a)(1).

[17] Also see: *St. John's Community Services-New Jersey*, 355 NLRB 414, 415 (2010); *Schrock Cabinet Co*., 339 NLRB 182, 183 (2003).

Respondent previously required employees to sign policies but the timing demonstrates Respondent did so in response to Clark's t-shirts. I therefore find that Respondent disparately required employees to sign the dress code policy.

VI. THE BULLETIN BOARD ISSUES

The Complaint alleges:

On or about May 3, 2022, Respondent, by Store Manager North and/or Assistant Store Manager Evans removed Union flyers from its community board while allowing other, non-Union posting to remain. (Complaint ¶9(a).)

On or about May 7, 2022 and/or mid-May 2022, Respondent, by Store Manager North and/or Assistant Store Manager Evans, removed Union flyers and a Union button from an employee bulletin board in the employee break area while allowing other non-Union postings to remain. (Complaint ¶9(b).)

In or about mid-May 2022, Respondent, by Store Manager and/or Assistant Manager Evans removed Union flyers and a Union button from an employee bulletin board while allowing other non-Union posting to remain. (Complaint ¶9(c).)

A. Pre-Renovation: Community Bulletin Board

Respondent's Community Board's policy states that this board's purpose is "to communicate how we help communities thrive. The board is designed to offer an approachable and genuine customer experience that demonstrates how, together we can create positive change in our communities." (GC Exh. 13.) The policy states that the categories that may be posted on the board are "Starbucks *enterprise* community programs and initiatives," "Starbucks *Local community* programs and initiatives," and "Neighborhood community programs and initiatives." (GC Exh. 13, *italics in the original*.) The store manager is charged with keeping the content "fresh and brand appropriate." Supposedly the content should be refreshed weekly. Yet the employees "are encouraged to submit relevant material for consideration." The policy identifies that the boards should not be used for sales, ads, business cards, personal ads, notices that "are political or religious in nature," "notices that disparage [Respondent]," and anything "deemed offensive, insulting or derogatory." (GC Exh. 13.)

Before the store was renovated in July 2022, the café maintained a community bulletin board to the left of the entry, as one walked in, with the condiment bar below it. The condiment bar was an area where customers could add sugar or sweeteners to their drinks or obtain napkins. The community bulletin board held postings for both Starbucks-affiliated efforts, such as disaster relief with QR codes, as well as other local non-profit community events that were not affiliated with Starbucks. Clark recalled that prior to unionization, one posting was for a car show. Another was for a lunch for people in need of a free lunch. Others were for dance shows, such as Shen Yun,[18] collecting donations for children's toys, and language classes. Nothing in the record reflects whether the dance shows or language classes were conducted by non-profit

[18] General Counsel, cites that this troupe promotes "China Before Communism" and has been denounced by the mainland China consulate. (GC Br. at 25 n. 33.)

organizations or that the managers screened these postings. Any posting could remain up for an indefinite amount of time. (Tr. 95, 171, 316-317.)[19]

About May 2, 2022, some of the postings on the community bulletin board included some Starbucks Workers United "Union Strong" posters, which were about 8 ½ inches by 11", and some stickers used on cups with the words, "Union Strong," on them. Within 24 hours, Clark observed Store Manager North taking down the posters and stickers. Another shift supervisor also observed North removing one or two union postings within a day of posting. (Tr. 95-96, 99, 317-318.)

Clark and Assistant Store Manager Evans talked about the poster removal in the back customer area in front of the restrooms. Evans told Clark that the "Union Strong" posters could not remain on the community board because the posters represented a for-profit company and Respondent could not allow advertising on the community board for another for-profit company. Clark told Evans that the Union was not a for-profit company. (Tr. 96-97.)[20] Clark, to leading questions, recalled that she said she had a right to have those posters up due to the NLRA.[21]

B. Pre-Renovation: The Bulletin Board in the Back Room

The back area of the store was not open to customers. It served as an area for employees to take breaks and the store manager to have a desk. The refrigerators, on both sides of the back room, also had places for posting, including the store metrics. The area also contains an employee bulletin board, also called the green apron board. Below the green apron board was another bulletin board used primarily for managerial paperwork. (Tr. 100-101, 319.)[22]

The green apron board postings included green apron cards, which were small cards employees used to compliment each other, and to give small gifts. A Christmas card also has been posted. The board also had cartoons, pins, small pieces of jewelry and other drawings. Clark and other employees created the artwork. These pieces often remained posted for long periods of time. Clark's artwork about the union was not left up any longer than 48 hours, while other artwork, such as a masked face of District Manager Presler, remained. (Tr. 104, 320-321, 328.)

The pins included pronoun pins, issued by Respondent; other pins, such as union pins and PRIDE pins, were not issued by Respondent. The PRIDE pins stayed up for an unknown amount of time without being removed. The union pins stayed up less than 48 hours. No witness testified about who removed the union pins.

Clark also posted flyers with the Union's logo on the green apron board, then she replaced it with "Union strong" flyer. One was taken down within 48 hours; another was hidden behind the Josh Presler masked face, with only half of the flyer visible. The flyer behind Presler's masked face was eventually removed too.

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[19] Respondent contends it enforced its policy regularly, but the managers failed to testify about the enforcement efforts pre-unionization. The corroborated testimony of the employees remains unrefuted and I credit it in full.

[20] General Counsel submitted unchallenged evidence that the Union was a non-profit entity.

[21] Clark could not recall how the conversation started, but recalled that the conversation lasted approximately 10 minutes. Other than what is above, Clark recalled little else about the conversation. (Tr. 97.)

[22] The area at the drive-thru also had jokes and pictures employees posted, which stayed until someone swapped them out. Clark recalled that a Halloween drawing remained posted for at least a couple of years. These were not visible only to employees, not customers. (Tr. 169-170.)

As the calendar moved into the PRIDE month in June,[23] Clark continued to create artwork and post it on the green apron board. The artwork was about PRIDE and the union. (Tr. 107.) Those depictions were also removed long before the renovation took place.

C. Analysis

An employer may not discriminatorily remove union literature from a bulletin board while allowing other non-employer information to be posted. *Cayuga Medical Center at Ithaca, Inc.*, 367 NLRB No. 21, slip op. at 6-7 (2018); *UPMC Presbyterian Hospital*, 366 NLRB No. 185, slip op. at 30-31 (2018).

Regarding the community bulletin board, within 24 to 48 hours of union postings placed on the community bulletin board, a shift supervisor saw North taking down union postings. I credit General Counsel's witnesses as the additional shift supervisor testified in a straight-forward manner and was corroborated by Clark. Clark and the additional supervisor's testimony was unrefuted as neither North, who was present throughout General Counsel's case, nor Evans testified about the policy or their conversations with Clark.. The failure of Store Manager North or Assistant Store Manager Evans to testify regarding the bulletin boards leads to a conclusion that their testimonies would not support Respondent. *Andronaco, Inc. d/b/a Andronaco Industries*, 364 NLRB 1887, 1897 (2016).

Respondent attempts to distinguish its treatment allowing non-profit posters on the community board. Respondent only examines a portion of the testimony and ignores other portions, e.g., dance presentations or language classes. (R. Br. at 23-24, citing Tr. 171-172.) Respondent does not demonstrate that language classes or dance presentations were for non-profit organizations.

Respondent does not show it enforced its policy prior to unionization and credited evidence shows Respondent selectively allowed non-Respondent postings to remain on the community bulletin board for some time. I find that Respondent, by North, unlawfully removed union postings on the community bulletin board discriminatorily while allowing other literature to remain. *MEK Arden*, 755 Fed. Appx. at 18-19 (numerous examples of non-union postings allowed before managers seen removing union postings violates §8(a)(1)); *Kroger Co.*, 311 NLRB , 1199 (1993), citing *NLRB v. Magnavox Co.*, 415 U.S. 322 (1974) and *Roadway Express*, 279 NLRB 302 (1986). Also see *Publix Super Markets, Inc.*, 347 NLRB 1434, 1435 (2006).

Additionally, I find that Evans violated Section 8(a)(1) when he told Clark the postings could not be placed on the community bulletin board. Assistant Store Evans did not refute that he told Clark that other non-profit postings could remain because the union was a for-profit entity. See generally *Roll and Hold Warehouse and Distribution Corp.*, 325 NLRB 41 (1997) ,enfd. 162 F.3d 513 (7th Cir. 1998). I make this finding sua sponte as it is closely related to the subject matter of disparate treatment of union postings on the community bulletin board and was fully litigated as Respondent had the opportunity to respond at hearing. *Seton Co.*, 332 NLRB 979, 981 n. 9 (2000), citing *Pergament United Sales*, 296 NLRB 333, 334 (1989), enfd. 920 F.2d 130 (2d Cir. 1990).

Two cases warrant differentiation. In *Miklin Enterprises, Inc., d/b/a Jimmy John's*, 861 F.3d 812 (8th Cir. 2017), denying enf. in rel. part 361 NLRB 283 n. 2 (2014), the court found that the

[23] Gay PRIDE month is observed in June each year, per Google.com.

postings that disparaged the employer's reputation and could harm its income were not protected per *Jefferson Standard*[24] and subsequently those who posted them could be lawfully discharged. Here Respondent makes no showing that the posting publicly disparaged the employer and in fact, did not enter the postings into evidence. Also differentiated is *Wal-Mart Stores, Inc.*, 340 NLRB 703 n. 1 (2003), in which the employer did not disparately enforce a rule against nonwork-related messages on its bulletin boards because no postings other than the employer's were permitted.

Regarding the bulletin board in the back room, no General Counsel witness testified that they observed any manager or assistant store manager removing the union postings or buttons. As a result, I cannot presume that management did so. I recommend that Complaint ¶¶9(b) and 9(c) be dismissed. *Holly Farms Corp. and Its Successor, Tyson Foods, Inc.*, 311 NLRB 273, 273-274 (1993), enfd. 48 F.3d 1360 (1995).

VII. RESPONDENT TERMINATES TWO UNION ADHERENTS AFTER EMPLOYEES SELECT UNION AS THEIR EXCLUSIVE BARGAINING AGENT

In this section, I examine the applicable law for discipline, Respondent's disciplinary processes, and the facts for each terminated employee with analysis.

A. Applicable Law for the 8(a)(3) Allegations

The Board has used *Wright Line*[25] for well over 40 years to determine whether an employer's adverse action was motivated by animus or hostility towards union and/or protected concerted activities. *Intertape Polymer*, 372 NLRB No. 133, slip op. at 6 (2023). The shifting burdens of proof are key to the analysis. Here, General Counsel's responsibility to establish a prima facie case and Respondent's burden of persuasion are discussed.

1. General Counsel's prima facie case

To establish a prima facie case, General Counsel must demonstrate that the employee engaged in union and/or protected activity, that the employer knew of that activity, and the activity was a motivating factor in the employer's decision to take an adverse action. *Roemer Industries, Inc.*, 367 NLRB No. 133, slip op. at 14-15 (2019), enfd. 824 Fed. Appx. 396 (6th Cir. 2020). Motivation can be established by direct evidence or inferred from circumstantial evidence. Id., slip op. at 15.

Because direct evidence of unlawful motive is a rare bird, General Counsel may rely upon circumstantial evidence to meet this burden. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). Circumstantial evidence frequently is used to establish knowledge and animus because an employer is unlikely to acknowledge improper motive in discipline and termination. *Intertape Polymer*, 372 NLRB No. 133, slip op. at 12-13 (smoking gun seldom present); *NLRB v. Health Care Logistics,* 784 F.2d 232, 236 (6th Cir. 1986), enfg. in part 273 NLRB 822 (1984). A showing of animus need not be specific towards an employee's union or protected concerted activities. *Roemer Industries*, 367 NLRB No. 133, slip op. at 15.

[24] *NLRB v. Local Union No. 1229, IBEW (Jefferson Standard)*, 346 U.S. 464 (1953).

[25] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB .v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Circumstantial evidence may include the timing of the action; shifting, false or exaggerated reasons offered for the action; failure to conduct a meaningful investigation; changes in past practices; and disparate treatment. *Intertape Polyme*r, 372 NLRB No. 133, slip op. at 7 and n. 27. Other factors influencing circumstantial evidence include inconsistencies between the stated reason(s) for discharge and other employer actions and the employer's deviation from past practices, and timing. *Mondelez Global,* LLC, 369 NLRB No. 46, slip op. at 24 (2020), enfd. 5 F.4th 759 (7th Cir. 2021); *Sheet Metal Workers' International Ass'n AFL-CIO v. NLRB*, 989 F.2d 515, 519 (D.C. Cir. 1993),[26] citing *Machinists Local v. NLRB*, 362 U.S. 411, 416 (1960). Also see: *Dodger Theatricals Holdings, Inc. and Its Successor Dodger Theatrical, Ltd.,* 347 NLRB 953, 966 (2006). General Counsel also may present evidence that the employer's asserted reasons are pretextual. *Intertape Polymer*, supra.

2. The Employer's burden of persuasion

The burden of persuasion then shifts to the employer: The employer must demonstrate that it would have taken the action despite the protected conduct. *Intertape Polymer*, 372 NLRB No. 133, slip op. at 7. An employer does not satisfy its burden by merely stating a legitimate reason for the action(s) taken, but instead must persuade by a preponderance of credible evidence that it would have taken the same action in the absence of the protected conduct. Id.; *Curaleaf Arizona*, 372 NLRB No. 16, slip op. at 4-5 (2022), enfd. in part and remanded on other grounds, 26 F.4th 1002 (D.C. Cir. 2022); *Roeme*r, supra, citing: *Manno Electric, Inc.*, 321 NLRB 278, 280 n. 12 (1996); and, *T & J Trucking Co.*, 316 NLRB 771 (1995). If the employer fails to meet this burden, a violation will be found because a causal relationship exists between the protected activity and the employer's adverse action. *Intertape Polymer Corp.,* supra

False reasons or reasons that the employer did not actually rely upon are considered pretextual. *Intertape Polymer*, 372 NLRB No .133, slip op. at 7 and 13. Findings of pretext mean that the employer's reasons either did not exist or were not in fact relied upon, which leaves in place an inference of the employer's wrongful motive. *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982). .

B. Respondent's Disciplinary Processes

Respondent provided no documents to demonstrate whether the disciplinary policies are more extensive than what is discussed here. Shift supervisors and managers can give baristas coaching, which is telling someone how to correctly perform duties.

Disciplinary action apparently never leaves an employee's record. (Tr. 383.) Store Manager North finds the most frequent violations are time and attendance. (Tr. 413.) Once North is made aware of an incident, she conducts "discovery conversations." However, North agreed discovery conversations are not limited conversations and the term is used broadly. (Tr. 435.) For written discipline, Starbucks uses a document called a "Corrective Action Form" which has boxes to check for the level of discipline being issued. The first is a "Documented Coaching," the second is a "Written Warning," and the third and final box is a "Final Written Warning." If corrective actions do not correct the behavior, or if an employee commits an infraction warranting termination, they may be separated with a "Separation Form." The corrective action form includes the statement to a partner that the form is maintained permanently in the employee's file and "There is no guarantee that you will receive a minimum number of warnings prior to separation of employment or that corrective action will occur in any set manner or order."

[26] This case involves §8(b)(4) conduct but the general principles still apply.

North testified that discipline usually follows a progression except for certain violations require final written warnings. For the first violation, an employee is coached. Employees may receive multiple verbal coachings before receiving any documented discipline. For further violations, an employee received correction action, which might be a documented coached or a written warning. An employee might not receive another documented coaching for the same conduct if the employee does not show a pattern of committing the same violation for a period of time. A violation that could warrant an immediate final written warning is losing store keys, but North could not recall others.

Apparently Respondent has no limit on the number of informal undocumented coachings an employee may have before it begins to document as disciplinary action. However, shift supervisors do not give written discipline. Store managers give written discipline. Assistant store managers cannot give documentary coachings while store managers are absent but could contact the district manager to proceed in those situations. (Tr. 442-443.) North keeps no records of coaching incidents that do not result in a written corrective action and has no expectation that shift supervisors would either. (Tr. 507.)

North refers to a virtual partner relations coach located within Respondent's intranet. The program has existed for several years. The virtual partner relations coach's first question is whether the store manager is "aligned" with the district manager, which requires the store manager to speak first with the district manager, unless the store manager already believes the district manager will agree. North testified that not all disciplinary actions recommended through the virtual coach are binding but others are; she did not identify which of those were binding or not. (Tr. 411-413, 499-500.)

If North is unsure of the appropriate level of discipline, she calls Partner Relations.[27] North guessed that the last time she was given updated instructions on when to call Partner relations occurred in 2021. (Tr. 501.) North typically calls when the discipline is to cover her bases. She has discretion when to contact Partner Relations for documented coachings and written warnings. However, in the three years before hearing, North called Partner Relations for final written warnings and separations. North may contact the district manager after she contacts Partner Relations. Once North contacts Partner Relations, Partner Relations may communication with the district manager instead of her. North receives advice from Partner Relations: She is free to accept or reject the advice but typically accepts the advice because Partner Relations is the subject matter expert. (Tr. 414-415, 451-454.)

North testified that Since March 1, 2022, which coincides the employees' unionization efforts, North increased use of Partner Relations. North said the reason is because she has questions about what level of corrective action to issue. North was hesitant about what answer she give for her reasons. (Tr. 462-463.) When later asked more specifically about whether she knew about the union organizing efforts at the time, North, again a bit hesitant, said she had "inklings." North admitted that union organizing and certification would cause her to contact Partner Relations more frequently. (Tr. 464-465.)

[27] North sometimes would contact the district manager, then testified she misspoke because she always talked to the district manager first, but then stated she might reach out to HR first. She then testified that it was not required to identify whether she was aligned with the district manager. (Tr. 500-501.)

C. Shift Supervisor Heather Clark

Respondent terminated Clark on January 5, 2023. She worked for Respondent for a total of 14 years with a few periods in which she left briefly. Clark began her employment at the Johnson Creek Crossing store about December 2020. She worked as a shift manager, which was the position she held for about 10 years. (Tr. 45-46.) During her tenure with Respondent, she worked in approximately 10 stores, and was borrowed in over 20 stores. (Tr. 177-178.)

Clark applied for an assistant store manager position in the Johnson Creek Crossing store during the first half of 2022.[28] Presler interviewed Clark for the position. Presler cited three criteria for selection and could not recall which criteria that Clark did not meet. (Tr. 582-583.) Presler testified Cooper was selected for the position. (Tr. 583.)[29]

1. May 1, 2022: Clark tells a drive-thru customer to put an unrestrained child in the car seat in the back of the vehicle

Clark was working on the drive-thru window as the barista making drinks instead if a shift supervisor. She turned to hand off a drink at the drive-thru and noticed a couple in the car with a small toddler on the lap of the passenger instead of being secured in a car seat. Clark has training as a medical assistant, which taught that she was a mandatory reporter to Child Protective Services for children who are not secured in car seats.

Clark firmly said, "Put your baby in the car seat." Clark denied using any curse words. Approximately five to six minutes later, the customer who was driving the car came into the store and was yelling. The customer and Shift Supervisor Jaime Normoyle[30] spoke. Clark did not hear what was actually said. (Tr. 110.) According to Clark, neither Store Manager North nor Assistant Manager Evans were in the store when these events occurred. (Tr. 112.)[31] However, Evans testified that Normoyle reported the conversation with the customer to him and Normoyle had not heard the interaction with the customer and Clark at the drive-thru window. (Tr. 538-539; R. Exh. 2 at 735-736.)

The petition for unionization was filed the following day, May 2, 2022. Almost two weeks after the incident, on May 12, 2022, Respondent began its investigation in earnest into the situation. North was in communication with Alyona Colyer of corporate Partner Resources throughout the process. (Tr. 447; R. Exh. 2.) At this time, North knew that Clark supported unionization. (Tr. 447.)

On about May 12, 2022, District Manager Ryan Wolfe and Store Manager North talked to Clark and asked Clark to explain this incident, which lasted approximately 30 minutes. Before North and Wolfe met with Clark, North advised the conversation would be "rough." (Tr. 209.) Wolfe said that several people, including customers and partners, reported Clark used the word "damn,"

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[28] Presler could not recall a specific month and was led on direct to March or April. (Tr. 581.)

[29] General Counsel subpoenaed records regarding the interview with Clark and documents reflecting why she was not selected for the position. Because the best evidence would have been the documents reflecting the interviews, I find that these documents do not support Respondent's position that Clark failed to meet the requirements necessary to hold the position and likely would have reflected animus.

[30] Normoyle also uses the last name Brown.

[31] Evans maintained he was in the store and Normoyle reported the incident to him. He then went out on the floor and asked who the employee was who made the statement. Clark said, "I own it" and everyone continued with their work Evans testified that he collected the statements from Normoyle and Young. (Tr. 523-525.)

which Clark denied. Clark asked who made those statements, which she said were not true. Wolfe and North asked Clark to write her statement, which she did while the managers waited for it. (Tr. 112-113, 114, 373) In her statement, Clark, feeling hurried, wrote what happened and concluded with:

> While I do not regret what I said in the moment, I am making a promise to handle situations differently. This behavior is severely out of character for me, and I do believe I had a very "human" moment where I wasn't being conscientious of my surroundings.

(Tr. 114; Jt. Exh. 9.)[32]

Clark's statement did not include that the occupants of the car were acting illegally and unsafely, which were issues she raised during her testimony. She testified she neglected to mention those points because she was stressed and afraid of losing her job. (Tr. 230-231.)

On May 13, Colyer in Partner Resources emailed North and asked for any updates on the situation with Clark and if so, send documents, including the discovery conversation notes with Clark, and any previous corrective actions. (R. Exh. 2 at 78.) On May 13, North sent to Colyer in Partner Resources a summary of the conversation with Clark and Kleeman's statement. Regarding collecting further statements, "My ASM [sic, Evans] is happy to write one. I can have him get it to me by Monday." (R. Exh. 2.) North also said she "just [had] two documented coaching documents for time and attendance" and that she had forgotten about the first one when she gave the second one. Id.

On May 13, North spoke with Jennifer Young[33] about the incident and Young provided a written statement, which stated Clark said put the child in a "damn" car seat. (Tr. 208, 373; R. Exh. 2 at 681.) Young's statement makes no mention of speaking with Assistant Store Manager Evans. Young's statement lists that the male customer came inside 10 to 15 minutes after the incident and asked whether Young was the offending person. Young wrote that she denied it. After a few minutes, the customer left. Nothing reflects Young or anyone else de-escalated the matter. Nor does it mention that Assistant Store Manager Evans was present. (R. Exh. 2 at 681.)

On May 15, 2022, North obtained an email statement from Jaime Normoyle. (Tr. 375; R. Exh. 2 at 735-736.) Normoyle also did not testify. Normoyle's statement primarily deals with the customer discussions when he came into the café, making no mention of any cursing, and only states that Clark took responsibility. Normoyle also does not state any discussion with Evans. (R. Exh. 2 at 735-736.)

On May 18, Assistant Manager Evans wrote and emailed to North a summary of the incident on May 1. (Tr. 540; R. Exh. 2 at 735-536.). In his written version, he maintained he was notified of this incident on the day it occurred. Evans was approached by Jen Young, the key-holding shift supervisor, told him that a man came into the café and shouted for the manager. Young told him that the customer was in the drive-thru that someone said to put "our damn baby" in a car seat. Normoyle was the one who de-escalated the situation. Young denied responsibility for the incident and Clark said she said it; Evans wrote in this statement he spoke with Clark that

[32] Clark testified that she disagreed that she should not have written that it she acted out of character and wrote it only because she felt that she had to as she was under pressure. However, she was not told what to write. (Tr. 165-166.)

[33] Respondent did not call Young to testify. (Tr. 374.)

day and "her attitude and tone made me feel like she understood that she should not have said it but was not necessarily sorry. I left the conversation not feeling entirely confident that she would not do something similar to this again." (R. Exh. 2 at 94.)[34]

On May 25, 2022, North and District Manager Presler gave Clark a corrective action form, dated May 23, 2022 and marked as a written warning. The corrective action form makes no mention of the alleged cursing. Respondent claimed Clark violated the "How We Communicate" standard and failed to serve as a role move in creating a positive environment as a shift supervisor. (Jt. Exh. 8.) Presler testified the investigation did not reveal where the child was in the car. He thought telling someone to put a child in a car seat might be a prelude to violence, such as when cars are rear-ended going through the drive-thru or patrons throwing hot drinks through the drive-thru window. Presler testified that he safely navigated his vehicle with his child in his lap on a campground and he was in control of the situation. (Tr. 637-638.)

Clark was asked about Respondent's mission and values, and the shift supervisor's role in de-escalating matters. Respondent did not provide the standards for doing so. Clark testified from memory that the mission and values are to lead with compassion, assume positive intent and the de-escalate situations as needed. (Tr. 206.)[35] De-escalation, according to Clark, is to maintain "the third place"---looking at behaviors, assuming positive intent, act with courage, talking to people as if they are human and clam a situation down through different steps. (Tr. 206.) However, when asking whether any of these were in conflict for the car seat situation, Clark testified that she acted with courage because the car's occupants were acting illegally and unsafely, and she found no other way around it except to tell them to put the child in a car seat. (Tr. 206-207.)[36]

Presler could not recall whether he referred to Respondent's "Living Our Values Every Day." (Tr. 672-673; R. Exh. 5.) That document includes certain applicable attributes, such as: putting needs of others ahead of their own; and, confronting the reality of a situation, good and bad, and results conflict constructively. While Respondent's witnesses confirmed that rear end collisions have occurred at the drive-thru, they maintained that other methods, such as calling the police, would have been a better measure. Presler himself admitted that he drove with his child in his lap and was "in full control" of the vehicle. However, Presler did not account for any other driver who might not have such control.

2. Store keys incidents

Shift managers have store door keys that they take with them; till and lock box keys stay at the store. (Tr. 333.) On July 7, 2022, Store Manager North and Assistant Manager Evans presented Clark a corrective action form, dated June 20, 2022, for twice misplacing/losing keys to the store during the month of June. (Tr. 193; Jt. Exh. 7.) Clark signed the corrective action

[34] On cross-examination Evans said he had a later discussion with Clark on May 1, which he considered a verbal coaching. While this testimony is consistent with Evans' May 18 statement, I do not credit this testimony or this part of the statement as Evans had no anecdotal notes and no one else mentions Evans' presence that day. Evans also failed to mention this discussion as counseling in his initial testimony. (Tr. 543; R. Exh. 2.)

[35] These were among the complete set of documents apparently not produced to General Counsel or the Union. The best evidence would have been the complete document for comparison and Respondent also made no effort to introduce these documents either.

[36] Respondent led Presler to an inquiry that Clark allegedly made about what she was supposed to do instead of immediately correct the driver about the child not secured in the car seat. (Tr. 586.) This version is not corroborated by either Clark or North and therefore is given no credit.

form, which was close in time to when the store was closing for renovation, with only the drive-thru open. (Tr. 118.) Each shift supervisor has keys to the store, which they are allowed to take off premises. (Tr. 115-116.) A specific key is needed for the safe. (Tr. 490.) The keys to the registers, tills and the lock boxes are kept separately inside the safe. (Tr. 116. 490.) At any given time, only one shift supervisor is considered a key holder, even if other shift supervisors are working at that time. Clark kept her store keys on the same keychain as her house keys. North testified that losing keys is a serious offense because it gives access to the entire store (Tr. 380.)

The first incident described on the corrective action form states: "In June 2022, [Clark] left the store without her keys, Her keys were located in the store in an unsecure location." (Jt. Exh. 7.) Clark testified she left the keys on Store Manager North's desk and discovered she did not have her keys as she was driving home. In total, Clark said she was away from the keys for about 30 to 45 minutes. Upon her arrival to the store, Clark saw Assistant Store Manager Evans at the desk. Clark retrieved her keys and left. No one called Clark to notify her that her keys were on the desk. (Tr. 120-121, 225-26.)[37] Clark did not recall whether she was required to prepare a written statement about misplacing the keys the first time or whether North and she discussed how to prevent such an event from happening again. (Tr. 192-193.) Although North was not present when Clark left the keys in the store, North disagreed with Clark's assessment of how long it took to retrieve them. North admitted she had no additional information to dispute that assessment. North also testified that she was on vacation at the time it occurred and Assistant Manager Evans reported the incident to her when she returned from vacation. (Tr. 440-441.)[38]

On June 17, two days after a second incident of Clark misplacing her keys, North sent to Evans an email asking on what date Clark lost her keys "the first time." (Tr. 441-442; GC Exh. 8.) North did not recall whether Evans responded verbally or by email. (Tr. 443.) Respondent never documented the date for the first incident. (Jt. Exh. 7.)

Respondent explained the second incident in the corrective action form:

> A second time, on June 15, 2022, [Clark] misplaced her keys while working. Her keys were located the following day in an unsecure location in the store.

(Jt. Exh. 7.)

Clark testified that, on June 15, she was not the key holder. About mid-day, while on break, she somehow lost her set of keys. North noticed Clark was flustered and Clark said she lost her keys. (Tr. 379.)

A number of people, including Store Manager North, attempted to find the keys. At the time, North said nothing to her about losing the keys. (Tr. 121-122.) Clark was scheduled to be the keyholder on June 16, but not to open the store. However, she arrived at the store between 6 to 9 a.m., at which time Shift Supervisor Anthony Hudson told Clark her keys were found in a box

[37] Evans testified that Clark called and asked if her keys were in the store and he found them on the back desk, then Clark picked the keys up from him. (Tr. 525.) Evans maintained that he had a brief discussion with Clark but gave no "formal coaching" because she was off the clock. (Tr. 525-526.)

[38] Evans testified that Clark called him for location of the keys and she was gone likely two hours before Clark retrieved them. Evans' estimate of Clark's time away was significantly longer than either North's information or Clark's assessment. The length of time Clark spent away was not included in any of the statements; I therefore find that Respondent did not think the length of time was relevant to the disciplinary action taken.

of pastries in the back of the store. (Tr. 123-124.) North testified that that the period the keys were missing was approximately 24 hours. (Tr. 379.)

North told Assistant Store Manager Evans about the incident. It was only then that Evans told North that Clark left her keys at the store a week or two before, which North identified as early June. (Tr. 379.)

On June 27, 2022, North sent her final written warning draft to Aloyna Colyer in Partner Relations. North's draft of the final written warning included a statement about "strike organizing." Colyer advised, "Partner have the right strike/organize so we will not discuss this in the conversation with [Clark]." (GC Exh. 10.)

During the July 7 meeting with North and Evans, Clark testified that during their 15-minute meeting, Clark agreed that she should not have lost her keys. North explained the importance of not losing the keys. (Tr. 193.) They explained to Clark that if Clark lost the keys again, she would be terminated, but no other form of discipline was mentioned as a terminable offense. (Tr. 194.)

North testified that on July 1, 2021, before Clark's incidents, employee A.P. also lost her store keys. A.P. was to receive a final written warning but A.P. supposedly transferred from the store before she could be presented the disciplinary action. Because the disciplinary action was never presented to Powell, she would not have any final written warning. (Tr. 381-383; R. Exh. 3.)[39] Additionally, on cross-examination North suddenly recalled two additional employees who supposedly received final written warnings for losing their keys; no documentary evidence was presented for these two, and North was not asked when these occurred. (Tr. 439-440.) I do not credit these examples because the best evidence would have been the final warnings themselves, which occurred at unknown dates.

Shift Supervisor Amanda Jean testified that she saw North's keys for the registers, lock box and till were left in the store around 6:00 p.m., in early August 2022. Jean noted that North had those keys earlier in the day. (Tr. 335-337, 341.)[40] Jean placed the keys in the safe. (Tr. 341.) North, who was present throughout the hearing, did not dispute Jean's testimony.

3. July 2022: Managers raise with Clark a vague customer complaint and comments in a union chat

While the store was renovated, Clark worked shifts at other stores. One day North and Evans came to see Clark at the other store about two issues. She then made an appointment to meet with District Manager Presler about these issues. During these meetings, Clark had union representation.

The first issue was an online review about the Johnson Creek Crossing store that stated woman with a half-shaved head was always rude to the customer and the customer's mother. The complaint stated that this half-shaved woman seemed to have a chip on her shoulder and did not like them. (Tr. 127.)

The complaint did not identify the employee with a name, nor did it identify a large tattoo on the shaved head. Clark had a large tattoo on the side on her shaved side. In addition, a

[39] An employee on a final written warning is not permitted to transfer, yet A.P. was permitted to transfer.
[40] Clark testified that she heard North had also left her keys in the store, but did not hear it firsthand. (Tr. 122.)

number of borrowed partners and one other employee also had half-shaved heads, so management just assumed the person was Clark. Clark and the union representative advised the managers about this information. (Tr. 129-131, 210.) North and Presler requested that Clark write a statement about the incident. (Tr. 211-212.)

The second issue was about statements Clark made in a union organizing text message group. Clark's text came about the time the Supreme Court overruled *Roe v. Wade* (regarding abortion rights). Clark's texts stated that anyone who was "egregiously affected by that . . . decision" might need to take some time for themselves. If that time required someone to call off work, then they should do so. The managers told Clark that her texts in the union chat encouraged people to skip work. (Tr. 128.) Clark explained to the managers that, first, the chat was with coworkers but was not limited to discussions about work and it was not limited to employees. Clark could not recall anyone who called off work because of the Supreme Court decision. (Tr. 128-129.)

Respondent did not discipline Clark for these incidents.

4. January 5, 2023: Respondent terminates Clark

Respondent's Notice of Separation cites two incidents involving customer complaints about Clark. The incidents occurred on December 1 and December 13, 2022, respectively. (Jt. Exh. 5.) Preceding these events, beginning in the middle of November 2022 and continuing thereafter (at least into December), Clark and other employees discussed on the union chat[41] the possibility of conducting a strike at the Johnson Creek Crossing store. (Tr. 152-153.)

a. December 1, 2022: Clark intercedes with a customer

On December 1, 2022, Clark was working as a shift supervisor and key holder. Barista Jennifer Young was taking drive-thru orders. Ramon de Luna Luevano, another barista, was working that day. Luevano was not wearing on a headset but could hear conversations customers had with Young. (Tr. 82, 134.)

At approximately 1 p.m. that afternoon, Luevano overheard Young advising a customer that her iced espresso with light ice would have empty space left in the cup. Luevano did not hear any customer response but believed the customer was agreeable. When the customer arrived at the drive-thru window, Luevano accepted payment and handed the customer the iced espresso with light ice. The customer said the cup had room in it. Luevano told the customer that with light ice, the cup would have room. The customer asked for milk in the cup. Luevano told the customer that if he added milk, he would need to charge the customer for an iced latte because the drink would change into an iced latte instead of iced espresso. (Tr. 82.) The customer and Luevano had further discussions, after which the customer drove away and came inside the store.

Clark was working at the warming station and the front register and was wearing a headset, as were most of the employees that day. (Tr. 132-133.) Before the customer came in the store, Clark overheard some of the customer's order and observed the employees' body language, seeing that Young and Luevano were getting frustrated. (Tr. 134.) Luevano told Clark

[41] The union chat was the same text group in which Clark discussed the Supreme Court's ruling on *Roe v. Wade.*

that this customer was the one at the window who had a problem with the iced espresso.[42] (Tr. 83, 135.)

Clark talked with the customer, who told Clark the drink was not what she ordered. (Tr. 135.) Clark intended to give the customer the iced latte at the cheaper iced espresso price, according to Luevano and Clark. Clark testified that she was confused by the customer's order and the customer became aggressive: The customer pointed at Clark's face, saying "I don't need you to educate me, they do it at my Starbuck's all the time." Clark picked up an uncapped Sharpie pen to write the drink order on a cup to make the drink as the customer requested. (Tr. 83.) Clark eventually gave the customer a refund. (Tr. 136.) Clark told the customer that she was upset too. (Tr. 138.) Luevano observed that the customer seemed aggravated and left. The customer submitted a complaint about Clark.

Luevano found Clark was not rude or unprofessional. No store manager or assistant store manager was present in the store at the time. No one asked Luevano what happened that day or asked him to write about the incident. (Tr. 83-84.) No one from management talked with Clark at the time of or near the time of the incident. (Tr. 138-139.)

b. In between the incidents regarding customers, North tries to terminate Clark for entering the store early

On December 12, 2022, Clark entered the store at 3:55 a.m. because she was outside the store, which parties have characterized as a crime area with police called to the store. Clark advised Store Manager North, and North in turn advised Presler that Clark entered the store 5 minutes before she was supposed to do so. North recognized that Clark was uncomfortable staying outside. (GC Exh. 11.) North characterized Clark's actions as a "safety and security violation," which was a part of why Clark received her final written warning. North further stated: "I do not know how 'clean' this is, but is definitely cut and dry." North admitted that nothing happened with her concerns. (Tr. 477.)

c. December 13, 2022: Clark again intercedes with a customer

On December 13, 2022, Luevano was working on the drive bar, which is preparation of all drinks for the drive-thru and wearing a headset. (Tr. 85.) Clark was working as a shift supervisor. Maya Gavittte, also wearing a headset, was working the actual drive-thru window position. (Tr. 86.) Luevano testified neither Store Manager North, Assistant Store Manager Evans nor District Manager Presler were present in the store at the time of these events. (Tr. 85, 88.) However, Clark testified that Assistant Store Manager Jake Cooper was present at the store during these events. (Tr. 140.)

An older man gave his order but Gavitte and others in the store could not understand his order. Luevano heard Gavitte ask the customer to speak up several times. The customer started screaming and verbally aggressive. Clark was working the front register and heating food. She did not have her headset on initially but put it on about the time she noticed Gavitte was getting physically upset, shaking and anxious. (Tr. 141-142.)

According to Clark, she directed Gavitte to take over her position and began to talk to the customer, requesting the size of his order, which was a mocha and already displayed on the order window. Clark testified that the customer was screaming, "It's a short, it's a short." Gavitte

[42] Luevano testified that both he and Young told Clark about the issue with this customer. (Tr. 83.)

stepped away while Clark continued to try to clarify the order but the customer continued to scream. Normally if a customer cannot be heard, the employee requests that the customer pull up to the window to give the order. In this case, however, the customer was already yelling and Clark did not have a chance to do so.

Clark noticed the customer was so loud that everyone with headsets on stopped what they were doing. Clark told the customer, "If you can't lower your voice, I can't help you." The customer continued to yell loudly, very belligerently, "I'm just trying to give you my order." Gavitte had walked to the back by this time and Clark believed the situation was threatening. Clark said she was sorry but she could not help him and he needed to leave. After the customer's continued tirade, Clark firmly told the customer that he was refused service because of his screaming. (Tr. 86-87, 213.).[43] The customer refused to leave the drive-thru and he was going to stay in the drive-thru. Clark contemplated calling the police but instead started recording the customer's interactions on the drive-thru's camera. Clark's hands were shaking so she could snap a picture. (Tr. 142-143.) The customer then came to the front window, demanding Clark's personal information. Clark looked over at Assistant Store Manager Cooper, who was off the clock and observing from a distance. Clark gave the customer the district manager's card and her employee number. Clark believed she instructed the customer to go to a different Starbucks. Cooper told Clark, "That's the best you can do in this situation." (Tr. 142-143, 146.)

Clark voluntarily filed an incident report through an app on the store's iPad. She did not have a copy of it and did not know how the report would be processed. (Tr. 148-150; Jt. Exh. 6.) Her report made no mention of taking a photograph of the customer. (Tr. 150.) The report states that Gavitte, Luevano, and "Michaela" were witnesses. (Jt. Exh. 6.)

When she took the picture of Respondent's screen at the drive-thru order location, Clark was unaware whether Respondent's screen information would be retained. (Tr. 146.) At the other stores Clark worked at, two within the downtown Portland area and at least two in Florida had pictures of problematic customers. (Tr. 220.) The 5th and Oak store downtown kept in its back room a binder with pictures of customers who were repeat problematic, restricted or trespass customers. The pictures may have been taking by a third-party security team or the store manager. (Tr. 147.)

According to Luevano, Clark stepped in to take over the order from Gavitte while the customer was on speaker. Clark began to record and told the customer she was recording for staff safety. The customer eventually pulled up to the window. Clark asked Gavitte if she wanted to step away from the window if she did not want to be at the window with this customer.

Clark testified that an employee at the Johnson Creek Crossing store took a video with Respondent's iPad of someone driving backwards through the drive-thru lane and she saw a picture of the offending customer on Respondent's iPad, Snapchat and other social media applications. (Tr. 178-180.) All employees use the iPads, including baristas, shift supervisors, assistant store managers and store managers. (Tr. 180-181.)

Within days of the incident, Clark told North what happened, including that she took a photo of the angry customer because of the safety issues for herself and the other partners. North testified that she did not understand Clark's safety concerns.

[43] In the incident report that Clark filed, it also reflects that the customer called her "a baby." (Jt. Exh. 6.)

District Manager Presler received a complaint from the customer and began an investigation, so North took no further action. (Tr. 385-386, 421, 588-589; R. Exh. 13.)[44] The conduct described in the customer's email was not attributed only to Clark and the customer said that his behavior was not his finest moment either. (R. Exh. 13.)

Presler stated his practice for investigating a customer complaint included, "in no order," speaking with the customer, contacting the store manager to see if the store manager is aware of the situation; "often" speaking with any observers to the incident and the partner involved. Presler did not delve into the customer's conduct when he spoke with the customer and made assumptions about what the customer's statement meant. (Tr. 654-655; R. Exh. 14)

Presler only spoke with North and two employees, Gavitte and "Michaela." (Tr. 593.) He did not obtain written statements from the two employees and took his own notes, which he sent to Partner Relations. Presler admittedly had no procedure for when he had the employee write a statement or take notes. (Tr. 595, 646-647.) Despite testifying that he took down verbatim what the two employees told him, Presler also admitted that he made errors in taking the statements. (e.g., Tr. 659-660.) When he spoke with Gavitte, Presler did not follow up on her statement about why employees were upset or why employees were laughing at the customer's "freakout": Presler relied only on the claim that the customer was talking loudly. (Tr. 656-658.)

Presler said no other witnesses were present so no other employees were close to the window, which conflicts with his notes about Gavitte's. (Tr. 605; R. Exh. 14.) Presler did not ask Luevano or any additional witnesses to provide a statement to management about the events involving Clark, nor did he find it necessary to look for other witnesses. (Tr. 89, 652-653.)[45]

Presler apparently did not speak with Clark for another two days. When Presler spoke to Clark, Clark showed him the picture of the customer and told Presler that she wanted to document the customer and thought he might be dangerous. Presler responded, "Yeah, you never know what kind of crazy things people will do." This conversation went no further: Presler said nothing about taking the photograph was against Respondent's rules or that it was inappropriate to do so. (Tr. 151-152.)[46] Presler submitted his notes to Alyona Colyer of Partner Relations on December 22, 2022. (Tr. 600; R. Exh. 14.)

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[44] R. Exh. 13 is used only to show subsequent action or lack thereof, not for the truth of the matter asserted. (Tr. 589-593.) The customer's email admitted his conduct was not his "most shining moment."

[45] According to Presler, Gavitte told him that the customer was speaking loudly and Clark took over. Gavitte said the matter was "trivial" and she was laughing. (Tr. 597.) Presler then shifted to "partners", including Gavitte," were laughing. (Tr. 597.) Presler notes about his chat with Gavitte do not match his testimony: Gavitte does not reflect that she was laughing. Gavitte's statement to Presler reflects two possible witnesses that Presler did not interview. Presler's note regarding Michaela noted the customer screamed at Clark when she tried to clarify his order and at that point, Clark refused service. (Tr. 605; R. Exh. 14.) Presler's interview with Michaela was very limited per his testimony and notes and does not confirm whether employees were laughing. (Tr. 598; R. Exh. 14.) Presler did not take contemporaneous notes of his conversation with the customer and is undated, with Presler unable to identify the date on which he spoke to the customer except it was not December 20. (Tr. 602-603; R. Exh. 14.) With Presler's failure to interview more possible witnesses and the discrepancy between his testimony and notes, Respondent does not prove Presler conducted a complete or thorough investigation.

[46] Presler did not testify about this conversation. He repeatedly testified that taking a picture of a customer was against Respondent's policy. For this incident as well as the May 1 incident, Presler indicated the better route would have been to take the customer's license plate number for future reference; for the May 1 incident, that license plate number should have been given to the police.

Presler admitted that employees have the right to refuse service to customers. He could not recall whether that information was included in de-escalation training. (Tr. 661-662.) When asked about Respondent's goal of improving the world one employee at a time and keeping employees safe, Presler testified that the latest version is "One person, one cup, one community at a time. Nurture the limitless possibilities of human connection." Pressler did not know when that mission statement changed. (Tr. 662.)

d. January 5, 2023: Respondent gives Clark a Notice of Separation

Clark testified that although staffing levels through December were within Respondent's norms, it still was understaffed.

North testified that she and District Manager Presler made the decision to terminate Clark's employment. (Tr. 387, 607.) On January 5, 2023, Store Manager North and District Manager Wolfe terminated Clark. The notice of separation cited that two customers complained to the district manager about Clark's treatment and that Clark was previously given a written warning on May 23, 2022 for rude and unprofessional treatment of a customer. The December 1 complaint was characterized that Clark was not willing to remake the customer's drink and argued with the customer instead. Regarding the December 13, 2022 incident, Respondent cited that Clark failed to de-escalate the incident and told the customer he would not be served. Respondent also stated that Clark's photographing the customer without the customer's consent violated the customer's privacy and Respondent's policy on Video Recording, Audio Recording and Photography. (Jt. Exh. 5.)

5. Analysis of Clark's termination

a. Credibility

Respondent attempted to undermine Clark's credibility about the May 1 incident because Clark's statements at the time did not refer to the safety of the child. As demonstrated by Store Manager North's testimony that she is aware that the law requires a child to be strapped into a car seat, it is a commonly known requirement. Respondent's position here is further undermined because it allegedly cares about the safety of its customers and this store had events of rear-ending in the drive-thru. (Tr. 445-446.) North admitted that Clark's statement to the customer required urgency, but still gave the written warning. (Tr. 447.) Presler's testimony that he was able to have his child in his lap while driving because he was in control of the car is also undermined by his admission that cars have rear-ended in the drive-thru: It shows one can be in control of a vehicle when someone else is not. It does not take a physicist or medical professional to adduce that rear-ending another vehicle could cause harm to the passengers in the front vehicle.

I cannot credit Assistant Store Manager Evans's written notes about the May 1 incident. First, Respondent only presented an attachment to an email, not the original document, so it is difficult to verify that Evans actually wrote the anecdotal note on May 1. His testimony also points out that he claimed to have a talk with Clark on that day but did not testify that he immediately documented it. (Tr. 525-526.) Secondly, Clark testified credibly that Evans was not in the store.

Because Clark's testimony is uncontroverted here and Presler makes no comment in his report to Partner Services that taking a customer's picture was against Respondent's policy (R. Exh. 14), I fully credit Clark's testimony.

None of the other notes presented in R. Exh. 2 cite any discussions with Evans until Evans emailed Colyer in Partner Services on June 23, 2022. (Tr. 526-527; R. Exh. 12.) Third, North's statement shows that Evans was "happy to write" a statement, not that he would send his notes, which undermines Evans having a statement already written. Evans further claimed he told North about the incident on the day of the incident, but that was not corroborated by North; I therefore discredit that portion of his testimony. (Tr. 526.)

North, who was Respondent's representative throughout the entire hearing, did not dispute that she left her keys in the store. No evidence was presented to show that she received a final written warning for this serious violation. I therefore find that North also committed the same infraction without consequences.

b. Application of *Wright Line* to credited evidence for Clark's termination

The record is replete with Clark's union activities and Respondent's knowledge.[47] These instances include, but are not limited to: Clark's discussion with Store Manager North about the unionization efforts; North and Assistant Store Manager Evans discussing the letter to Schultz and figuring out that Clark authored it; Clark wearing union insignia on her t-shirt and Presler trying to get the shirt off; Evans telling Clark that union information could not be posted on the community bulletin board when other non-employer information was already posted; and Clark asking for union representation during a meeting with management over their investigation of possible discipline. During the interview for the assistant store manager position, Clark raised the unionization movement.

Respondent denies any evidence of animus. (R. Br. at 28.) However, the record contains direct and indirect evidence of animus. Conduct that has not been found violative of the Act still may demonstrate animus. *Stoody Co., Div. of Thermadyne, Inc.*, 312 NLRB 1175, 1182 (1993). Direct evidence of knowledge and animus are proven with Evans telling Clark, after she expressed disappointment in not getting the promotion, "they" were not looking for someone involved in unionization. Direct evidence of animus towards Clark's North wanted to include "strike organizing" in one of Clark's disciplinary action. Although North followed Partner Services' instructions not to include such language, North believed that strike activity and organizing were a basis to include in a corrective action form. It also demonstrates that Partner Services was advised of Clark's union activities. Respondent also failed to provide the interview documents for the promotion; failure to produce these documents, which would have been the best evidence, leads to an inference that Respondent maintained animus towards Clark's union activities. Respondent's conduct towards Clark's union activities, whether within the 6-month statute of limitations or preceding it, demonstrate that Respondent had animus towards Clark's union activities and Respondent's objectives "as manifested in . . . antecedent conduct" continued, without disavowal, and was unchanged. *Sheet Metal Workers*, 989 F.2d at 519.

Respondent's actions create an inference that the termination was discriminatorily motivated. *Stern Produce Co.*, 372 NLRB No. 74, slip op. at 4-5 (2023). For Clark's loss of the keys, she was told she would be terminated if she lost the keys again; the managers made no mention that any further discipline would lead to termination. Respondent's managers then proceeded to terminate Clark for her interactions with customers and taking a photo, not for losing keys. I agree with General Counsel's assessment that employee A.P. was given preferential treatment for such a serious offense as A.P. received no discipline upon transfer. Somehow North and Evans were able to discuss events with Clark at another store during the renovations; yet

[47] Respondent admits Clark's activities and Respondent's knowledge. (R. Br. at 27.)

North did not go see A.P. at her new store to give her the discipline. North additionally did not dispute that she lost her keys and gave no indication of receiving any discipline, so that lack of denial indicates that North also received no disciplinary action. These incidents demonstrate disparate treatment, which leads to a conclusion of animus and pretext.

The limited investigation for the December 13 incident also points towards a discriminatory motive. *Mondelez Global LLC*, 5 F.4th at 771; *Jack in the Box Distribution Center Systems*, 339 NLRB 40, 53 (2003). Presler's investigation included a number of assumptions that undermined the claim that Respondent conducted a complete investigation. Presler failed to follow up with the customer about why the customer admitted the confrontation was not his finest moment.

Respondent contends it conducted "a prompt, non-discriminatory and meaningful investigation into each of Clark's policy violations." (R Br. at 28.) Missing from the discussion of the investigation is whether Presler first consulted the Virtual Partner Relations Hub, and if so, what was its instructions. Taking the photograph, which was not the Presler's original investigatory issue, was later included and instead became the main focus for termination. At the time, Presler made no comment on taking the photograph as a violation of Respondent's policies. It demonstrates a shift for Respondent.

The record evidence points to the opposite of a non-discriminatory and meaningful investigation. Respondent's inadequate investigation also supports a finding that Respondent's actions for both the December 1 and December 13 incident were a pretext to rid itself of a union adherent. *DHSC, LLC d/b/a Affinity Medical Center*, 362 NLRB 654 n. 4 (2015), enfd. 944 F.3d 934 (D.C. Cir. 2019); *Mondelez Global LLC*, 5 F.4th at 771. Presler failed to interview all witnesses identified. (Tr. 605.) Respondent failed to interview Luevano, who witnessed the entire events, making Respondent's investigation particularly inadequate. For the December 1 incident, neither manager was present when it occurred, which made the need for an accurate investigation more acute. Had Respondent interviewed Luevano, it would have found that, on December 1, Clark took appropriate actions to resolve the customer's issues.

For the December 13 incident, Presler admittedly did not ask whether other partners were near the window and claimed he relied only upon the schedule. (Tr. 606.) Presler also admitted that employees who were wearing headsets could have heard the exchange between anyone at the window and Clark and, by failing to ask additional employees, limited the scope of the information sought. (Tr. 641.) For the two employees Presler interviewed, Presler failed to ask whether they recognized the customer could have been a threat. Presler also admitted that employees may refuse service to a customer, yet this fact is missing from the investigation and the determination to terminate Clark. Despite testifying that his notes of the interviews were word for word, Presler admitted that his notes were inaccurate. Again these facts point to an inadequate and inaccurate investigation. Further, an employer allegedly concerned about customer relations and safety of its employees and the environment in which they work and the customers they serve, which it maintains as part of de-escalation, is inconsistent with Presler's actions here. *Wendt Corp.*, 369 NLRB No. 135, slip op. at 2-3 (2020), enfd. in rel. part 26 F.4th 1002 (D.C. Cir. 2022).

The evidence demonstrates Respondent intended to build a case against Clark by progressive disciplinary action against her for months. Respondent gave no warning about the December 1 incident and combined it with the December 13 incident. Nothing happened about the December 1 incident until the December 13 incident. Similarly, nothing happened about the May 1 incident with the keys until after the second loss of the keys. Had it been considered a

serious safety and security issues, surely Evans should have recognized it when Clark picked up her keys the first time.

Respondent also contends it did not treat Clark disparately. (R. Br. at 29.) Yet Respondent treated Clark disparately when compared to Gavitte for the December 13 incident. The normal procedure when unable to understand a customer's order at the drive-thru is to ask the customer to drive up to the window. Respondent only considered Clark's actions and did not consider that Gavitte, in the first instance, failed to de-escalate the situation by asking the customer to pull up to the window to get the correct order. *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 264-265 (D.C. Cir. 1993), enfg. sub nom *Gold Coast Restaurant Corp. d/b/a Bryant & Cooper Steakhouse*, 304 NLRB 750 (1991) (other employees involved in same claimed rule violations not subject to discipline while discriminatee was). Also see generally *BS&B Safety Systems, LLC*, 370 NLRB No. 90, slip op. at 1-2 (2021). Similarly, the events with the lost keys point to a delayed reaction to the first incident. Evans said nothing when Clark retrieved the keys in the first incident. Suddenly Evans reported it after the second incident. *Stoody*, 312 NLRB at 1182-1183.The disparate treatment points to animus and pretext.

Respondent maintains that, because it did not discipline Clark in July for two incidents, it was not acting inconsistently and it proves Respondent only disciplined Clark for significant incidents. Respondent could not prove the incidents in July and did not start its investigation quickly after the incidents occurred; it then sought out Clark at a different store while the renovations were taking place. On December 12, North attempted to go forward with a "safety and security" event that day, in which Clark entered the store 5 minutes before she was allowed to do so. North admitted she did not know how "clean" her conclusions were. North's admission that nothing happened with that incident, combined with the July discussions, demonstrate Respondent was scouring for reasons to terminate Clark, a visible union adherent.

Because Respondent did not produce copies of its disciplinary policies and procedures, it cannot establish that its practice here was consistent with those policies and procedures. See *Smithfield Packing Co., Inc.*, 344 NLRB 1, 8 (2004), enfd. 447 F.3d 821 (D.C. Cir. 2006) (a party is not allowed to provide secondary evidence when refusing to provide the best evidence). The actual disciplinary policies and procedures are the best evidence. Respondent was ordered to produce several documents in which disciplinary procedures and processes are likely maintained and failed to comply. At hearing Respondent was asked whether the disciplinary policies and procedures would be presented and it declined to do so. Respondent did not contend these documents were lost or stolen. Whether Respondent complied with its own policies and procedures goes part and parcel with Respondent's defenses and General Counsel's burden of proof. *Sylvania Elec. Products, Inc. v. Flanagan*, 352 F.2d 1005, 1007-1008 (1st Cir. 1965) (best evidence necessary to prove any disputed fact that is material to the case).

Respondent contends that it would have discharged Clark regardless of her union and/or protected concerted activities. (R. Br. at 29-30.) Respondent does not carry its burden of persuasion in light of the ample evidence of animus and pretext. I therefore find Respondent violated Section 8(a)(3) and (1) of the Act by terminating Clark.

D. Partner Gail Kleeman[48]

Kleeman was a "partner," who was terminated on March 7, 2023. She had worked for Respondent since 2003 as a barista. She began her employment in Illinois and transferred to the Johnson Creek Crossing store in 2014. (Tr. 240.) She worked with Store Manager North for the last five years of her employment. (Tr. 241.) Assistant Store Manager Evans was present for most of her employment but Jake Cooper was assistant store manager when Kleeman was terminated. (Tr. 241-242.)

In spring 2022, Kleeman became aware of the union organizing campaign from Shift Supervisor Heather Clark while they were at work. (Tr. 251.) Kleeman discussed unionization with her fellow employees. Although she did not discuss the matter with Store Manager North, she discussed unionization with Assistant Store Manager Evans. After the vote, Kleeman asked Shift Supervisor Anthony Hudson if he voted in favor of unionization. Kleeman told Hudson she voted in favor of the union. (Tr. 253.)

1. Kleeman's history of corrective actions

On October 6, 2021, Store Manager North gave Kleeman a documented coaching for several general issues: not responding well to feedback or adjusting performance after feedback; failing to wash her hands after touch trash or her face; taking long breaks, even after being coached to limit breaks to 10 minutes or 30 for lunches; failing to follow warned food routines after coachings "several times." (Tr. 389; Jt. Exh. 15.) North maintained that the documented counseling was based upon multiple shift supervisors notifying her of these issues. However, North testified every partner in the store needed a refresher on the food warming procedures, which she did not do. (Tr. 391-392.) Two and a half years later, Respondent included this coaching as part of continued discipline. Despite the documented counseling, shift supervisors continued to report Kleeman about not washing her hands, not handling food safely and not complying with the rules and routines. Yet Respondent presented no disciplinary actions for this period. (Tr. 393.)[49]

On March 7, 2022, Kleeman received a written warning for failing to prepare vanilla sweet cream by the correct recipe. Kleeman testified that this incident was her first written warning. The corrective action report stated Kleeman failed to measure the ingredients, for which she had previously received coaching. Kleeman was reminded to use any resources needed, such as other employees, the store iPad, and recipe hub, to follow the standards and routines during her shifts. (Jt. Exh. 13.) Kleeman testified that the recipe was previously made in cubes, which was the recipe on the refrigerator in the back room. However, the vanilla sweet cream now was switched to two-liter pitchers instead of the cubes, without the recipe itself unchanged. Shift Supervisor Anthony Hudson, who observed Kleeman making the vanilla sweet cream in the cubes, told Kleeman she should not have prepared it that way. (Tr. 245-247.) Hudson did not raise that she had the incorrect recipe. (Tr. 248.) However, both Evans and North testified that each was the manager who witnessed Kleeman making the recipe incorrectly. (Tr. 393, 529.)[50]

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[48] Some points in the transcript and Respondent's Notice of Separation spell the name as "Kleenman." However, the witness spelled her name as written above. (Tr. 238.)

[49] Evans also testified that, in March 2022, he reminded Kleeman about food safety because she changed the trash bag then went to the warming oven without washing her hands. (Tr. 528-529.)

[50] Evans testified that he reported the incident to North but at first could not recall when he told North, then waffled to: "It would have been, potentially, the ---within the next two days." (Tr. 548 LL. 8-9.) Evans'

When Store Manager North and Assistant Store Manager Evans gave Kleeman the corrective action form on March 7, Kleeman did not explain that she made used the correct ingredient amounts per the recipe but made it in cubes instead. North told Kleeman she should not have used the cube. (Tr. 293.) The written warning does not identify that Kleeman made the recipe in the cubes. (Jt. Exh. 13.)

In July 2022, North received the brunt of several "formal" complaints filed against her. North did not testify where these complaints came from or who conducted the investigation; she only testified about one specific complaint: not holding partners accountable for washing their hands. North did not know who made the complaints but testified it was from employees in her store. She maintained the investigation was discontinued because she demonstrated she provided a single handwashing discipline. (Tr. 494-495.) North did not identify that Kleeman was one of the partners who was not following the handwashing procedures that caused the complaint. (Tr. 394.)[51]

After the remodeling, Kleeman returned to the store. On August 13, 2022, North and Evans gave Kleeman a final written warning, dated August 9, 2022, for an instance of incorrectly preparing sweet cream on August 7, 2022. The disciplinary action cites the Kleeman failed to meet expectation for the "barista approach," which included following standard work methods and guidelines by working in assigned positions and routines. It also states that Kleeman failed to follow the field operations guide portions of "living our values everyday" regarding receiving feedback and measuring sweet cream ingredients when North corrected her. It notes that Kleeman was repeatedly coached on handwashing in the "employee health and personal hygiene handbook' from the FDA and Respondent's standard for handwashing, citing a disciplinary action from October 6, 2021 reminding her of the same, but cites no other instances of coaching since that time. Kleeman testified that North reminded her at some point to wash, presumably when North apparently believed Kleeman was about to touch food without washing her hands after emptying garbage; North removed the food from the oven. (Tr. 299-300.)[52] Kleeman noted at the bottom of the corrective action form that she made the vanilla sweet cream to the point she could without the vanilla; she could proceed no further because vanilla was being obtained from another store. (Joint Exh. 12.)

North testified that she noticed Kleeman incorrectly making the vanilla sweet cream and that Kleeman had taken the measuring tools and impliedly, the whisk as well, to the back room. In addition, the missing vanilla syrup was supposed to be added at the second step, not last, because of the consistency. (Tr. 395.) North testified she did not recall whether she checked if the tools were in the sink because Kleeman did not have tools available as she prepared the sweet cream. (Tr. 456-457.) North told Assistant Store Manager Evans about the incident and additionally, Shift Supervisor Hudson, who allegedly confirmed Kleeman was not following rules and routines. The August 9 final written warning was the result. (Tr. 396; Jt. Exh. 12.)

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stutter-step testimony was reaching for an answer consistent with Respondent's position. Additionally his answer as qualified as "potentially," which makes his statement unsure. As a result, I cannot credit this testimony. Because North and Evans contradict each other about observing Kleeman and the reports, I cannot credit that both were present for the first error in making sweet cream.

[51] Respondent concludes that Kleeman was the individual that prompted others to complain about not holding partners accountable for handwashing. (R. Br. at 18, citing Tr. 394.) The record does not support this conclusion: North said the complaint was not holding "partners," not a singular and no names were mentioned.

[52] Kleeman recalled Shift Supervisor Hudson repeatedly reminding her to wash her hands, whether she started to do so or not. (Tr. 299-300.)

North normally would not give a final written warning for going out of order for a recipe, had that been the only issue. (Tr. 457-458.) North testified that the protocol for handling used utensils is to place them in the back or set them aside, then wash hands. (Tr. 496.) The underlying documents upon which Respondent relied for this final written warning were not produced during hearing by Respondent and I cannot independently verify the contents of the policies and procedures on which this disciplinary action is based.[53]

Kleeman testified that she could not recall what time of day or where she received the warning but recalled all were standing. (Tr. 259.) During the disciplinary interview, Kleeman denied that she incorrectly measured the sweet cream recipe. Kleeman maintained she measured all ingredients except the vanilla; the measuring cup and whisk were in the sink. North approached her while she was waiting for the vanilla. Kleeman mentioned the measuring cup and pitcher were in the sink and North failed to check the sink. (Tr. 262.)

Per email dated August 21, 2022, Shift Supervisor Hudson informed North that Kleeman did not clean dishes properly and got defensive when corrected, which occurred on August 10. (R. Exh. 4 at 2.) Hudson only informed North of the incident about "maybe" August 19, and North had no recollection of why Hudson reported the incident 9 days after it occurred. (Tr. 399-400.) During voir dire, North said it was typical for shift supervisors to take 11 days to report the incident. However, the shift supervisor could email North if she was not in the store. (Tr. 401.)

Evans testified that, on August 21, 2022, he and North met with Kleeman again about the vanilla sweet cream recipe and handwashing routines. (Tr. 530.)

At some unknown point, North, concerned about Kleeman's conduct so soon after the final written warning and whether "separation" was necessary, emailed Alyona Colyer in Partner Services about the matter. Colyer instructed her to "have another sit-down" with Kleeman to ensure Kleeman's understanding the policies. (Tr. 397.)[54] On August 22, 2022, North emailed an anecdotal note to Colyer about a conversation with Kleeman, which included Assistant Store Manager Evans, and primarily concerned Hudson's observations. (Tr. 402; R. Exh. 4.) North's note then says, ". . . multiple [shift supervisors] witnessed [Kleeman] not following the routines/policies outlined in the [final written warning." North then wrote about Kleeman being confronted about Hudson's observations and other shift supervisors and Kleeman becoming defensive. North reminded Kleeman that Kleeman would be held accountable and North would continue to document. At the end of the conversation, North provided copies of certain procedures, the field operations guide's "avoid giving and receiving feedback" page, the vanilla sweet cream recipe, and making Kleeman sign a copy to show these were discussed. (R. Exhs. 4-5.)[55] North, in her testimony, maintained that she would have employees sign policies or mission values. (Tr. 407-408.) Colyer's response thanked North, then continued:

[53] Kleeman admitted that the dairy should have been refrigerated. (Tr. 297.) However, Respondent did not use that as a reason for its discipline.

[54] Although the subsequent communication with Colyer was included in the exhibits, Respondent did not present this portion of the email communications.

[55] For R. Exh. 5, Respondent redacted the vanilla sweet cream recipe from the document, presumably for proprietary reasons; however, Respondent asked Kleeman to state the recipe, which she did not recall the exact proportions. In discussing the location of these documents, North testified that the documents came from the partner hub and the "Living Our Values" portion came from the Field Operations Guide. (Tr. 405.) The Union objected because the document because of the best evidence rule; General Counsel did not object to admission because it was in Kleeman's personnel file. (Tr. 407.)

> At this point you gave her this finalest final warning verbally in addition to [the final written warning] verbally on the expectations. If Gail continues to violate, policies, please call the case in for separation and will support!

(R. Exh. 2.)

On December 6, 2022, Shift Supervisor Hudson observed Kleeman touching a breakfast sandwich with her bare hands.and, at some point, informed Store Manager North (Tr. 409.) On December 9, 2022, North emailed Linda Diaz in Partner Resources:

> This should be the last of the emails I send in preparation for our call. In addition to everything that is documented here, we continue to experience a downward trend in Gail's performance. Also, after I called to open this request for separation, my [shift supervisor Hudson] informed me that on Tuesday 12/6/2022 he witnessed [Kleeman] touch a cooked breakfast sandwich with her bare hand while trying to put it into the bag to serve to the customer. When he saw it, he coached it and Gail said that she was trying to get the sandwich into the bag. I am not 100% sure if she acknowledged that she had touched the food or if she denied it, but he told me that he saw it happen right in front of him. This seems relevant because of the other health concerns around handwashing and not following standards and routines.

(R. Exh. 6.)

Despite the statement that the email was the last, North could not recall whether she sent other emails. (Tr. 415-416.) The email does not reflect that she told Kleeman she was on the "finalist" of final warnings. Such a conversation is not reflected for 10 more days.

On December 19, 2022, North sent an email to District Manager Presler about a conversation she and Assistant Manager Jake Cooper had with Kleeman. (R. Exh. 7.)[56] According to the email, North asked Kleeman whether she understood about her status on a final corrective action, to which Kleeman stated she would be fired. (Tr. 422; R. Exh. 7.) North testified that she had not previously been so frustrated that she created such documentation and she felt it was in line to do so. North also stated she was "advised" to have this conversation and report it.

2. Assistant Manager Cooper finds Kleeman violated the partner food and beverage policy, resulting in Kleeman's termination

    a. Drink policy enforcement shifts

The 2020 "Free Food Items and Beverages While Working" policy states: " . . . [P]artners are required to wait in line with other customers to receive their partner food items or beverages, and another partner should ring out each partner's items." (Tr. 361; GC Exh. 12.) Employees are permitted to enjoy free beverages and food 30 minutes before and after work and during their

[56] North stated she created the email within a few hours of the conversation and sent it through her company laptop. The document was admitted as a business record.

shift breaks. (Tr. 267; GC Exh. 12.) However, the process in obtaining the beverages and food changed three times over a period of months,[57] according to Kleeman. (Tr. 270.)[58]

Employees learn of the policy upon hire and when the policy shifts, such as an adjustment during COVID. (Tr. 611.) Employees have access to this policy on the computerized partner hub. (Tr. 517.) When Shift Supervisor Jean began working in the Johnson Creek Crossing store, about 2 years before hearing, the policy was not enforced. (Tr. 329.) Assistant Store Manager Evans also testified that the policy was not enforced until August 1, 2022. (Tr. 549.) Evans provided no examples of the policy being enforced with written disciplinary action after that time.

Store Manager North testified that, in August 2022, after the remodeling, she conducted an all-store meeting and a shift supervisor meeting. The employees needed to become familiar with the new layout. (Tr. 518.) North intended to reset expectations. According to North, one of the policies reviewed or "refreshed" was the employees' beverage policy with the employees. North testified that, since the employees had not worked together for 3 weeks, the timing was a natural for a reset. Assistant Store Manager Evans prepared the agenda at North's direction. (Tr. 485, 519-520; R. Exh. 11.) For the shift supervisors, North asked they enforce the beverage policy, without exceptions. (Tr. 361-362, 435-436.) Shift supervisors asked how an employee opening the store could take advantage of the beverage policy; North said the individual should make coffee at home and could not make their own once at the store. (Tr. 363.)

However, the refresh agenda on the food and beverage policy is only reflected specifically in North's agenda for shift supervisors, not for the rest of employees. (R. Exh. 11.) On cross-examination North admitted that she may not have been present for the entire shift supervisor meeting and she could not recall whether she or Evans made the statement about the policy. She then admitted that she did not know whether the refreshers to the shift supervisors actually occurred. (Tr. 485-487.) Evans testified that he conducted the supervisor portion of the meeting, including the refresh on the beverage policy, but left off crossing off the agenda so that North could see it; North was dealing with the construction superintendent. (Tr. 520-521.)[59] Based upon North's shifting testimony and no identification of the food and beverage policy on the agenda for employees, I find that Evans conducted the shift supervisor training, not North, and the food and beverage policy refresher was only shared with the shift supervisors, not with employees.

On October 16, 2022, District Manager Presler emailed his team of 13 store managers within his district about the need for a refresh on the beverage and food policy. He attached a document for the store manager to instruct each employee to sign off, restating the policy; he later testified he did not recall whether he required the store managers to collect signatures from each employee. The attachment was one he copied from the Partner Guide. Presler could not recall what violation prompted him to send the email and admitted that none of the violations occurred in his district. (Tr. 612-622, 663-665; R. Exh. 15.) Nothing in the record reflects that Kleeman or other employees at the Johnson Creek Crossing store were asked to sign this refresh.

[57] In answer to a leading question on direct examination, after giving her original answer of 1-2 months, Kleeman agreed the time period could have been longer than her original answer. (Tr. 270.)

[58] The transcript describes Respondent presenting Kleeman with an exhibit marked R. Exh. 4, that Kleeman admitted she initialed a document regarding the Perks for Partners drink policy but could not recall when. However, that document was R. Exh. 1. (Tr. 301-302, 364.)

[59] District Manager Presler testified that, during a meeting on August 8, 2022, he instructed store managers and assistant store managers in his district to refresh the policy. (Tr. 623-624; R. Exh. 16.) Neither North nor Evans corroborated that this meeting took place or that they took any action based upon Presler's instructions. As Respondent presents no evidence of another refresh so soon after the August 1 refresh, this information is irrelevant.

Nor does any evidence show that anyone at this particular store was disciplined or terminated by October 16.

In December 2022, North testified she found a need to reinforce this policy after she observed an employee telling the shift supervisor to mark out a cookie as the employee walked off the floor to take a break. The employee was still wearing an apron. (Tr. 364, 436.) North stopped the employee and instructed on the policy but gave no discipline or counseling. North again reeducated the staff about the food and beverage policy.[60]

b. Kleeman makes her own drink before her shift on January 14, 2023

Kleeman usually arrived at work 15 to 20 minutes before her shift. On the morning of January 14, 2023, Kleeman arrived before her 4:30 a.m. shift. One barista was working at the drive-thru and "keeping busy." (Tr. 271.) The interior café was not open. Kleeman asked the barista to ring up her usual drink, 4 shots of espresso and a little milk. (Tr. 271-272.) Kleeman was in process of making her drink when Assistant Manager Cooper came out of the back office. Cooper told Kleeman she could not make her own drink. Kleeman apologized, said it would not happen again and left the counter area. No customers were in the café area. (Tr. 272-273, 509.) Kleeman went to the back room to wait to begin her shift. (Tr. 290.) North later confronted Kleeman but only to say the matter would be discussed later. (Tr. 275.)

Kleeman met with District Manager Presler in late January 2023 but Presler did not mention the drink policy. Kleeman was more interested in transferring, although it might mean going to a non-unionized store, and Presler told her that she could not transfer because she was the final warning. Presler did not testify about this conversation.

c. On March 7, 2023 Respondent terminates Kleeman

The first evidence of North beginning the separation process is over two weeks after Kleeman prepared her own drink. North received her first contact from Partner Relations about separating Kleeman on January 31, 2023. It instructed North to provide the following documents: previous signed corrective actions; signed policy acknowledgements; and a statement from Kleeman about the January 14 incident. (GC Exh. 9.)

North contacted Partner Relations about Kleeman because North believed Kleeman's situation was not "cut and dry": Kleeman had a long pattern of violations but this violation was unlike the previous violations. (Tr. 454.) North consulted Partner Relations, which took seven weeks for North to obtain approval to terminate Kleeman. (Tr. 460.) North's emails with Partner

[60] To make the "reset" in policy, North testified printed out the beverage and food policy and wrote all employees' names on the back of the policy. The document, which is undated, was marked at the top for employees to read and sign the back to signify understanding. (Tr. 364; R. Exh. 1.) Based upon the Union's voir dire of R. Exh. 1, the signature page is unclear whether it actually matches the reinforcement of the food and beverage policy or a safety committee meeting in 2022. (Tr. 367-270.) Shift Supervisor Jean recalled North announced the procedure to obtain the beverage and/or food would be for the employee to stand in line or go through the drive-thru, place the order and give the employee number, and wait for the order. (Tr. 267-268, 270, 330.) When North made the announcement, she said employees could no longer make their own drink or food even when another employee rang up the order. (Tr. 268-269.) Given the conflict in testimony between North, Kleeman and Jean about reannouncement in December of this policy, I give R. Exh. 1 little weight. The conclusion that I draw is that in December 2022, the policy was "reset" in some way.

Relations sounded hesitant to take such severe action: North testified that Kleeman's long history of employment with Respondent gave her some pause.[61]

On February 5, 2023, Cooper sent an anecdotal note, dated January 15, 2023, to Store Manager North about Kleeman making her own beverage. (R. Exh. 8.)[62] Cooper said he immediately recorded the incident in a coaching log in his computer, which he did as a best practice. (Tr. 509-510, 513.) In the cover email to North regarding the statement, Cooper writes," Here's that statement for you regarding the partner Beverage policy . . . ." North did not testify when Cooper notified her about Kleeman's violation of the beverage policy. (Tr. 423-425.)

Approximately 3 weeks after Kleeman made her own drink, Respondent asked Kleeman to prepare a statement about what happened. The statement ostensibly follows her testimony. (Jt. Exh. 18.) In February Kleeman worked and took vacation. Kleeman heard no more about making her own drink until March 7, 2023, at which time she was terminated. (Tr. 279.) At that time, Kleeman was working at the drive-thru and speaking with the new district manager, Ryan Affinato. About an hour before Kleeman's shift was over, Store Manager North took Kleeman to the back room. North handed Kleeman her coat, purse, and green apron cards and took her back out into the café floor, where Affinato waited. North immediately read verbatim the Notice of Separation. (Tr. 279-282.) The Statement portion provided a litany of Kleeman's past infractions, plus the last infraction:

> This document serves as the separation notice for Gail Kleenman [sic] due to continued violation of the Starbucks Partner beverage policy.
>
> Gail has received the following corrective action/coaching related to the barista approach.
>
> On 8/3/2020 Gail received a documented coaching for ringing on another partners assigned till.
> On 11/27/2020 Gail received a documented coaching for not completing her covid mandatory health check before beginning work.
> On 3/7/2022 Gail received a written warning for failure to meet the expectation of the barista role – preparing beverage components incorrectly.
> On 8/9/2022 Gail received a final written warning for failure to meet the expectation of the barista role – preparing beverage incorrectly, not following standard of the beverage components.
>
> On 1/24/23 Gail made her own beverage while not the clock, a violation of our beverage mark out policy and a violation by working behind the line while not on the clock.
>
> According to page 69 of the partner resources manual:
> Perks for Partners

[61] North also testified that an employee's benefits increase at 20 years, including a large bonus. Retirement benefits would not be available after termination. (Tr. 461.-462.)

[62] R. Exh. 8 is admitted over the Union's objection at Tr. 426-427; the transcript erroneously attributes no objection from Respondent counsel Marty instead of GC Garfield. (Tr. 427, LL. 2-3.), However, this document was supposed to be part of a larger document, showing Cooper's coaching log. Respondent insisted it would only produce this excerpt rather than the entire log, which the Union contended could show additional comparator evidence.

Free Food Item and Beverages While Working

- A store partner may enjoy – free of charge – any handcrafted beverages while on break during the partner's scheduled shift and during the 30 minutes prior to or after the partner's scheduled shift. A partner may not receive more than one free beverage at a time, and not order multiple free beverages after the shift ends.

. . . .

The partner is required to wait in line with other customers to receive their partner food item or beverage, and another partner must process the transaction on the register.

(Jt. Exh. 11.)

Kleeman told North and Affinato that she was upset and that their action was unfair. Affinato made no comments. (Tr. 283.)

d. Comparator evidence

Regarding the COVID pre-check violation, Respondent presented documented coachings for three different employees on November 27, 2020, the same date on which Kleeman received her documented coaching. Respondent had no other comparable COVID disciplinary actions. (Tr. 429-431; R. Exh. 9.) North saw no need for a refresh on the COVID policies despite three violations in one day. (Tr.499.)

North testified that no employee was disciplined for food and beverage policy violations for 2022. (Tr. 486.) Evans testified that no employee had been so disciplined from the beginning of his tenure at the store in 2021 until the reset of policy on August 1, 2022, but provided no examples until Kleeman's discipline. (Tr. 549.)

Regarding Respondent's enforcement of the free beverage policy, Respondent presented to employee R.V. a written warning for a July 2, 2023 violation of the beverage policy and ringing up the drink on another's till instead of her own. R.V. also was on the clock when she made the drink. The employee also lied about how the drink was rung up. The employee received the disciplinary action on August 4, over one month after the incident and a few days before the beginning of this hearing and included discipline for dishonesty. R.V. was reported for the violations by a shift supervisor. North reported she had not recalled any additional reports made to her. (Tr. 431-433. 499; R. Exh. 10.) North further testified that, except for the cookie incident and Kleeman, no other incidents occurred when employees prepared their own food/beverages. That employee was "coached in the moment" and received no written discipline. North justified not giving any written discipline because she "stopped" the violation before it happened. (Tr. 437. 488.)

Kleeman said that she observed other employees making their own drinks but no supervisors present; to her knowledge, none were disciplined after North's announcement. (Tr. 275.) A shift supervisor testified that she observed four or five occasions when an employee made their own beverage. Those employees were reminded by other shift supervisors and North and Evans about the policy requirements. None of these employees told Jean that they were disciplined. (Tr. 330-332.) Respondent did not have any written disciplinary actions for those employees who violated the policy.

Respondent never presented any evidence that Kleeman was required to sign the field operations guide and employees are not typically required to do so. (Tr. 492.)

3. Analysis

a. Credibility

General Counsel used a significant amount of leading questions with Kleeman. Kleeman often tried to answer before General Counsel completed a question and was frequently reminded not to talk over General Counsel. However, as much as possible I rely upon the documents that were made available and that the lack of documentation in certain areas creates adverse inference.

North's testimony about Kleeman incorrectly making vanilla sweet cream was scant and undetailed. The written warning does not refer to the failure to make the recipe in the pitcher instead. (Tr. 393-394; Jt. Exh. 13.) Because of the lack of detail and discrepancies, I do not credit North's limited testimony about this disciplinary action except to the extent that Kleeman received a written warning.

North also testified that in July 2022 some party investigated her for not holding employees accountable for proper handwashing. However, on Respondent's direct examination, she left out significant information, including who conducted the investigation, what other complaints were contained in the investigation, or whether Kleeman was one of the partners who was not following the procedure. I therefore reject the implication that Kleeman was one of the partners who was not following procedure. (Tr. 393-394.)

North testified that she presented employees with sections of policy or Mission Values to sign when they violated those sections. North so directed Kleeman not with her final written warning, but during the August 21, 2022 conversation in which Kleeman was required to sign a few sections, some of which did not pertain to the most recent incident. (Tr. 408.) Yet Respondent did not present specific examples of North doing so; North could only cite one example for Clark, who allegedly violated numerous policies. The testimony that North consistently required employees to sign certain policies and procedures upon violation for documentation into the employees' files is not supported in the record.

I also discredit that North reset expectations for employees on the free beverage and food policies in August 2022. The agenda for this meeting shows that the expectation was only discussed with the shift supervisors, but not employees. This discrepancy undermines North's testimony about what she told the rank-and-file employees. North also was inconsistent about whether the shift supervisors were actually informed of changes in the food and beverage policy in August 2022. On direct examination she testified that the shift supervisors were instructed; on cross-examination, she waffled and admitted she did not know whether the refresh took place. (Tr. 485-487.) As a result, I do not credit North's initial testimony that the shift supervisors were so instructed or that employees received any instruction.

North's testimony about the incidents in which employees violated the food and beverage policy was inconsistent: She testified at first to the need for a reset in December after witnessing an employee take a cookie and ask that another employee ring her out; then Kleeman's incident; and finally the incident in July 2023 resulting in a written warning. On cross-examination, North

could only recall the first two incidents, not the third incident from July 2023. (Tr. 437.) She also admitted that no one received discipline in 2022.

b. Application of *Wright Line* to credited evidence

General Counsel presents a prima facie case, which includes instances of pretext. Respondent had knowledge of Kleeman's union activities and sympathies. Circumstantial evidence can create a reasonable inference of knowledge. *North Atlantic Medical* Services, 329 NLRB 85, 85-86 (1999), enfd. sub nom. *NLRB v. Regional Home Care Services, Inc.*, 237 F.3d 62 (1st Cir. 2001). The managers had knowledge of the employees' union activities. *Flex-N-Gate Texas, LLC*, 358 NLRB 622 n. 1 (2012). Clark's undisputed testimony demon, including discussions that North and Clark had and North's statement at the district meeting that she believed her store would be the next to file a petition. North and Evans examined the letter to Schultz to divine who wrote it. Although the managers concluded Clark was the author, the letter included Kleeman's name. The managers' knowledge of Kleeman's union activity and leanings are imputed to Respondent. *Twin Table & Furniture Co., Inc.*, 133 NLRB 1113, 1122 (1961).[63] Because the store employs a relatively small number of people, small-plant doctrine also applies for knowledge of Kleeman's activities, including discussions with Clark in the back room. *NLRB v. Roemer Industries*, 824 Fed. Appx .at 404. This inference is appropriate because of the circumstantial evidence of Kleeman's activities. *McKinney v. Starbucks Corp.*, 2022 WL 543206 at *12 (W.D. Tenn 2022), affd. 77 F.4th 391 (6th Cir. 2023), petition for cert. pending (2023).

Regarding use of plant size as an indicator of knowledge, Respondent cites *Mantac Corp.*, 231 NLRB 858 n. 2 (1977). The case is inapposite: the Board found small plant doctrine could not support an inference of knowledge because "absent supporting evidence that such activities were carried on in such a manner or at such times that, in the normal course of events, Respondent must have been aware of them." Id. (cites omitted). The employees at issue in *Mantac* had no union activities on the plant premises. Id. Here, Kleeman talked generally to Evans and was named in Clark's letter to Schultz. She also participated in discussions in the back room, on the store premises. *Sears, Roebuck & Co. v. NLRB*, 349 F.3d 493, 506 (7th Cir. 2003).

Kleeman's situation does not demonstrate any direct evidence of animus and Respondent maintains the record contains no evidence of animus. Yet animus is aplenty. First, animus towards the union in general may be applied to find an unlawful termination. *John W. Hancock, Jr., Inc. v. NLRB*, 73 Fed. Appx. 617, 621 (unpub.) (4th Cir. 2003) enfg. 357 NLRB 1223 (2002). The 8(a)(1) violations above, although Kleeman was not involved, support a finding of Respondent's animus towards union activities and sympathies. Id. at 622.

The circumstances surrounding Kleeman's disciplinary actions and discharge also point to animus and pretext. Where Respondent's actions are pretextual, the inference is that Respondent's true motive is an unlawful one that it attempted to conceal. *Weldon, Williams & Lick Inc.* 348 NLRB 822, 826 (2006) (citing *Richard Mellow Electrical Contractors Corp.*, 327 NLRB 1112, 1115 n. 17 (1999)), enfd. 255 Fed.Appx. 535 (D.C. Cir. 2007). Respondent's notice of separation reaches back to 2020 to support its reasons to terminate Kleeman. Although Respondent's corrective action forms state the discipline never is removed from a file,

[63] Compare *San Angelo Packing Co.*, 183 NLRB 842 n. 30 (1967): The discriminatee's name was not in a union letter and the trial examiner stated nothing in the conversations with managers could impute the employer's knowledge. According to Clark's credited testimony, Evans made clear he had reviewed the letter.

Respondent does not identify how missing a COVID check is relevant to the following disciplines. Further, Respondent did not include the 2020 disciplinary actions in the 2022 disciplinary actions as a reason give progressive discipline to Kleeman. Therefore, Respondent reason's for termination, compared to the 2022 disciplinary actions, shifted.

An employer should meet its burden by demonstrating the rule has been applied to employees in the past. *Publix Super Markets*, 347 NLRB at 1439. Respondent contends new employees received instruction on the policy as part of their orientation and that it conducted some refreshers on the policy. Yet others who violated the rules received little discipline or none at all. The first example occurred when Store Manager North believes the employees needed a "refresher," but issued no discipline. When an employee advised another to ring him out for taking a cookie, the requesting partner had already violated the policy. That North stopped it does not excuse the behavior. North split hairs and found no reason to discipline the partner who ignored the requirements of standing in line. Evans testified that the no one was disciplined until the policy reset on August 1, 2022, yet failed to state any examples of someone disciplined, much less terminated, for a violation of the food and beverage policy between the policy resets until he left that store. Nor did Cooper provide examples preceding Kleeman's termination. *Bardon, Inc. d/b/a Aggregate Industries*, 371 NLRB No. 78, slip op. at 2 (2022) (disparate treatment when employer enforces a previously violated policy that was not previously enforced). Inconsistent application does not rebut General Counsel's case regarding animus. *Publix Super Markets, Inc.*, 347 NLRB 1434, 1440-1441 (2006). Respondent singled out Kleeman, a union supporter, for harsher treatment pursuant to the food and beverage policy. *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d at 264 (enforcement of valid work rule against union supporter in disparately harsh manner violative).

Respondent cites no examples of discipline at this store except for R.V. The incident involving R.V. occurred on July 2, 2023. Although Respondent wrote up R.V.'s discipline on July 31, 2023, R.V. did not receive it until August 11, 2023, very close to the beginning of the hearing. Thus, Respondent waited until shortly before the hearing to issue R.V's warning. (R. Exh. 10.) R.V.'s discipline shows a few violations of Respondent's policies in the single incident, such as making the drink while on the clock (and still wearing an apron), ringing up the order herself and doing so on another associate's till, and then lying about it. R.V's lack of honesty also violates Respondent's code of conduct but did not warrant a final written warning or termination.

In comparison, Kleeman, who admittedly made the drink herself, was not on the clock and did not ring it up herself, nor did Kleeman lie about it. (R. Exh. 10.) Comparing Respondent's treatment of R.V. to Kleeman, Respondent meted out significantly more severe punishment for Kleeman, particularly when balanced with North's reluctance to terminate Kleeman for this incident. This single example is insufficient to show Respondent was consistent in enforcing the policy with written disciplinary actions. The disparate treatment is evidence of Respondent's animus and pretext. *Wismettac Asian Foods*, 371 NLRB No. 9, slip op. at 7 (failure to come forward with evidence of similarly treated employees points to pretext); *BS&B*, 370 NLRB No. 90, slip op. at 2 (employer's defense pretextual when it failed to explain why it discharged an employee when it did not discipline others for similar conduct); *Bruce Harwood Floors*, 314 NLRB 996, 996 and 1001 (1994) (animus); *NLRB v. Advance Transportation Co.*, 965 F.2d 186, 193-194 (7th Cir. 1992), enfg. 299 NLRB 900 (1990) (terminating driver for violating unauthorized coffee break policy when no driver ever received a warning shows employer failed to meet its burden it would have fired driver but for protected activities).Also see *Lhoist North America of Alabama, LLC, A Subsidiary of Lhoist North America*, 370 NLRB No. 12, slip op. at 1 n. 3 (2021), enfd.2023 WL 4679013 (11th Cir. July 21, 2023) (employer's defense that it terminated union president for talking on cell phone during company time unavailing when employe only discharged one

temporary employee for talking on cell phone multiple times, and had no evidence on terminating one employee for a single incident.)

When Respondent relies upon a false reason, Respondent fails to meet its burden to show it would have taken the same action for those reasons absent protected activity. *Boothwyn Fire Co. No. 1,* 363 NLRB 1893, 1899 (2016); *Cherry Hill Convalescent Center*, 309 NLRB 518, 524 (1992). Respondent's witnesses only identified one instance of Kleeman violating the Food and Beverage policy. The Notice of Separation contradicts itself about the reason for terminating Kleeman---It states that she had a continuous violation of the free beverage policy. This statement is incorrect as Respondent only cited one instance in which Kleeman violated the policy. Respondent fails to meet its burden by relying upon a created reason that instead demonstrates pretext.

In addition, no reports were documented until March 2022, a year and a half after North also testified that, in December 2022, she did not give more than a counseling on the spot to the employee who violating the food and beverage policy because she stopped it in midstream. However the employee already jumped the customer line by making the statement to the other employee; the policy was already violated and the distinction here is a false one. Testimony demonstrated that numerous employees violated the policy without more than an undocumented talking-to. Because Respondent tolerated this conduct without any written disciplinary action for other employees for quite some time, Respondent's actions are discriminatory.

Failure to provide a clear, consistent and credible explanation for discipline supports a finding of pretext. *Wismettac Asian Foods*, 371 NLRB No. 9, slip op. (2021), enfd. 2022 WL 14915659 (9th Cir. 2022); *NLRB v. Inter-Disciplinary Advantage, Inc*., 312 Fed. Appx. 737, 751 (6th Cir. 2008). Store Manager North admitted she was hesitant to terminate Kleeman for this infraction, which I credit. North's hesitance points to an overreaction to the violation. When the rule violation is trivial, particularly here where so many never received any written disciplinary actions, Respondent's actions are pretextual. *Bell Halter, Inc.*, 276, NLRB 1208, 1222 (1985), quoting *Sea-Land Service*, 240 NLRB 1146, 1147 (1979).

Toleration of alleged poor performance until the ultimate violation demonstrates Respondent's reasons are pretextual. *Roemer Industries*, supra, slip op. at 18; *Andronaco*, 364 NLRB at 1897. Respondent points to R. Exh. 6, in which North was working on terminating Kleeman in January 2023 because of her concerns about Kleeman's ability to work safely. That exhibit, dated December 9, 2022 and citing continued downtrends in Kleeman's performance, does not support Respondent's contention that was preparing to terminate Kleeman in January 2023. The subsequent events show that North previously failed to give Kleeman notice that she was on the "finalest" of final written warnings and required North, 10 days later, to discuss those problems with Kleeman again.

In addition, Respondent collected quite a record on Kleeman beginning about the unionization efforts began, and then doggedly pursued compiling a disciplinary record after the unionization efforts were continuing. The disciplinary record, as cited in the separation notice, has a gap of written disciplinary actions, yet relies on discipline accrued in 2020. Respondent apparently has no disciplinary action on Kleeman again until March 2022. These also contribute to findings that Respondent displayed animus and gave pretextual reasons for its actions. *Conley v. NLRB*, 520 F.3d 629, 643-644 (6th Cir. 2008), enfg. *Delmas Conley d/b/a Conley Trucking* 349 NLRB 308 (2007).

Respondent contends that Kleeman's discipline did not depart from its usual practices. (R. Br. at 32, citing *Waterbury Hotel Management, LLC*, 314 F.3d at 652.) Therein lies the same issue as with Clark's disciplinary action and Respondent's failure to produce its disciplinary policies and procedures: The written documents would have been the best evidence pf what the disciplinary process and policies require. Because Respondent refused to make those documents available for review, such a conclusion is unsupported. I instead must take an adverse inference from Respondent's failure to produce them and find that those documents would have shown Respondent in fact did not follow its disciplinary policies and procedures.

Respondent fails to overcome General Counsel's prima facie case and the record reflects pretext in Respondent's actions. Based upon the analysis above and North's hesitance to rely upon that policy, Respondent's reliance upon the food and beverage policy for Kleeman's termination are pretextual. When the reasons are pretextual, an employer commits an unfair labor practice. Therefore Respondent violated Section 8(a)(3) and (1) by terminating Kleeman. *NLRB v. Health Care Logistics, Inc.*, 784 F.2d 232 (6th Cir. 1986), citing *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 398 (1983).

VIII. SECTION 8(A)(5) FAILURE TO BARGAIN DISCIPLINE ALLEGATION

The Board's current standard for discretionary discipline before parties reach a collective bargaining agreement currently is stated in *CareOne at Milford*, 369 NLRB No. 109 (2020). The Board overturned *Total Security Management Illinois I, LLC*, 364 NLRB No. 106 (2016). In doing so, the Board stated that it would not "recognize a predisciplinary bargaining obligation under the Act." *Care One*, 369 NLRB No. 109, slip op. at 1. As I am bound by current Board precedent, I am unable to find a violation of Section 8(a)(5) and (1) for Respondent's failure to bargain disciplinary actions with Charging Party Union before the disciplinary actions are given. I therefore recommend dismissal of this allegation.

IX. RESPONDENT'S ADDITIONAL AFFIRMATIVE DEFENSES

Respondent puts forth a number of affirmative defenses in its Answer(s). With the exception of *Care One*, supra, Respondent addresses none of these in their briefs. It includes its rote defenses, such as: failure to state a claim upon which relief may be granted; allegations are impermissibly vague and deny Respondent due process; any violations, if found, are de minimis to the rights guaranteed by Section 7 of the Act and therefore no remedy would further the purposes of the Act; and the complaint allegations are barred by waiver, estoppel and unclean hands. Respondent also maintains that the Act, as interpreted and/or applied here, is unconstitutional. It also makes a number of other affirmative defenses, a few of which may be addressed later in Supreme Court decisions this term. For the purposes of this decision, Respondent does not address these issues in its brief and I consider them waived.

CONCLUSIONS OF LAW

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

2. Charging Party Workers United Labor Union International, affiliated with Service Employees International Union has been a labor organization within the meaning of Section 2(5) of the Act.

3. The following are Respondent's supervisors within the meaning of Section 2(11) and agents within the meaning of Section 2(13):

a.	Joshua Presler	District Manager
b.	Ryan Affinito	District Manager
c.	Ryan Wolfe	District Manager
d.	Sarah North	Manager, Johnson Creek Crossing store
e.	Kai Evans	Assistant Manager
f.	Jake Cooper	Assistant Manager

4. Respondent violated Section 8(a)(1) of the Act by:
   a. Discriminatorily enforcing the dress code.
   b. By Evans and Presler, telling employees that they violate the dress code while wearing union t-shirts but allowing other t-shirts until that time.
   c. Discriminatorily removing or confiscating union literature from the community bulletin board.
   d. By Evans, telling employees that they may not post union literature on the community bulletin board after allowing other outside postings.

5. Respondent violated Section 8(a)(3) and (1) of the Act by:
   a. Terminating its employee Heather Clark;
   b. Terminating its employee Gail Kleeman.

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

7. The Act has not been violated in any other way.

REMEDY

Having found Respondent engaged in certain unfair labor practices, Respondent is ordered it to cease and desist and to take certain affirmative action designed to effectuate the Act.

Respondent, having unlawfully removed or confiscated union literature from its community bulletin board while allowing the posting of other non-Respondent sponsored literature, shall be ordered to cease and desist from removing and/or confiscating union literature from its community bulletin board.

Having found Respondent unlawfully terminated Heather Clark and Gail Kleeman, Respondent is ordered to offer them reinstatement and make them whole for any loss of earnings and other benefits suffered as a result of the terminations. Respondent is ordered to make Clark and Kleeman whole for any loss of earnings and other benefits suffered as a result of their discharges. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In accordance with *Thryv, Inc.*, 372 NLRB No. 22 (2022), Respondent shall also compensate Clark and Kleeman for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharges, including reasonable search-for-work and interim employment expenses, if any, regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra.

Further, Respondent is ordered to compensate Clark and Kleeman for the adverse tax consequences, if any, of receiving lump-sum backpay awards and to file with the Regional Director for Region1 9, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s). *AdvoServ of New Jersey, Inc.*, 363 NLRB 1324 (2016). In accordance with our decision in *Cascades Containerboard Packaging--Niagara*, 370 NLRB No. 76 (2021), as modified in 371 NLRB No. 25 (2021), Respondent is ordered to file with the Regional Director for Region 19 copies of the unlawfully discharged unit employees' corresponding W-2 form(s) reflecting the backpay awards. Respondent is ordered to remove from its files any references to the unlawful discharges and to notify Clark and Kleeman in writing that this has been done and that the unlawful discharges will not be used against them in any way.

General Counsel also seeks a broad cease-and-desist order due to the prolific administrative judge decisions and one Board decision, 372 NLRB No. 50 (2023). Administrative law judges' decisions and orders are not the word of the Board. As a result, I decline to issue a broad cease-and-desist order.

General Counsel requests that Respondent post the Board's Explanation of Rights and that the posting remain for longer than 60 days. Such a finding again would have to rely upon my fellow administrative law judges' decisions, so for the same reasons I decline to create the *Hickmott* order, I deny this request.

In addition, General Counsel requests training for the supervisors and that Respondent issue letters of apology to employees for violating their statutory rights. These remedies are not standard Board requirements. Regarding the training requirement, General Counsel cites *J.P. Stevens & Co.*, 244 NLRB 407, 458 (1979), which had a significantly larger number of violations and I find that would be a step too far for this case, which has a limited number of violations. Regarding the letter of apology, the Board has not created this remedy, so I decline to make such an order.

Lastly, General Counsel requests a notice reading, citing *Noah's Ark Processors, LLC d/b/a WR Reserve*, 372 NLRB No. 80, slip op. at 6 (2023) and *Johnson Fire Services, LLC*, 371 NLRB No. 56, slip op. at 6 (2022). Given the size of the employee complement and termination of a vocal union adherent, I agree that a notice reading is appropriate.

ORDER

Respondent Starbucks Corporation, Portland, Oregon, its officers, agents, successors and assigns, shall

1. Cease and desist from
   a. Discriminatorily enforcing the dress code.
   b. Telling employees that they cannot wearing union t-shirts.
   c. Discriminatorily confiscating or removing posted union literature from the community bulletin board.
   d. Telling employees that they cannot post union literature on the community bulletin board.
   e. Disciplining and/or terminating employees due to their union and/or protected concerted activities and sympathies.
   f. In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

a. Within 14 days after the issuance of this decision, reinstate Heather Clark and Gail Kleeman to their former positions or, if their positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

b. Make whole Kleeman and Clark for any loss of earnings and other benefits, and for any direct or foreseeable pecuniary harms suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.

c. Compensate Clark and Kleeman for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

d. File with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

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

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

g. Within 14 days after service, duplicate and mail, at its own expense and after being signed by Respondent's authorized representative, copies of the attached notice marked "Appendix"[64] to the last known addresses of all employees who were employed by Respondent at its Johnson Creek Crossing store in Portland, Oregon at any time since March 1, 2022. In addition to the mailing of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or internet site, and/or other electronic means, if Respondent customarily communicates by such means.

h. Respondent shall post at its Johnson Creek Crossing store in Portland, Oregon copies of the attached notice marked "Appendix."[65] Copies of the notice, on

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

[65] If the facility involved in these proceedings is open and staffed by a substantial complement of employees, the notice must be posted within 14 days. If the facility involved in these proceedings is closed or not staffed by a substantial complement of employees due to the Coronavirus Disease 2019 (COVID-19) pandemic, the notice must be posted within 14 days after the facility reopens and a substantial complement of employees have returned to work. If the notice to be physically posted was posted electronically more than 60 days before physical posting of the notice, the notice shall state at the bottom that "This notice is the same notice previously [sent or posted] electronically on [date}."

forms provided by the Region Director for Region 19, after being signed by Respondent's authorized representative, shall be posted by Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

i. Hold a meeting or meetings during worktime at the Johnson Creek Crossing location, scheduled to ensure the widest possible attendance of employees, at which time the attached notice marked "Appendix" will be read to employees by a District Manager from the Store's district in the presence of a Board Agent, or at Respondent's option, by a Board agent in the presence of the District Manager.

j. Within 21 days after service by the Region, file with the Regional Director for Region 19 a sworn a certification of a responsible official on a form provided by the Region attesting to the steps that Respondent has taken to comply.

Dated Washington, D.C., November 27, 2023

Sharon Levinson Steckler
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discriminatorily enforce the dress code while allowing other t-shirts to be worn and WE WILL NOT tell you that you cannot wear union t-shirts.

WE WILL NOT discriminatorily confiscate or remove union literature from the community bulletin boards and WE WILL NOT tell you that you cannot post union literature on the community bulletin board.

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

WE WILL reinstate Heather Clark and Gail Kleeman within 14 days of the issuance of this decision to their former positions, or if those positions no longer exist, the substantially equivalent positions they held before their unlawful terminations.

WE WILL make Gail Kleeman and Heather Clark whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make such employees whole for any other direct and foreseeable pecuniary harms suffered as a result of their discharges, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Kleeman and Clark for the adverse tax consequences, if any, of receiving lump-sum back pay awards and WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar year(s) for each employee.

WE WILL file with the Regional Director for Region 19, within 21 days of the date the amount of backpay is fixed by agreement or Board order or such additional time as the Regional Director may allow for good cause shown, a copy of each backpay recipient's corresponding W-2 form(s) reflecting the backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful discharges, and WE WILL, within 3 days thereafter, notify Kleeman and Clark in writing that this has been done and the discharges will not be used against them in any way.

WE WILL hold a meeting or meetings during working hours and have this notice read to you and your fellow workers by Starbuck's District Manager in the presence of a Board agent or, at Respondent's option, by a Board agent in the presence of Respondent's District Manager.

STARBUCKS CORPORATION LLC
(Employer)

Dated: _____ By _____
(Representative) (Title)

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

Green–Wyatt Federal Building
1220 SW 3rd Avenue, Suite 605
Portland, OR 97204–2170
(303) 844–3551, Hours of Operation: 8:00 a.m. to 4:30 p.m.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/19-CA-296765 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER (206) 220-6300.