

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STARBUCKS CORPORATION d/b/a)	
STARBUCKS COFFEE COMPANY)	
)	
)	
and)	Case Nos. 2-CA-37548
)	2-CA-37599
)	2-CA-37606
LOCAL 660, INDUSTRIAL WORKERS OF THE WORLD)	2-CA-37688
)	2-CA-37689
)	2-CA-37689
Charging Party.)	2-CA-37798
)	2-CA-37821
)	2-CA-38187

**BRIEF IN SUPPORT OF EXCEPTIONS OF EMPLOYER STARBUCKS COFFEE
COMPANY TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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INTRODUCTION

Pursuant to 29 C.F.R. § 102.46(c), Starbucks Coffee Company (“Starbucks,” “Employer” or “Respondent”), submits this Brief in Support of its Exceptions to the Decision of the Administrative Law Judge (“ALJ”) dated December 19, 2008 (“Decision”).

Starbucks seeks review of the ALJ’s decision that the Act requires it to allow employees to wear more than one union button while at work. The record demonstrates that Respondent’s limitation on the number of buttons that may be worn does not unlawfully restrict its employees from expressing their support for a union and, even if it did, Starbucks interest in maintaining its public image constitutes special circumstances that outweigh any possible adverse effect on employees’ Section 7 rights. The ALJ erred by ignoring unrebutted testimony establishing that this limitation derived from Starbucks detailed dress code which, as the ALJ found, is consistently and strictly enforced. The ALJ further erred by injecting her own belief as to Starbucks intended public image by finding the special circumstances exception inapplicable based on evidence that employees can wear Starbucks-issued pins as a means for recognizing their achievements at work. Comparing pins designed to bolster store performance with pins advocating a union contravenes Board law.

In addition, Starbucks appeals the ALJ’s determinations that it unlawfully discharged three employees based upon their union activities. Two of the employees were terminated for blatant insubordination, which included profane and threatening behavior directed at their supervisors. The terminations were in accordance with Starbucks clearly established policies that have been consistently enforced without regard to an individual’s protected activity. The third employee was fired for substandard job performance, which included his virtual failure to appear at work for over eight months and his receipt of two consecutive job evaluations documenting his poor performance.

Despite overwhelming and virtually un rebutted evidence proving the legitimate and well-grounded reasons for the discharges, the ALJ nonetheless overturned these decisions based on, in effect, the single fact that they were known union supporters. In doing so, she misapplied governing law, drew illogical inferences from undisputed facts, and improperly couched her unsupported findings as based on contradictory “credibility determinations.”

For example, one of the alleged discriminatees was fired after he admittedly engaged in a profane and threatening tirade in the middle of the retail area of a Starbucks store, during which he screamed profanities at a customer and a Starbucks manager. Yet the ALJ determined that such behavior was somehow protected by the Act because, among other reasons, it was “overblown” for the approximately 100-pound manager to testify that she had “felt threatened” by the profane outburst of the 220-pound employee. The ALJ reached this conclusion even though the employee had previously been suspended for a prior incident she witnessed where he demonstrated his lack of “anger management.”

Similarly, the other employee was discharged after she encouraged demonstrators outside a Starbucks store to “spit on” and “piss on” one of her supervisors, and then joined a threatening group that followed the supervisor home. The ALJ found this admitted misconduct was “protected activity” under the misguided reasoning that any abusive conduct short of the “sustained” use of physical aggression or profanities will retain protection under the Act.

Finally, the ALJ determined that Starbucks was powerless to fire an employee for job performance, even though she determined that his performance was clearly substandard – for a period of well over a year during which he received repeated warnings and performance reviews – based upon what amounts to the fact that he was a longstanding union supporter. These determinations must be reversed.

For these and the reasons set forth below, the Decision of the ALJ should be reversed.¹
Because of the important issues presented by the Decision, Starbucks requests oral argument.

STATEMENT OF FACTS

A. The Parties

Starbucks operates retail coffee stores throughout the United States. This case involves several Starbucks stores located in Manhattan, New York.

The underlying charges were filed by Local 660 of the Industrial Workers of the World (hereafter “the IWW” or the “Union”).

In June 2004, the Union filed a petition with Region 2 of the National Labor Relations Board (“NLRB” or “Board”) seeking to represent the baristas at Starbucks store at 200 Madison Avenue. (GC Ex. 30; Tr. 1053). However, the Union withdrew the petition on the eve of the election. (Tr. 1062-63, 1189-90). Since then, the IWW has disavowed any interest in serving as a collective bargaining representative of any Starbucks employee under the National Labor Relations Act (“NLRA” or “Act”). Instead, the IWW has engaged in a series of demonstrations and actions purposely designed to disrupt the operations of various Starbucks stores in New York. (Resp. Ex. 46; Tr. 526-27, 1065-67, 2478-80). As detailed below, the actions of the IWW and its members have included threats and intimidation directly at Starbucks employees. *See, e.g.*, (Resp. Ex. 46; Tr. 2421, 2482-83, 2624-25).

Joseph Agins (“Agins”), Isis Saenz (“Saenz”) and Daniel Gross (“Gross”) were employed as “baristas” at several Starbucks stores in New York. (Tr. 819, 1052, 1349). During their employment, each was a member of the IWW. (Tr. 970, 1052-54, 1168). Both Agins and Saenz

¹ Specifically, Respondent excepts to the ALJ’s factual findings and legal conclusion with respect to Paragraphs ¶¶ 12(a)-(c), 22(a)-(c), 23(a)-(d), and 24(a)-(c) of the Amended Complaint. (GC Ex. 46).

were fired for insubordination in violation of Starbucks clear and consistently-enforced policies. (Tr. 1374, 2083-84, 2100, 2504-05, 2522). Gross was discharged for poor job performance, which included his virtual failure to report to work for more than eight months and his willful failure to respond to consecutive performance evaluations and other counseling encouraging him to improve his performance. (Tr. 295, 297, 304, 1233).

B. Starbucks Retail Store Operations

Starbucks stores are staffed by “partners,” including hourly employees known as baristas and shift supervisors. (Resp. Exs. 61, 65 at 9; GC Ex. 11 at 9; Tr. 331). In general, the duties of shift supervisors and baristas include preparing beverages, ringing up customers, cleaning and stocking the store, and product merchandising. (Resp. Exs. 61, 65 at 9; GC Ex. 11 at 9; Tr. 2322-23, 2344). Each store is led by a store manager and, in many locations, Starbucks also employs one or more assistant store managers. (Resp. Exs. 61, 65 at 9; GC Ex. 11 at 9; Tr. 331, 1856). All partners within the store must be knowledgeable about the various coffees and products sold in the stores and must stay abreast of Starbucks new and promotional drinks and coffees, which change each season. (Tr. 652, 1181, 1203, 2328, 2389).

Starbucks maintains employment policies that are provided to all newly-hired partners in the Partner Information and New Hire Paperwork and Partner Guide (“Partner Guide”). (Resp. Exs. 61, 65; GC Ex. 11; Tr. 385). Included in these materials is the Starbucks Mission Statement, which requires partners to “[p]rovide a great work environment and treat each other with respect and dignity.” (Resp. Exs. 61, 65 at 4; GC Ex. 11 at 4). All Starbucks partners are expected to comply with policies designed to ensure that retail customers are provided with the best possible experience. Indeed, Starbucks success has been dependent upon the quality of its products and the welcoming environment it strives to create for customers in its stores, described as the “Third Place.” (Resp. Exs. 61, 65).

C. Starbucks Retail Store Dress Code

The Starbucks Dress Code and Personal Presentation Policy (“Dress Code”) applies to all retail partners and sets forth in detail acceptable types of pants, shirts, hair color, and shoes that partners may wear. (Resp. Exs. 61, 65 at 15-16; GC Ex. 11 at 15-16). In addition, it contains detailed restrictions on the number, size and appearance of jewelry that may be worn. (Resp. Exs. 61, 65; GC Ex. 11 at 16; Tr. 2191). For example, the policy limits partners to no more than two earrings per ear and prohibits the wearing of any other “pierced jewelry or ornaments.” *Id.* The policy also contains rules regarding partners’ personal appearance, including rules that prohibit partners from showing any tattoos, require hair to be “clean and brushed,” and mandate that nails be “clean, manicured,” and “of short or moderate length.” *Id.*

The Dress Code specifically limits the type of buttons or pins that may be worn in the retail area of the store. (Resp. Ex. 65). Partners are expected to wear buttons or pins issued by the Company that promote the sale of various products or that recognize their individual contributions to the store. (Resp. Exs. 61, 65). For example, partners are expected give each other MUG (“Moves of Uncommon Greatness”) award pins as a show of appreciation for various performance achievements. (Resp. Exs. 61, 65; GC Ex. 11; Tr. 196-200, 650-51). However, until 2006, Starbucks Dress Code strictly prohibited partners from wearing any non-Starbucks issued buttons or pins.

In March 2006, Starbucks revised its Dress Code as part of a settlement entered with Region 2 resolving certain charges filed by the IWW. (GC Ex. 44; Tr. 415, 2637-38). The settlement contained a Non-Admission clause, stating that the signing of the agreement did not constitute an admission by Starbucks that it had committed any violations of the Act. (GC Ex. 44). The revised policy, which Starbucks submitted to the Board for approval, prohibits partners from wearing *any* pins “that advocate a political, religious or personal issue,” but permits

partners to wear pins “issued to the partner by Starbucks for special recognition or advertising a Starbucks-sponsored event or promotion” as well as a Union pin or button containing the IWW logo or other labor organization logos. (GC Ex. 3; Resp. Ex. 65). Thus, the policy states that partners may wear:

reasonably-sized and -placed buttons or pins that identify a particular labor organization or a partner’s support for that organization, except if they interfere with safety or threaten to harm customer relations or otherwise unreasonably interfere with Starbucks public image.

(GC Ex. 3; Resp. Ex. 65).

Following the implementation of the revised button policy, partners began to come to work wearing numerous Union pins on various parts of their uniforms. (Tr. 411-12, 665-67, 750, 2509-10). For instance, within days of the settlement agreement, Laura DeAnda, a partner at the Second and Ninth store, came to work wearing approximately eight pins covering her pants, shirt, hat, and apron. (Tr. 2509-10). Her district manager Will Smith informed her that, while the revised policy permitted her to wear a button in support of the Union, she needed to remove the remaining buttons. *Id.* DeAnda eventually removed the buttons, but showed up a few weeks later again with many buttons covering her uniform, and refused to remove them. (Tr. 2510-11). Other partners similarly showed up at work wearing multiple pins. (Tr. 411).

At all times since the implementation of the revised Dress Code, Starbucks has allowed partners to wear a button or pin demonstrating their support for a union, including the IWW. (Tr. 221-22, 1377, 1336-38, 1505). Starbucks has also consistently prohibited partners from wearing any other non-Starbucks issued button or pin. (Tr. 2649-50).

D. Joseph Agins' Discharge

Starbucks hired Joseph Agins in or about May 2004 as a barista at its Second and Ninth Avenue store. (Tr. 898). During his employment, Agins had repeated difficulty in controlling his temper.

1. Agins' May 15, 2005 Outburst

On May 15, 2005, Agins became frustrated by the customer demands while he was working behind the bar. Upon receiving a large order, Agins asked his assistant store manager, Tanya James, for assistance. (Tr. 1985, 1989-90). After James asked Agins to "give [her] one second," Agins became impatient that James did not stop what she was doing and immediately come to help him. (Tr. 972-74). According to Agins' own testimony, he then "used foul language" directed toward James and was disrespectful to her "in front of customers." (Tr. 1002).

Following this exchange, James asked Agins to pull his register and go to the back room of the store. (Tr. 1986). Agins refused and said, "This is bullshit." (Resp. Ex. 26; Tr. 1990). Agins then took the blender and "threw it in the sink," making a loud noise, and told James to "do everything your damn self." (Resp. Ex. 26; Tr. 1990-91). James asked Agins to pull his till and clock out several times. (Tr. 1991-92). When Agins finally pulled his till, he remarked loudly to the customer waiting in line, "She wants me to pull my God damn till." (Tr. 1992).

Agins refused James' request to clock out and went to the back of the store to call store manager Julian Warner. (Resp. Ex. 17; Tr. 955, 980-81). Warner directed Agins to clock out and go home. (Tr. 955). Warner also instructed Agins not to return to the store for his next scheduled shift pending further notice due to the serious nature of his conduct. (Tr. 985-86). Agins admitted that he "knew this was serious." (Tr. 986). Agins' notes written shortly after the incident state "I admit I was wrong when I [replied] back at [James]." (Resp. Ex. 17).

Warner met with Agins a few days later to discuss the incident. (Tr. 986). Warner informed Agins that he had wanted to fire him for his conduct on May 15. *Id.* Agins also spoke with Smith and, according to Agins' notes, he apologized to Smith for "using foul language on the floor in front of customers" and for the "attitude [he] was giving on the floor." (Resp. Ex. 17; Tr. 991, 1002). Smith again warned Agins about his continued problem with maintaining his composure. (Tr. 2470, 2530-31, 2538-39). Agins also apologized to James for his "attitude" on the floor. (Tr. 991). Although Agins disputes that he received a written warning this incident, it is undisputed that he was suspended for several days in response to his misconduct. (Dec. 37).

2. Agins' November 2005 Outburst

On November 21, 2005, Agins again lost control and became insubordinate, disruptive, and profane. That evening, Agins, who was off duty, entered the store with approximately six others, including partners Tomer Malchi and Suley Ayala. (Tr. 1007-08).

Agins approached the register and began a conversation with partners Peter Montalbano and Tiffany Martinez, both on duty at the time. (Tr. 1008, 2002). Ifram Yablon, a manager who worked at a different Starbucks store, entered the store to purchase a drink. (Tr. 1010-11). Agins recognized Yablon as a frequent customer. (Tr. 1011). After a few minutes of discussion, Agins became visibly agitated and began arguing with Yablon. (Tr. 696, 800, 1507).

During this exchange, Agins accused Yablon of disrespecting his father at an Ethos Water promotion for Starbucks that took place that summer. (Tr. 942-43, 1011, 1017). James heard Agins say, "Stop. You gotta stop disrespecting me. Stop fucking disrespecting me. You disrespected me in front of my Pops. My dad." (Tr. 2003). Agins admitted becoming "angry" and to using profanity "loud enough for everyone to hear." (Tr. 1012-13, 1018). Among other things, Agins told Yablon, "You can go fuck yourself, if you want to fuck me up, go ahead, I'm here." (Tr. 1014-15). Montalbano testified he could hear Agins from 10-15 feet away. (Tr.

1570). James testified she could hear Agins' voice over the sound of the coffee grinder and that "[h]e was causing a scene." (Tr. 2002-04). Yablon at one point had to ask Agins to "get out of [his] face." (Tr. 1039). When James approached him and told him to "calm down" or she would have to "call the police," Agins continued to yell and shout profanities such as "fuck this shit" and "I'm tired of this shit." (Tr. 2003-2005).

Agins admitted that Malchi had to "separate [him] from Yablon" and that his friends "had to restrain [him]." (Tr. 937, 1015). Malchi testified he "had to calm [Agins] down," and Ayala testified that they "sat [Agins] down." (Tr. 697, 802). James, accordingly, did not ask him to leave the store, and Agins and his friends remained at the store for about 10 minutes after Yablon left before leaving. (Resp. Ex. 27; Tr. 697, 1015). At the end of the night, Montalbano approached James and apologized for what had happened. (Tr. 2006).

3. Agins' Termination

Shortly after the confrontation with Yablon, James reported the incident to her managers, and Smith had a conversation with Agins. (Resp. Ex. 51; Tr. 2502-03, 2518). He and Agins agreed that they had "had a conversation about this before." (Tr. 2502). Agins admitted to cursing on the floor and that he knew he was wrong. (Tr. 2525-26). Smith recommended Agins' discharge because "[t]his was the second occurrence of the same type of behavior" that took place in May. (Tr. 2504). On December 12, 2005, after Agins was given an opportunity to tell his side of the story, he was terminated. (Resp. Ex. 18; Tr. 948, 1035-36, 1043-44).

E. Isis Saenz's Discharge

Starbucks hired Isis Saenz as a barista at the East 57th Street store in the summer of 2005. (Tr. 1349). On the evening of October 26, 2006, Starbucks hosted a book signing event at its store located at 29th and Park Avenue. (Tr. 336, 1365). Approximately 20 to 25 supporters of the Union gathered outside the 29th Street and Park Avenue location that evening. (Tr. 336-37,

1167-68, 1301-03, 1365, 1541-42). This group included Saenz as well as then-current partners Sarah Bender and Peter Montalbano. (Tr. 1167-68, 1301-02, 1329, 1541, 1602).

As the event was taking place, Saenz and the other IWW supporters chanted and yelled outside the store. (GC Ex. 50). They held stakes with large signs on top of them and directed the signs inside the store toward customers. (Tr. 1390, 1542). At least two of the IWW supporters, including Charles Fostrom, videotaped outside the store, and Saenz admitted that she videotaped and took pictures throughout the evening. (GC Ex. 50; Tr. 1391-92). Video from that evening shows Saenz and the other IWW supporters pointing out Starbucks Regional Vice President Jim McDermet through the window of the store. (GC Ex. 50).

In a video of the event, Saenz can be heard making comments such as “Hello Jim, we have a surprise for you” and yelling “Hey Barbie Doll baristas” at Starbucks partners exiting the store. (GC Ex. 50; Tr. 1680-81, 1690-91).

When McDermet exited the store, the protestors began yelling at him, taunting him, and chanting. (GC Ex. 50; Tr. 1369-70, 1543-44, 1573-74, 1604). Saenz yelled “Spit on him.” (GC Ex. 50; Tr. 1693). Saenz also yelled “Piss on him.” (GC Ex. 50). As McDermet walked away toward his home, a group of the protestors followed him. (GC Ex. 50). McDermet recognized Saenz as part of that group. (GC Ex. 50; Tr. 341-42, 1543-44, 1604-05, 2458).

Saenz admitted that she was, in fact, among at least six Union supporters who followed him. She also admitted that while she was following McDermet, she catcalled and shouted at him, yelling multiple times “Jimmy, Jimmy why won’t you speak to us. Why are you ignoring your workers.” (Tr. 342, 1370, 1398-99, 1695-96). Saenz continued to take pictures of McDermet as she followed him. (Tr. 1395-96).

One member of the group following McDermet with Saenz shouted at him “We know where you live.” (GC Ex. 50; Tr. 1695, 1699-1700). Saenz was standing near this supporter at the time he made this remark. (Tr. 1699). Other members directed statements at McDermet such as “[W]e’re following you now, boy!,” “Stand up for yourself,” and “Fuck Starbucks.” (Tr. 1697, 1700-02). The record contains no evidence that Saenz attempted to disavow these remarks. (GC Ex. 50; Tr. 1702).

Because of the crowd following him and because McDermet feared that the group did in fact know where he lived, McDermet opted not to walk to his home, but rather walked circuitously around the city. (Tr. 346, 2456). Saenz admitted that as they followed McDermet, she and others in the group continued to chant and laugh at McDermet. (Tr. 1396-97).

Upon returning home that night, McDermet apprised partner resources manager Traci Wilk of the events of the evening, and subsequently filed a police report because he felt threatened and intimidated. (Resp. Ex. 42; Tr. 2456). Wilk told Saenz’s store manager and district manager Veronica Park what had happened. (Tr. 483-84, 2091-96). Park met with Saenz on November 1, 2006. (Tr. 1372-73, 2084-85). She asked Saenz if she called McDermet “Jimmy Jimmy” in a disrespectful and demeaning way. (Tr. 1373, 2083, 2096-97). Saenz admitted calling McDermet “Jimmy Jimmy.” (Tr. 1373-74). Park asked if Saenz believed McDermet may have felt threatened or intimidated, based in part on her behavior, and Saenz agreed that he might have. (Tr. 1373-74, 2096-97). Park also asked Saenz if she remembered hearing someone say “We know where you live” to McDermet, and Saenz admitted she may have heard someone say that, but she did not remember exactly who. (Tr. 1402-03, 2083-84, 2097-98).

Based on Saenz's responses to Park's questions, Park separated Saenz's employment because her disrespect toward McDermet violated Starbucks Guiding Principle of treating each other with respect and dignity. (Tr. 1374, 2083-84, 2096, 2100).

F. Daniel Gross' Discharge

Starbucks hired Daniel Gross to work at its retail store located at 36th and Madison Avenue store in May 2003. (Tr. 1052). When he was hired, Gross was available to work any time, seven days a week. (Resp. Ex. 19; Tr. 1096, 1179). By May 2005, Gross had limited his availability to two days per week, Saturdays and Sundays, between the hours of 12 p.m. and 6 p.m., and often worked only four hours. (Tr. 301-03, 1223). Thereafter, during the eight-month period between May 16, 2005 and January 28, 2006, Gross worked a total of 25 hours. (Resp. Ex. 59; Tr. 1233).

In the "fall or winter" of 2005, his store manager, James Cannon, told Gross: "I haven't been seeing you around enough" in the store; "you've been giving away all of these shifts." (Tr. 1100, 1238). Gross responded: "This seems discriminatory to me but I won't give away any shifts any more." (Tr. 1100). Following this conversation with Cannon, Gross continued his practice of "taking off from time to time." (Tr. 1237-38).

1. Gross' January 2006 Performance Review

Under Starbucks policy, Gross should have received a performance review on November 27, 2005. (Tr. 460, 1231).² However, because Gross did not work any shifts between November

² Hourly partners should receive reviews approximately six months after the partner's date of hire and then at regular six-month intervals. (Resp. Exs. 61, 65 at 27; GC Ex. 11 at 27; Tr. 460). The performance reviews are broken into several categories reflecting Starbucks core competencies. (Resp. Ex. 11). For each category, a partner can receive one of three rankings: a "needs improvement," or a "1," a "meets expectations," or a "2," or a "consistently exceeds expectations," or a "3." (Resp. Exs. 61, 65 at 27; GC Ex. 11 at 27; Tr. 1278, 2553). Based on the ratings given in each of the individual categories, partners receive an overall rating of "needs improvement," "meets expectations," or "consistently exceeds expectations." (Tr. 1278-79).

13, 2005 and January 28, 2006, Cannon did not administer Gross' review until January 29, 2006, when he finally returned. (Resp. Ex. 59; GC Ex. 35; Tr. 1086, 1200, 1231-34). At that time, Cannon provided Gross with a copy of the review and went through several of the categories with Gross before giving him an opportunity to respond. (Tr. 1091-93, 1206-08, 1220).

In large part because of Gross' lack of availability and limited hours worked, Gross received an overall rating of a "1" or "needs improvement" on this review. (GC Ex. 35). Cannon commented on the review that "Dan does not maintain adequate hours of availability. Therefore he is rarely scheduled to work. When he is scheduled, Dan frequently asks other partners to work his shifts for him." *Id.* Cannon also stated that because Gross "worked only infrequently," he "had little exposure to [Starbucks] seasonal lineup" and did not "demonstrate[] that he ha[d] kept up his knowledge of current promotional items." *Id.*

Cannon also noted that Gross failed to utilize Starbucks organizational methods to recognize the efforts of other partners, an area previously cited by Cannon in Gross' earlier reviews as needing improvement. (GC Exs. 35, 39; Tr. 1210-11). Gross also received "needs improvement" ratings in the categories of communicating with management and assisting with partner training, consistent with the feedback given to him in prior reviews. *Id.*; *see also* (GC Exs. 38, 39; Tr. 1186-87). The review further noted that Gross failed to proactively communicate store and customer needs to management and that Gross had "not been involved with the training of any new partners." *Id.*

Gross responded to these ratings by telling Cannon he believed they were "clearly inaccurate" and should be modified. (Tr. 1207). Gross "didn't comment one way or the other" as to whether he intended to try to improve his performance in any of the areas identified in his review. (Tr. 1208).

2. Follow-Up Counseling Provided To Gross

In March 2006, Jose Lopez became the store manager at 36th and Madison. (Tr. 167-68, 2348-49).³ At that time, Lopez spoke with Cannon about “every partner in the store” in an effort to learn each partner’s “strengths and weaknesses.” (Tr. 271-72, 2349). They discussed Gross’ overall performance as well as his January 2006 review. (Tr. 2349-50).

Lopez did not meet Gross for several weeks because Gross did not work during that period. (GC Exs. 80, 81; Tr. 2355-56). Cannon asked Gross to come to the store on April 14 for an introductory meeting. (Tr. 238, 1238-39, 2354). Lopez wanted to “go over his last review” and discuss performance “opportunities” so they “could be on the same page.” (Tr. 238).

At the April 14 meeting, Lopez and Cannon provided Gross with a document that reiterated the performance issues identified in Gross’ January 2006 review. (GC Ex. 36; Tr. 1239). Cannon went through the categories in the document and discussed the comments pertaining to Gross’ performance. (GC Ex. 36; Tr. 239, 1239). More than once, Lopez stated his intention to set Gross “up for success.” (Tr. 1111, 1239, 1241-42).

Gross stated that the document was “inaccurate” and “clearly discriminatory.” (Tr. 1115, 1243). He stated he would give the managers “two weeks to remedy” the document “or the Union will take legal action.” (Tr. 1115). Gross then proceeded to slam his fist on the table and walked out. (Tr. 239).

Because Gross had abruptly left the April 14 meeting before Lopez or Cannon had an opportunity to discuss his performance with him, Lopez requested a second meeting. (GC Ex. 6; Tr. 264). Prior to the meeting, Lopez prepared a memorandum discussing Gross’ “up to now”

³ After leaving the 36th and Madison store, Cannon transferred to another store, and subsequently left Starbucks. (Tr. 230-31, 2606-07). At the time of the hearing, Cannon no longer was employed by Starbucks. (Tr. 2606-07).

performance and outlining areas where Gross needed to improve his performance. (GC Ex. 6; Tr. 265). Lopez based the memorandum on his own assessment of Gross' performance as well as his review of the January 2006 review and Gross' personnel file. (Tr. 2360).

In the memorandum, Lopez listed four areas of deficiency: (1) "Engaging in legendary, positive interactions with partners and customers at all times;" (2) "demonstrating an understanding of all promotions;" (3) "[c]ommunicating to the management team on enhancing the customer experience;" and (4) "[c]ontributing to a positive work environment by exhibiting behaviors such as distributing green apron cards and MUG awards to your co-workers." (GC Ex. 6). Lopez prepared this memorandum with the "intention . . . to communicate clearly" to Gross his performance expectations and did not intend the memorandum to be disciplinary in nature. (Tr. 278, 283).

At the meeting, which occurred on April 29, Lopez explained that Gross would have an additional two months, until July 29, 2006, before receiving his next performance review, even though his six-month review cycle should have ended on May 27, 2006. (GC Ex. 6; Tr. 1244-45). Lopez also attempted to review the memorandum with Gross and to provide him with specific examples to demonstrate the steps Gross needed to take to improve in the identified performance areas. (GC Ex. 6; Tr. 265-66, 278-80). While Gross acknowledged that Lopez's stated purpose at the meeting was to "set [him] up for success," he refused to listen to Lopez and did not "comment one way or the other" as to whether he intended to try to improve his performance. (GC Ex. 6; Tr. 265-66, 278-80, 1122-23, 1244, 1248). At no time during this meeting did Lopez say anything about the Union. (Tr. 1249).

3. Gross's Continued Poor Job Performance

Gross continued to fail to perform in accordance with the Company's expectations. (GC 6; Tr. 1241). Among other things, he consistently sought to undermine Lopez's authority. (Tr.

298). On one occasion, Lopez was cleaning the baseboard in the store when he was interrupted by a phone call. (Tr. 298). Lopez asked assistant store manager Tiffany Scott to finish the job. (Tr. 298, 2550-51). Gross told Scott she should stop cleaning the baseboard because she “did not get paid enough.” (Tr. 298, 2383, 2550-51). Scott relayed this incident to Lopez. (Tr. 2383).

Similarly, after noting that barista Jenny Robateau had been scheduled for “cleaning shifts” where she would have responsibility for deep cleaning the store, Gross commented that she “shouldn’t have the responsibility to do the cleaning shifts” and that she was “doing more work than [she] had to.” (Tr. 2345-46). Lopez did not believe that such comments helped to “create a good work environment,” particularly in light of the fact that cleaning was part of the barista job description and because Lopez himself regularly cleaned the store. (Tr. 2383-84).

Lopez observed that Gross “constantly” needed to be reminded to perform basic tasks assigned to him. (Tr. 2384-87). When Gross did perform tasks, Lopez observed that he often took a very long time to complete them. (Tr. 2387). For example, Lopez explained that other partners would take out the trash by putting all of the garbage in the bin before walking to the dumpster, but Gross would take one bag at a time. *Id.* As a result, a trash run by Gross would take as long as 30 minutes compared to 10 minutes for other partners. *Id.* Gross also did the bare minimum when it came to cleaning and “constantly” had to be reminded to wash his pitchers after preparing blended beverages called Frappuccinos. (Tr. 2387).

Gross also failed to open up his availability beyond midday Saturdays and Sundays and to work more shifts despite requests from both Cannon and Lopez to do so. (GC Exs. 6, 35; Tr. 287, 1097-1100). Because Gross “requested so many Sundays off” and continued to give away shifts, he rarely worked both days and generally worked only “four hours a week for quite some time.” (Resp. Ex. 59; Tr. 285, 301, 303, 1273). Consistent with his treatment of other partners,

Lopez granted Gross' requests for Sundays off. (Tr. 299). As a result, between April 14, 2006 and August 5, 2006, Gross worked only *five* Sundays, and on Saturday he generally worked only from noon to 4 p.m. (Resp. Ex. 59). Due to Gross' limited schedule, it was "practically impossible" for him to stay on top of "all the current promotions" and changes to drinks, and Lopez had to "constantly remind" Gross to learn the new promotions. (Tr. 303, 2389). When Gross did work, Lopez noticed he worked at a deliberately slow pace, did the "bare minimum," and consistently had to be instructed to perform his duties. (GC Ex. 42; Tr. 304, 2385, 2550).

Gross' co-workers at 36th and Madison confirmed Lopez's assessments. Barista Jenny Robateau, who worked with Gross on multiple occasions between October 2005 and into 2006, testified that Gross was not "very knowledgeable about things in the store" and failed to take initiative during slower periods even though other partners did. (Tr. 2324-25).

4. Gross' August 5, 2006 Review And Discharge

In July 2006, Lopez prepared Gross' performance review and gave him an overall rating of "needs improvement." (GC Ex. 42; Tr. 505-07). Lopez explained that Gross "does not take any initiative to anticipate customer and store needs. He seems to be focused on doing the bare minimum . . . He has not taken a proactive approach to create the 'Third Place Environment' by communicating issues to his management team" (GC Ex. 42). Lopez observed that, in contrast to other partners, Gross "didn't do much" unless Lopez was there to direct him. (Tr. 2386). Lopez had never seen Gross give an award to a co-worker or inform Lopez he thought a partner should receive one. (Tr. 2391). Lopez also noted that, as a tenured three-year partner, Gross was expected to help with the training of new hires, which he had not done. (GC Ex. 42).

Gross also earned a "1" in "Maintains regular and consistent attendance and punctuality." (GC Ex. 42). Though Gross had worked more shifts than prior to the January 2006 review, Lopez stated: "[Gross] has not consistently worked even the two days he has availability,

frequently requesting Sundays off. Dan has met the expectation of working both Saturday and Sunday only five times since his January review . . . his attendance has not improved to a satisfactory level.” *Id.* Additionally, he wrote: “Dan does not demonstrate the level of experience and judgment expected of a partner of his tenure He seems content to do the bare minimum required and does not display initiative or act proactively to improve the environment for customers or fellow partners.” *Id.*

Lopez gave Gross an overall rating of “needs improvement.” He did so on the following basis: “Dan did not live up to the task of a Partner. He wasn’t enthusiastic. He didn’t help create a good work environment. So my assessment of Dan was NI, needs improvement just due to the fact that he did the minimum as possible.” (Tr. 2386). In addition, Lopez explained, Gross had to be given constant reminders, leading Lopez to conclude that Gross was not working a level sufficient to warrant a “meets expectations” review. *Id.*

After preparing the evaluation, Lopez made the decision to discharge Gross. (Tr. 295, 297). Lopez considered the various components of Gross’ performance including his overall “bare minimum” performance, his limited availability” and other performance deficiencies outlined in the review. (Tr. 297, 304-05).

Gross was informed of this decision on August 5, 2006. (Tr. 305-06, 1158-59, 1163).

STATEMENT OF QUESTIONS PRESENTED

- I. Whether the ALJ erred in finding that Starbucks consistent enforcement of its Dress Code violated Section 8(a)(1) of the Act because partners were not allowed to wear more than one union button. (Exception Nos. 1 – 9)
- II. Whether the ALJ erred in finding Agins’ discharge violated the Act. (Exception Nos. 10 – 34)
- III. Whether the ALJ erred in finding Saenz’s discharge violated the Act. (Exception Nos. 35 – 48)
- IV. Whether the ALJ erred in finding Starbucks violated the Act by discharging Gross, by issuing his January 29 and August 5, 2006 performance reviews, and by providing him with feedback on his performance on April 14 and April 29, 2006. (Exception Nos. 49 – 82)

ARGUMENT

I. STANDARD OF REVIEW

Where exceptions to the ALJ’s decision and recommended order have been filed, the Board is not bound by the findings of the administrative law judge and must engage in an independent review of the record. *Standard Dry Wall Products, Inc.*, 91 N.L.R.B. 544, 544-45 (1950), *enfd.*, 188 F.2d 362 (3d Cir. 1951). “[T]he Act commits to the Board itself the power and responsibility of determining the facts” and the Board must base its findings “on a *de novo* review of the entire record.” *RC Aluminum Indus., Inc.*, 343 N.L.R.B. 939, 942 fn.1 (2004) (citing *Standard Dry Wall Products*, 91 N.L.R.B. 544).

Although credibility determinations based on witness demeanor will be upheld unless “the clear preponderance of all the relevant evidence convinces [the Board] that the Trial Examiner’s resolution was incorrect,” *Standard Dry Wall Products*, 91 N.L.R.B. at 545, where the “credibility findings” are based on factors other than demeanor, the Board should proceed with an independent evaluation. *Id.*; *Starcraft Aerospace, Inc.*, 346 N.L.R.B. 1228, 1231 (2006).

II. THE ALJ'S FINDING THAT STARBUCKS PIN POLICY VIOLATED THE ACT SHOULD BE REVERSED

The record makes clear that Starbucks limitation on the number of pins that may be worn does not interfere with employees' Section 7 rights. Even if it did, the ALJ erred in concluding that this limitation was not justified by special circumstances.

A. Permitting Partners To Wear One Pin In Support Of The Union Does Not Interfere With Their Section 7 Rights

While Section 7 generally gives employees the right to wear union insignia at work, *see Republic Aviation Corp. v. NLRB*, 324 U.S. 793 (1945), this right “is not without limitation,” *see Sam's Club*, 349 N.L.R.B. 1007, 1010 (2007). An employee's right to wear union insignia at work must be balanced against the right of employers to “manage their business.” *Id; compare Bigg's Foods.*, 347 N.L.R.B. 425, 436 (2006) (finding restriction prohibiting “quarter-size” union pin unlawful) *with Con-Way Transp. Servs.*, 333 N.L.R.B. 1073, 1075 (2001) (employer lawfully banned “highly conspicuous, flat, two and a quarter inches in diameter” button in “one of four ‘day glow’ colors”). For instance, the Board found lawful employer United Parcel Services' prohibition of a white and red button two and a half inches in diameter, *see United Parcel Serv., Inc.*, 195 N.L.R.B. 441 (1972), while later finding its prohibition of dime-sized pins that were “small, neat, inconspicuous, and free of any provocative message or language” unlawful, *United Parcel Serv., Inc.*, 312 N.L.R.B. 596, 597 (1993), *enforcement denied*, 41 F.3d 1068 (6th Cir. 1994).

Although the ALJ recognized the need for such balancing, the ALJ failed to engage in a meaningful balancing of these respective rights. (Decision “Dec.” 14). Had the ALJ conducted a proper analysis, she would have noted the evidence in the record making clear that the “one union pin” rule did not adversely impact partners who supported the Union. Partners were able to wear their Union logo on their uniform, and supporters of the Union regularly leafleted outside

of their stores (Tr. 536, 1007, 1067-68, 1103-05, 1361, 1583), staged actions within the stores while on working time to disclose their union affiliation (Tr. 535-37, 1353-54, 1383-84), and handed out buttons to co-workers while on the clock (Tr. 1343-45, 1352-53, 1381), all without incident. Given partners' unrestricted right to express support for the Union, Starbucks right to "manage its business" and protect its public image outweighs any claimed adverse impact on Section 7 rights. The ALJ erred in concluding otherwise. *See, e.g., W. San Diego*, 348 N.L.R.B. 372 (2006); *Pathmark Stores, Inc.*, 342 N.L.R.B. 378 (2004).⁴

B. Starbucks One-Button Limitation Is Justified By Special Circumstances

The Board has recognized that "an employer may limit or ban the display or wearing of union insignia at work if special circumstances exist and if those circumstances outweigh the adverse effect on employees' Section 7 rights resulting from the limitation or ban." *Sam's Club*, 349 N.L.R.B. 1007, 1010 (2007) (citing *Albis Plastics*, 335 N.L.R.B. 923, 924 (2001)); *Mack's Supermarkets*, 288 N.L.R.B. 1082, 1098 (1988). Among other factors giving rise to the special circumstances exception, the Board has recognized that restrictions on union insignia or apparel may be justified "when their display may . . . unreasonably interfere with a public image that the employer has established, or when necessary to maintain decorum and discipline among employees." *Komatsu Am. Corp.*, 342 N.L.R.B. 649, 650 (2004); *Pathmark Stores, Inc.*, 342 N.L.R.B. 378, 379 (2004).

In the retail context, the Board has found that an employer will satisfy the "special circumstance" exception if the display of union insignia unreasonably interferes with a public image that the employer has established, as part of its business plan, through appearance rules for

⁴ The ALJ further erred in finding that the settlement did not contemplate a limit on the number of union pins an employee could wear. (Dec. 15). Indeed, the General Counsel did not allege that Starbucks enforcement and interpretation of the revised policy breached the March 2006 settlement agreement.

its employees. *See Produce Warehouse of Coram, Inc.*, 329 N.L.R.B. 915, 917-18 (1999) (company rule requiring employees to wear company hats as part of its uniform policy is valid special circumstance and exception to employee’s right to display union insignia); *Houston Coca-Cola Bottling Co.*, 256 N.L.R.B. 520, 524, fn.5 (1981) (employer lawfully prohibited employees from wearing union insignia in the presence of customers to “protect [its] image”).

Applying this exception, the Board has upheld employer policies that prohibit employees from wearing any pins or buttons other than those issued by the Company where the employer sought to portray a particular public image by promulgating a detailed dress code and appearance policy. *Con-Way Transp. Servs.*, 333 N.L.R.B. 1073, 1075 (2001). The employer in *Con-Way Transp. Servs.*, a freight shipper, sought to portray a modern, professional public image by requiring its drivers to “present a neat, clean, well groomed business appearance while on duty.” *Id.* The policy prevented employees from wearing *any* pins or buttons not issued by the employer. *Id.* The Board found that this restriction and subsequent discipline did not violate Section 8(a)(1) or 8(a)(3) because the employer’s concern about its public image justified its prohibition on buttons. *Id.* at 1076-77; *see also W. San Diego* 348 N.L.R.B. 372 (2006) (employer lawfully prohibited employees from wearing union buttons in accord with mission to provide a trendy, distinct, and chic ambiance for guests); *United Parcel Serv., Inc.*, 195 N.L.R.B. 441, 450 (1972) (no violation where employer prohibited delivery driver employees from wearing union button in an effort to uphold company’s image of providing “neatly uniformed” drivers); *see also Claremont Resort & Spa*, 2003 N.L.R.B. LEXIS 297, at *19-20 (2003) (employer spa’s one-button rule lawful where employer maintained detailed dress code and limitation lawfully balanced the spa’s “long-standing marketing concept of presenting a consistent image and product to its customers” with the dictates of the Act).

The evidence at the hearing established that Starbucks similarly maintains and strictly enforces an extremely detailed Dress Code, whose purpose is to ensure that its partners “present a clean, neat and professional appearance appropriate of a retailer of specialty gourmet products.” (Resp. Exs. 55, 61, 65; GC Ex. 11 at 15). Among other things, the policy restricts partners from wearing any jewelry other than those items that are “moderately sized,” “simple,” and which will not “be a distraction.” (Resp. Exs. 61, 65; GC Ex. 11 at 16; Tr. 2191). The policy limits partners to no more than two earrings per ear and prohibits the wearing of any other “pierced jewelry or ornaments.” The policy also contains detailed rules regarding partners’ personal appearance, including rules that prohibit partners from showing any tattoos, require hair to “look natural” and be “clean and brushed,” and mandate that nails be “clean, manicured,” and “of short or moderate length.” *Id.*

As the ALJ recognized, Starbucks consistently enforces its dress code and appearance policy and has done so since well before any union activity occurred in its stores. (Dec. 28; Resp. Ex. 55). Indeed, the ALJ dismissed allegations in the Complaint alleging disparate enforcement of Starbucks dress code by relying on record evidence “establish[ing] that employees are routinely given corrective actions for violations of” the dress code. (Dec. 30).

Yet the ALJ rejected the “special circumstances” argument. In doing so, she erred in four respects: (1) by finding that the “one-button rule” was not promulgated as part of Starbucks dress code; (2) by failing to acknowledge the Board-recognized distinction between employer-issued pins versus outside pins that are not employer-sponsored when evaluating dress and appearance policies; (3) by relying upon a highly distinguishable and inapposite Board decision from 1966 finding a “one button” rule unlawful; and (4) by inferring that Starbucks pin policy applied to employees in non-selling areas or on breaks.

The ALJ ignored clear evidence in finding that the record contained insufficient evidence to demonstrate that Starbucks promulgated its pin policy as an extension of its dress code. The ALJ stated: “[n]otably, not one witness who testified on behalf of Respondent pointed to this as a rationale for the restrictions imposed.” (Dec. 15). This assessment directly contradicts unambiguous and unrebutted testimony by Starbucks Regional Vice President Jim McDermet establishing that Starbucks specifically drafted the post-settlement pin policy with its dress code policy in mind:

The policy was derived based on a conversation that I had with [Counsel for the General Counsel] in March 2006 where I specifically asked him for clarification around what was acceptable what did the Act provide for in terms of union pins and I specifically asked the question because if you take a look at Starbucks dress code, it’s very, very specific in terms of talking about for example size of earrings that partners might wear, number of earrings or piercings or things of that nature. *So I specifically asked in terms of pins because I knew it would be the type of thing that you manage at Starbucks as a Starbucks manager in terms of managing dress code[.]*

(Tr. 334) (emphasis added).

Starbucks witness Jose Lopez similarly described the pin policy as “the dress code policy in regards to pins.” (Tr. 210). Moreover, the employee manual or Partner Guide also makes clear that Starbucks intended its pin policy to be enforced as part of its overall dress code. In fact, the challenged pin policy appears under the subheading “Pins” as part of the larger Dress Code and Personal Presentation section of the Starbucks Partner Guide.

The ALJ also ignored the Board’s well-settled distinction between employer-issued pins and all other pins. Despite her recognition that Starbucks “encourages its employees to present a certain image to the public[.]” the ALJ determined that this desired public image did not justify the limitation on union pins because Starbucks has “no qualms” in allowing its employees to wear multiple *Starbucks-issued* pins. (Dec. 15). This analysis improperly imposes the ALJ’s own notion of what image she thinks Starbucks employees should project to the public. It also

contravenes Board precedent upholding the right of employers to distinguish between pins or buttons which are “related directly to the Employer’s business” and those “unrelated to the business” in order to protect their public image. *See W. San Diego.*, 348 N.L.R.B. at 373 (finding special circumstances justified policy requiring employees to wear employer-issued button and at the same time banning union pins in public areas); *Nordstrom, Inc.*, 264 N.L.R.B. 698, 701 (1982) (finding employer’s consistent prohibition against political buttons and protest insignia not inconsistent with allowing employees to wear employer-issued award insignia to denote encouraged employee conduct). As these cases make clear, employers do not forfeit the special circumstances exception simply by virtue of allowing employees to wear employer-issued pins, particularly where, as here, the evidence demonstrates Starbucks strict enforcement of its dress code and personal appearance policy. (GC Ex. 3; Resp. Ex. 65).

The ALJ’s reliance on *Serv-Air, Inc.*, 161 N.L.R.B. 382 (1966), issued by the Board more than 40 years ago in a factually distinguishable context, fails to support her analysis. (Dec. 15). In contrast to the retail and customer-focused environment present in this case, the employees in *Serv-Air* worked as jet engine mechanics at an Air Force base. The employer argued that its policy fell within the “special circumstances” circumstances exception because (1) the wearing of multiple buttons posed a safety hazard for employees who worked with jet engines that could be harmed by the introduction of small foreign objects, and (2) multiple buttons presented a disruptive influence upon production and employee harmony. *Serv-Air, Inc.* at 416. *Serv-Air*’s safety argument was rejected because the policy was enforced against groundskeepers who did not work around engines, and the evidence showed that employees were permitted to wear various other adornments that undermined the rationale of the employer’s alleged safety concerns. *Id.* The ALJ in *Serv-Air* also emphasized the employer’s tolerance of employees’

wearing anti-union buttons, which contributed to the disharmony the employer was supposedly trying to prevent. *Id.* The ALJ's sole reliance on a case this factually dissimilar to the one before her confirms the absence of any cases warranting the rejection of the special circumstances defense.

Indeed, as the ALJ concedes, in "the great majority of cases" where the Board has found that the special circumstances exception does not justify an employer's restriction, the employer had imposed a complete ban on employees' right to wear union buttons. (Dec. 15). *See, e.g., P.S.K. Supermarkets, Inc.*, 349 N.L.R.B. 34, 35 (2007) (finding "complete ban" on wearing union button unjustified by "special circumstances" exception); *Bigg's Foods*, 347 N.L.R.B. 425, 436 (2006) (affirming finding that employer's rule prohibiting all union buttons was unlawful); *Meijer, Inc.*, 318 N.L.R.B. 50, 51 (1995), *enfd.*, 130 F.3d 1209 (6th Cir. 1997) (employer failed to show that special circumstances justified absolute prohibition on wearing union pins on the floor); *Floridian Hotel of Tampa, Inc.*, 137 N.L.R.B. 1484, 1486 (1962), *enfd. as modified*, 318 F.2d 545 (5th Cir. 1963) (prohibition of all union buttons not warranted by special circumstances). Here, by contrast, Starbucks policy expressly permits partners to wear a button with the Union logo.

Finally, the ALJ's assertion that the one-button rule "apparently applies to employees who are present in its stores, regardless of whether they are actively working, on break or in non-customer areas" is clearly erroneous. (Dec. 13). Some witnesses testified that conversations between button-wearing partners and management took place in the back rooms of Starbucks stores. *See, e.g.,* (Tr. 1527-28). Starbucks can only surmise that this testimony may be the source of the ALJ's erroneous inference that Starbucks pin policy "apparently applies regardless of whether the employee is in a selling area or elsewhere in the facility or whether the employee

is working or on break” and was therefore overly broad. (Dec. 15). However, a review of the record demonstrates that the policy was enforced with customer reactions in mind, (Tr. 1526), and that there were no allegations that any partner was asked not to wear more than one union button while on a break. Thus, because the ALJ’s conclusion that Starbucks policy applies regardless of whether an employee is working or in work areas lacks any support in the record, it cannot serve as a basis for finding Starbucks pin policy violates Section 8(a)(1).

Accordingly, there is no basis for the ALJ’s rejection of Starbucks defense that its one-button limitation is justified by special circumstances. The ALJ’s ruling that Starbucks pin policy violated Section 8(a)(1) of the Act should be reversed for this reason, as well.

III. THE ALJ’S FINDING THAT AGINS’ DISCHARGE VIOLATED THE ACT SHOULD BE REVERSED

The undisputed evidence establishes that Starbucks discharged Agins for engaging in insubordinate, disrespectful, and profane behavior on at least two occasions in direct violation of Starbucks core guiding principles. First, on May 15, 2005, Agins directed profanities including “this is bullshit” toward his manager while serving customers in the store. Following this incident, Agins’ manager told him he wanted to discharge him based on the seriousness of his misconduct. Instead, Agins was warned and suspended for several days, providing him clear notice that his behavior was unacceptable and that he would be subject to termination for repeated offenses.

Six months later, on November 21, Agins had another outburst. While in the store in front of customers and partners, Agins yelled repeated profanities at a customer who was also a Starbucks manager, telling him: “You can go fuck yourself, if you want to fuck me up, go ahead, I’m here.” (Tr. 696, 1014-15). Agins continued to shout profanities after his manager tried to

intervene and calm him down. (Tr. 2003-2005). Agins became so out of control during this outburst that his friends “had to restrain” him. (Tr. 1015).

Starbucks discharged Agins for these outbursts consistent with its treatment of other partners who, like Agins, violate Starbucks Mission Statement. That Statement requires partners to “[p]rovide a great work environment and treat each other with respect and dignity.” (Resp. Exs. 61, 65 at 4; GC Ex. 11 at 4).

The ALJ erroneously concluded based on these facts that Starbucks discharged Agins for engaging in protected concerted activity, and further found that Agins’ conduct was not sufficiently egregious to remove him from protection under the Act. (Dec. 50). This finding constitutes plain error. First, the ALJ erred in concluding that Agins was engaged in protected activity at the time of the November 21 incident. Second, the ALJ erroneously found that Agins’ profane outburst on November 21 did not cause him to lose protection under the Act. Third, the ALJ erred by crediting the contradictory and impeached testimony of Agins and the other General Counsel witnesses over the testimony of his assistant store manager, Tanya James. Finally, the ALJ erred by disregarding the substantial evidence demonstrating that Starbucks would have discharged Agins regardless of his union activity.

A. The ALJ Erred By Concluding Agins’ Outburst On November 21 Was Protected Under The Act

The ALJ erred in analyzing Agins’ discharge under *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979). (Dec. 48). The legal framework established in *Atlantic Steel* applies only where an employee is discharged for conduct that is part of the “res gestae” of concerted activity. *Atlantic Steel*, 245 N.L.R.B. at 816; *Noble Metal Processing, Inc.*, 346 N.L.R.B. 795, 795 (2006). This analysis has no relevance where, as here, an employee is discharged for conduct that does not constitute concerted activity within the meaning of the Act.

The Act protects employees who act in concert “for the purpose of negotiating the terms and conditions of their employment.” 29 U.S.C. § 151. An action undertaken for purely personal reasons is not “concerted activity.” See *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). Thus, the Board in *K-Mart Corp.* concluded that an employee’s complaint that a co-worker did not “show [him] courtesy” was not protected activity, but rather a complaint about a problem that “related solely to him.” 268 N.L.R.B. 246, 251-252 (1983) (citing *Mills Patrol Svc. Inc.*, 264 N.L.R.B. 323 (1982)); see also *The Broadway*, 267 N.L.R.B. 385, 407 (1983) (finding employee was not engaged in concerted activity where he “acted alone in verbally assailing” his supervisor “solely to satisfy his own pent up hostilities and frustrations”); *Media General Operations, Inc. v. NLRB*, 394 F.3d 207, 212 (4th Cir. 2005) (employee’s “derogatory attacks” not concerted activity where they “were merely a manifestation of his personal sentiments towards his supervisor, not an expression of Union opinion”). Even where an employee acts in the general context of union activities, the employee “must demonstrate some nexus between the words he uttered and protected activity” in order to invoke the Act’s protection. *Media General Operations*, 394 F.3d at 211.

Respondent does not dispute the ALJ’s finding that Agins’ conduct the night of November 21 may have begun as concerted activity: he and his fellow employees initially went to the store to support fellow partner Peter Montalbano’s right to wear a union pin. (Tr. 799). However, shortly after the group arrived at Montalbano’s store, Montalbano received permission to wear his button, and the “button action” was complete. (Dec. 37). Thus, when Yablon entered the store to purchase a drink a few minutes later, Agins no longer was engaged in concerted activity.

Moreover, even assuming the “button action” had not concluded by the time Yablon entered the store as the ALJ found, Agins’ own testimony makes clear that his outburst occurred not in defense of partners’ right to wear a button, but in reaction to Yablon’s lawful expression of his belief that Starbucks workers did not need a union, and in reaction to alleged “disrespect” of Agins’ father by Yablon. (Tr. 941, 1011-12, 1017).

Agins admitted that the dispute escalated based on an alleged incident between Yablon and Agins’ father, causing him to become “emotional” and “angry” with Yablon. (Tr. 1011-12). Agins testified that he had attended a Starbucks event the previous summer where he leafleted on behalf of the Union. Based on “the hearsay of [his] father,” Agins believed Yablon had directed an insult toward his father at this event because his father was wearing a Union hat. (Dec. 37; Tr. 1017). Agins testified that his belief that Yablon had “disrespected” his father was “one of the main reasons why” he became angry during the exchange. (Tr. 1012).

Despite the clear division between the “button action” and the exchange between Agins and Yablon, the ALJ, relying on a General Counsel witness’ testimony that Yablon pointed to his button before asking Agins why a union was necessary at Starbucks, concluded that the “disagreement took place in the overall context of a demonstration in support of employees’ Section 7 rights.” (Dec. 48). The ALJ also concluded that Yablon’s alleged “insult” to his father “stemmed from protected conduct” apparently because it occurred at an event where Agins was leafleting on behalf of the Union or because Yablon’s alleged comment was made about his father’s union support. (Dec. 48).

This was clear legal error. The mere fact that Agins wore a union pin in support of Montalbano and advocated the benefits of a union during his confrontation with Yablon does not convert his outburst into protected conduct. (Dec. 44 fn.48). Indeed, the Board has made clear

that simply using “the word ‘union’” does not, without more, cause an employee to be “automatically engaged in protected concerted activity.” *See Scooba Mfg. Co.*, 258 N.L.R.B. 147, 149 (1981), *enforcement denied*, 694 F.2d 82, 85 (5th Cir. 1982).

Similarly, Agins’ unsubstantiated allegation that Yablon insulted his father because of his support for the union – an exchange that Agins admitted he never heard and which constitutes inadmissible hearsay – falls significantly short of establishing that Agins’ outburst in defense of his father several months later constituted protected activity. (Tr. 1017). The record establishes that Agins acted solely on his own behalf and that his attack on Yablon was “merely a manifestation of his personal sentiments . . . not an expression of Union opinion.” *Media General Operations, Inc. v. N.L.R.B.*, 394 F.3d 207, 212 (4th Cir. 2005). “Such personal missions are not the sort of concerted activity which the statute protects.” *Id.* The ALJ’s conclusion to the contrary strains well-settled definitions of what constitutes protected activity and improperly extends Section 7 protection to any conversation in which the word “union” is mentioned or during which an employee wears a piece of union paraphernalia.

B. Agins Lost Protection Under The Atlantic Steel Factors

Even if the ALJ did not err in finding that Agins was engaged in protected activity during his outburst, her finding that Agins did not lose protection under the Act based on his misconduct contravenes Board precedent and should be reversed.

Although employees are “permitted some leeway for impulsive behavior when engaging in concerted activity, this leeway is balanced against an employer’s right to maintain order and respect) in the workplace.” *Verizon Wireless*, 349 N.L.R.B. 640, 642 (2007) (citing *Piper Realty Co.*, 313 N.L.R.B. 1289, 1290 (1994)). Whether an employee’s inappropriate conduct remains protected depends on a careful balancing of four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee’s outburst; and (4) whether the

outburst was, in any way, provoked by an employer's unfair labor practice. *Atlantic Steel Co.*, 245 N.L.R.B. 814 (1979). The ALJ's finding that Agins' outburst did not cause him to lose protection under the balance of these factors should be reversed.

1. The Nature of Agins' Outburst Does Not Weigh in Favor of Protection

The ALJ erred in finding that the nature of Agins' misconduct did not weigh against continued protection under the Act, and by requiring evidence that the outburst was a "repeated, sustained course of action, including vulgar language . . . accompanied by threats, physically intimidating conduct or otherwise inappropriate references . . . directed toward a superior." (Dec. 48). A "threat or physical violence" need not accompany a profane outburst in order for this factor to weigh against protection. *See Felix Industries, Inc. v. NLRB*, 251 F.3d 1051 (D.C. Cir. 2001), *remanded* 339 N.L.R.B. 195 (2003), *enfd. per curiam* (D.C. Cir. 2004) (No. 03-1221, 03-1239) (unpublished) (the lack of a physical threat "cannot, under established law, prevent [an employee's outburst] from weigh[ing] in favor of . . . losing the protection of the Act").

To the contrary, in several cases, the Board has found the nature of the outburst to weigh against protection based on an employee's isolated use of profanity. *See, e.g., Verizon Wireless*, 349 N.L.R.B. 640, 642 (2007); *DaimlerChrysler Corp.*, 344 N.L.R.B. 1324, 1329-30 (2005); *Trus Joist MacMillan*, 341 N.L.R.B. 369, 371 (2004). For instance, the employee in *Verizon Wireless* engaged in two brief profane outbursts in the middle of an office. *Verizon Wireless*, 349 N.L.R.B. at 642. The Board found that profanity was not commonly heard on the work floor, and that the employee's use of profanity "would necessarily have drawn attention and had a destructive effect on workplace discipline." *Id.* It therefore concluded that "the nature of the outburst[] weighs heavily in favor of a finding that [the employee] lost protection of the Act." *Id.*; *see also DaimlerChrysler Corp.*, 344 N.L.R.B. at 1329-30 (nature of outburst weighed against protection where employee directed profanity toward a supervisor in a "brief" outburst).

Here, Agins went well beyond the isolated use of profanity. He engaged in a loud, heated, and profane argument with a customer and Starbucks manager that lasted at least 10 minutes. During this time, Agins admits he loudly used repeated profanity, including the word “fuck” at least several times, and told Yablon “You can go fuck yourself, if you want to fuck me up, go ahead, I’m here.” (Tr. 696, 1014-15). Agins testified that he was yelling in the middle of the store loud enough that customers and partners could hear. (Tr. 1013-14). He further admitted that he became so out of control that his friends “had to restrain” him during this incident. (Tr. 1015). Fellow Union member Peter Montalbano even apologized to James at the end of the night for what happened. (Tr. 2006) This admission alone illustrates just how out of bounds Agins’ outburst was.

The ALJ found that some employees who used profanity at work were “at times” treated less harshly than Agins. (Dec. 49). This finding disregards undisputed record evidence showing that many employees who used profanity were treated similarly to Agins or even more harshly. Resp. Ex. 53. As noted *infra* Section III.D.3, record evidence demonstrates that profanity was not common or tolerated in Starbucks, particularly yelling the word “fuck.” (GC Ex. 11 at 4; Resp. Exs. 53, 61 at 4, 65 at 4).

Moreover, in finding that other employees who used profanity were treated less harshly than Agins, the ALJ relied on evidence indicating that, in certain instances, Starbucks terminated employees for the use of profanity “only after repeated incidents of inappropriate behavior, and after receiving final warnings.” (Dec. 49 fn.55). However, the record unambiguously demonstrates that, at a minimum, Starbucks counseled and suspended Agins for his use of profanity toward James during the May 15 incident, and that his store manager told Agins he

wanted to fire him over this conduct. (Tr. 986). Thus, the ALJ's implication that, unlike other examples in the record, Agins had no prior warnings constitutes plain error.

For these reasons, the nature of Agins' outburst should have "weighed heavily" in favor of losing the Act's protection.

2. The Remaining *Atlantic Steel* Factors Demonstrate that Agins' Outburst Caused Him to Lose Protection Under the Act

Although ultimately concluding that the location of Agins' misconduct "weighs against protection," the ALJ erred by failing to give proper weight to the disruptive impact Agins' outburst had on Starbucks customers and other partners in the store. The ALJ further erred in determining that the fourth factor – whether Agins' conduct was provoked by an unfair labor practice – did not impact the balance of factors under *Atlantic Steel*.⁵

a. The location of Agins' outburst weighs heavily against protection

In several cases, the Board has found that where, as here, an employee raises his voice and uses profanity in the middle of a workplace in the presence of co-workers and customers, the location of the conduct weighs heavily against protection. *See, e.g., Verizon Wireless*, 349 N.L.R.B. 640, 643 (2007); *DaimlerChrysler Corp.*, 344 N.L.R.B. 1324 (2005); *Piper Realty Co.*, 313 N.L.R.B. 1289, 1290 (1994). As in this case, the employee in *DaimlerChrysler* engaged in a profane outburst in an open working area where other employees were present. 313 N.L.R.B. at 1328-29. Because the outburst was overheard by other employees and therefore likely to "affect workplace discipline," the Board determined that the location of the outburst weighed against protection of the Act. *Id.*

⁵ For the reasons set forth in Section III.A, *supra*, the ALJ also erred in finding that the subject matter of Agins' outburst was related to protected activity. Rather, Agins became outraged at Yablon based on Yablon's alleged insult directed at his father several months earlier. That the word "union" was mentioned in the exchange does not mean that the subject matter of Agins' outburst was related to protected activity. *See Scooba Mfg. Co.*, 258 N.L.R.B. at 149.

The undisputed evidence establishes that Agins' profane outburst took place in the middle of a Starbucks store during working hours in front of other employees and customers. Agins admitted that he engaged in a heated argument and loudly yelled profanities at a customer who also worked as an assistant manager at another Starbucks store. (Tr. 1014-15). Witnesses for both the General Counsel and Respondent testified that other partners and customers were in the store at the time and overheard the argument. (Tr. 782-83, 870, 2004). Agins and other witnesses testified that Agins became so agitated and out of control that he had to be restrained by his friends. (Tr. 937, 1015). Montalbano testified that Agins' conduct caused James to stop what she was doing and walk over to the café area where Agins was yelling in order to warn him that he "needed to calm down" because he was "being disruptive." (Tr. 1507).

The ALJ found only that Agins' conduct "*could have* resulted in a disruption in business as both employees and customers *may have* overheard the exchange." (Dec. 48) (emphasis supplied). The ALJ thus ignored clear admissions that Agins' conduct actually was disruptive. The ALJ also erred in downplaying the significance of this factor by noting that Agins had been off-duty when he exploded and had not addressed his comments to any superiors. *Id.* Such distinctions are irrelevant. *See Aluminum Co. of Am.*, 338 N.L.R.B. 20, 21-22 (2002) (finding employee's outburst that occurred in employee break room weighed against protection). Agins' profane statements, spoken loudly in the middle of a retail store in front of co-workers and customers, unquestionably "tend[ed] to undermine" Starbucks ability to maintain order and respect among its employees. *See Verizon Wireless*, 349 N.L.R.B. 640, 643 (2007).

The ALJ also diminished the weight of this factor by erroneously speculating that because the store was open to the public, "it is more than likely that this was not the first, nor the last, heated discussion or importune use of profanity to take place there." (Dec. 48). However,

Respondent introduced substantial evidence demonstrating that the Company does not tolerate the use of profanity by its employees. (Resp. Exs. 53, 61 at 4, 65 at 4; GC Ex. 11 at 4). The record contains no evidence to support the pure speculation by the ALJ. In any event, simply because profane words may have been uttered in a Starbucks store in the past does not establish that the use of profanity was common or accepted. *See Verizon Wireless*, 349 N.L.R.B. at 641 (“Although the record evidence shows that profanities were sometimes used on Respondent’s premises, there is no evidence that profanities were commonly heard on the work floor . . . the word ‘fuck,’ in particular, was not commonly heard on the work floor during worktime.”). The ALJ therefore erred by failing to give substantial weight to this factor.

b. Agins’ outburst was not provoked by unfair labor practices

The undisputed evidence establishes that Yablon’s comments to Agins about the absence of a need for a union at Starbucks constituted a lawful expression of his opinion under Section 8(c) of the Act. Indeed, no unfair labor practice charge was ever filed based on Yablon’s interaction with Agins on November 21. It is also clear that the exchange was entirely unrelated to the “button action.” Thus, the ALJ erred in concluding that this factor “supports continued protection under the Act.” (Dec. 50); *see Verizon*, 349 N.L.R.B. at 642-43 (finding that the fourth factor weighed against protection because the employee’s “profane outbursts were not a reaction to any unfair labor practice”); *DaimlerChrysler Corp.*, 344 N.L.R.B. 1324, 1330 (2005) (same; no evidence of “unlawful conduct”).

As the cases relied on by the ALJ recognize, this factor weighs against protection under the Act even where an employee is provoked by an employer’s lawful statement criticizing the union. *See* (Dec. 50 (citing *Tampa Tribune*, 351 N.L.R.B. 1324 (2007); *Verizon Wireless*, 349 N.L.R.B. 640 (2007))). Only where an employer’s conduct rises to the level of an unfair labor practice or “clearly [seeks] to interfere with the employee’s protected right to assist in

organization activity,” will this favor weigh in favor of continued protection. (Dec. 50 (citing *Overnite Transp. Co.*, 343 N.L.R.B. 1431, 1437-38 (2004))). No such conduct occurred here.

The ALJ plainly erred in finding it “undisputed” that “Yablon’s initial comments [to Agins] addressed themselves to” the issue of unfair labor practice charges that had been filed regarding the right to wear union buttons. (Dec. 50). This finding ignores the undisputed testimony of the General Counsel’s witnesses, including Agins, that the exchange between Agins and Yablon had nothing to do with the button action. (Tr. 934-36, 1011). Nothing in the record remotely suggests that Yablon questioned or even mentioned whether Starbucks partners had the right to wear a button. (Tr. 934-936). The only testimony cited by the ALJ comes from witnesses other than Agins who testified that Yablon pointed to Agins’ button and asked him “why employees needed a union.” (Dec. 38).

Thus, the ALJ erred by attempting to tie together two completely unrelated events: Yablon’s conversation with Agins about the pros and cons of a union, and unfair labor practice charges that had been filed regarding Union buttons. The ALJ found it significant that Agins’ outburst with Yablon took place on the same night as the employees’ “button action” and that Yablon asked Agins about his views on the Union after noticing that Agins was wearing a button. (Dec. 44-45). She emphasized that unfair labor practice charges had been filed against Starbucks regarding Union buttons and that the group’s “button action” was in response to those alleged unfair labor practices (even though the “charges were eventually settled with a non-admission clause” and “no specific finding of unfair labor practices can be found”). (Dec. 49). She also speculated – despite no record evidence to support her conclusion – that Yablon knew about the charges and therefore sought to provoke Agins by asking a question after looking at his button. *See* (Dec. 44).

As the ALJ found, however, the discussion between Agins and Yablon in fact centered on health benefits, stock options, and Starbucks mission statement. (Dec. 37). And, it is well settled that an employer is free to communicate views on a union without violating the Act provided it does not threaten employees or otherwise interfere with their Section 7 rights. *See NLRB v. Gissel Packing Co., Inc.*, 395 U.S. 575, 618 (1969). Moreover, by Agins' own admission, the incident did not begin to escalate until Agins accused Yablon of insulting his father. (Tr. 934-936).

The ALJ therefore erred by concluding that "the overall context of the discussion" – the fact that unfair labor practice charges had been filed about buttons and that Agins was wearing a button – created "mitigating factors" such that Agins' outburst should be protected.

C. The ALJ's Credibility Determinations Should Be Reviewed *De Novo* And Should Be Rejected

The ALJ erroneously concluded that her analysis under *Atlantic Steel* was "largely controlled by" her credibility determinations. (Dec. 48). Even assuming that this were true, the Board should conduct an independent, *de novo* review of these findings because they are based on factual inferences having no bearing on witness demeanor. *Starcraft Aerospace, Inc.*, 346 N.L.R.B. 1228, 1231 (2006). ALJs cannot simply characterize their assessments as based upon witness demeanor in order to insulate their findings from meaningful review:

Where an ALJ provides no more than a generalized, conclusory statement purportedly incorporating a host of individual comparative credibility determinations with respect to multiple witnesses, we refuse to indulge the presumption that its findings are entitled to the ordinary deference Otherwise, savvy ALJ's could simply ground their judgments in broad, categorical statements that they credit all of one party's witnesses and discredit all of the other party's witnesses, and thereby effectively insulate their decisions from meaningful judicial review.

Be-Lo Stores v. NLRB, 126 F.3d 268, 279 (4th Cir. 1997); *see also Pavillions at Forrestal, LLC*, 353 N.L.R.B. No. 60, fn.2 (Dec. 5, 2008) (explaining the Board will not affirm ALJ's credibility

findings based on “blanket statement” that ALJ’s “findings of fact were based . . . on [the ALJ’s] ‘observation of the demeanor of the witnesses.’” (citation omitted)).

This is precisely what the ALJ has done here. Despite characterizing her credibility resolutions as based on “[w]itness demeanor and [the] inherent probability of the testimony,” an examination of these assessments reveals that they are grounded not in witness demeanor, but based on speculative factual inferences unsupported by the record and not entitled to deference. (Dec. 2 fn.3); *see also, e.g.*, (Dec. 47 (“I find it highly unlikely that [James] would have failed to contact either managerial personnel or the police had Agins been as disruptive or she felt as threatened as has been asserted.”)).

Moreover, the ALJ’s credibility determinations should not be given any deference because the ALJ improperly applied two different standards to evaluate the credibility of the witnesses. The ALJ found that the stark internal inconsistencies and “shading” of testimony by the General Counsel witnesses insufficient to discredit their testimony. She also ignored the multiple contradictions and material impeachment of Agins’ testimony to credit his account of the November 21 incident over that of Tanya James. In addition, she relied on Agins’ hearsay testimony regarding the alleged exchange between Yablon and Agins’ father.

In contrast, the ALJ did not identify any inconsistencies in the testimony of Respondent’s witnesses. Yet the ALJ discredited James’ testimony as “overblown” based in part on the ALJ’s finding that James’ e-mail account of the incident, which fully corroborated James’ testimony and which constitutes an admissible business record, was “unreliable hearsay.” (Dec. 40). The ALJ further discredited James’ testimony as “inherently improbable” based on speculation as to what steps James should have taken had Agins made her feel threatened. (Dec. 46).

The ALJ's application of such disparate standards based entirely on factors other than demeanor should not be given any deference, and her findings should be overturned.

1. Agins' Testimony Should Not Be Credited

The ALJ erred in crediting Agins' testimony given the material contradictions and inconsistencies between his testimony and his prior written accounts of the incidents leading to his discharge. *See Mickey's Linen & Towel Supply, Inc.*, 349 N.L.R.B. 790, 794-95 (2007) (upholding ALJ's finding discrediting witness whose testimony conflicted with pre-trial affidavit); *L.B. & B. Assocs., Inc.*, 346 N.L.R.B. 1025, 1045-46 (2006) (same). His testimony should further be discredited because it was impeached in material respects on cross-examination. *See E.S. Sutton Realty Co.*, 336 N.L.R.B. 405, 407 & fn.9 (2001) (witness' "vivid testimony" that was directly contradicted by documentary evidence "should have given [the ALJ] pause about [the witness'] credibility in general"); *Neshaminy Elec. Contractors, Inc.*, 334 N.L.R.B. 994, 997-98 (2001) (discrediting testimony where important aspects were impeached on cross-examination and by pre-trial affidavits).

Agins testified more than once that neither his store manager, Julian Warner, nor the human resources representative present at his termination meeting informed him of the purpose of their meeting or the basis for his termination. (Tr. 1028-29). Yet Agins later admitted when presented with his March 2006 Board affidavit that, in fact, he had been advised on both matters. (Tr. 1036, 1041-42). Similarly, Agins initially testified that he was "sure" that Yablon never said "get out of my face" in response to Agins' conduct. (Tr. 1012-13). Moments later, when confronted with his pre-trial affidavit, Agins admitted that Yablon had in fact told him to "get out of my face." (Dec. 38; Tr. 1038-39).

The ALJ also noted that, though Agins testified at the hearing that Yablon used profanity during the November 21 incident, he did not mention this in his affidavit. (Tr. 1039-40). The

ALJ characterized this as “a significant omission to be sure,” but found it insufficient to “discredit his testimony on this issue.” (Dec. 45 fn.49). This material contradiction, when coupled with the many additional impeachments of Agins on cross-examination, should have led the ALJ to discredit his testimony in its entirety. *Overnite Transp. Co. (Dayton Ohio Terminal)*, 334 N.L.R.B. 1074, 1113-14 (2001) (affirming ALJ’s credibility findings where a statement was discredited because the witness omitted the relevant statement from his pretrial affidavit).

2. The ALJ Erred in Finding Tanya James Not Credible

The ALJ’s “credibility determinations” regarding James’ testimony are based not on James’ demeanor, but rather on inferences made concerning “surrounding facts and circumstances.” As such, they are entitled to no deference. (Dec. 47); *Starcraft Aerospace, Inc.*, 346 N.L.R.B. 1228, 1231 (2006).⁶

Respondent specifically excepts to the ALJ’s failure to credit the testimonial and documentary evidence demonstrating that Agins was physically aggressive and profane toward his direct manager, Tanya James. (Tr. 2003-2005; Resp. Ex. 27, 51). As James consistently recalled, through both her testimony and her December 5 declaration, Agins continued to shout profanities as she approached him, causing her to warn him more than once that he needed to calm down or she would have to call the police. (Resp. Ex. 27; Tr. 2004-05). Despite her

⁶ The Judge’s generalized finding that “I do not credit significant portions of Respondent’s account of events, which I find to be overblown and to a large extent, inherently improbable” is particularly questionable considering there is no evidence in the record of James acting with animus toward the union at any time. (Dec. 45). As the Judge acknowledged in her decision, Montalbano testified that when he came to work and announced to James that he was going to wear a Union pin and that “she could tell [management] that I wasn’t going to remove it,” James responded “Okay, Pete. I understand what you’re telling me” and permitted him to wear the pin. (Dec. 37; Tr. 1504-1505). Similarly, Montalbano testified that when he presented James with a letter signed by several employees expressing support for the Union, “she said she understood what I was saying.” (Tr. 1475). There was uncontradicted evidence in the record that James did not participate in the decision to terminate Agins. (Tr. 2012).

attempts to calm him down, Agins continued to shout “I’m tired of this shit and fuck this shit.” (Tr. 2003-05). James testified she “felt threatened.” (Tr. 2006).

The ALJ’s finding that it was “inherently improbable” that Agins and his companions would have stayed in the store for 10 minutes after his outburst had the incident been as extreme as described by James is based on nothing more than speculation as to what she believed should have happened after Agins’ friends were able to restrain him, sit him down, and calm him down at the table. As such, it should not be given any deference. (Dec. 47); Tr. 697, 802, 937, 1015); *see also Betances Health Unit, Inc.*, 283 N.L.R.B. 369, 370 (1987) (ALJ’s finding that witness account was “highly improbable” not entitled to deference; “the judge is in no better position than the Board to assess inherent probabilities of testimony, and . . . the Board is not bound by credibility determinations based on such assessments”). There is nothing implausible, moreover, about Agins remaining in the store with his friends once they had calmed him down.

Similarly, the ALJ erred in discrediting James’ account of the incident based on the fact that James did not contact anyone from Starbucks or the police until the next day. (Dec. 47). In fact, the General Counsel’s own witnesses testified that James told Agins “that he needed to calm down and that he was being disruptive and that they needed to stop arguing.” (Tr. 1507). James similarly testified that she told Agins “you have to calm down or I’m going to have to call the police.” (Tr. 2003; Resp. Ex. 27). Moreover, contrary to the ALJ’s suggestion, Starbucks does not dispute that Agins calmed down prior to leaving the store. Under these circumstances, it was entirely reasonable for James to wait until the next day to apprise her managers of the situation. (Tr. 2000-01).

The ALJ further erred in finding that James did not write the e-mail describing the November 21 incident because she did not testify about it. (Dec. 40). The ALJ ignored

uncontradicted testimony from district manager Smith, who received the e-mail, explaining that he received the e-mail and that it was written by James. (Dec. 40, 45-46; Tr. 2502-03, 2518).⁷ The General Counsel made no effort to contradict Smith's testimony on this point, and the ALJ's finding should be rejected. *See Marshall Engineered Prods. Co.*, 351 N.L.R.B. 767, 768 (2007) (rejecting ALJ's credibility determination where the ALJ "fail[ed] to appreciate that a significant portion of the [discredited witness'] testimony was independently corroborated" by a witness the ALJ did not explicitly discredit). To the extent the ALJ disregards the e-mail as "unreliable hearsay," this cannot be reconciled with her reliance on Agins' admitted "hearsay from [his] father" to establish that Agins' was engaged in protected activity at the time of the November 21 incident. (Dec. 37, 40; Tr. 1017).

Similarly, the ALJ erred in relying on "immaterial" contradictions to discredit James. (Dec. 45).⁸ The ALJ emphasized that James' December 5 statement "fails to corroborate James' testimony" that as Yablon exited the store, Agins walked toward her in a confrontational manner, used profanities in a loud voice, and that she felt threatened. (Dec. 46; Tr. 2003-2006). In her December 5 declaration, James affirms that she approached Agins and asked him to calm down, that he was "extremely agitated" and responded using profanities in a loud voice, and that she felt threatened. (Resp. Ex. 27). There is no "material" discrepancy between these two accounts.

⁷ The Judge stated that "Smith testified that it had been sent to him either by James or Warner" (Dec. 40). In fact, after considering aloud whether he received the e-mail from James or Warner, Smith testified "I think it was from Tanya [James]" and later testified that "Tanya gave me her recap of what happened" in reference to the e-mail. (Tr. 2502-03, 2518).

⁸ The ALJ further erred in drawing an adverse based on Respondent's failure to produce James' handwritten report regarding the November 21 incident. In contrast to those cases where the Board has upheld adverse inferences based on a party's failure to produce documents in their entirety, Starbucks timely produced those portions of the document maintained in its files in response to the General Counsel's subpoena. (Dec. 47; GC Ex. 98; Tr. 2038-39). *See, e.g., Windsor Convalescent Ctr. of North Long Beach*, 351 N.L.R.B. No. 44, slip op. at 12 (Sept. 30, 2007) (drawing adverse inference where documents were withheld in their entirety).

See Upper Great Lakes Pilots, Inc., 311 N.L.R.B. 131, 138-39 (1993) (refusing to conclude that employer's account of its decision was a fabrication simply because the employer's witnesses' testimony was "inconsistent in unimportant respects.")⁹

Given these errors by the ALJ and the unreliability of Agins' testimony, James' testimony should be credited over Agins'. *See Pioneer Natural Gas Co. v. NLRB*, 662 F.2d 408, 414 fn.9 (5th Cir. 1981) ("we think that the ALJ's focus on a purported inconsistency [in discredited witness' testimony] stands in striking contrast with his disregard for the serious inconsistencies in [credited witness'] story concerning this very issue and other substantial issues"). Indeed, the ALJ credited James' testimony regarding the May incident, including the e-mail recap she sent to her store manager and the fact that Agins used profanity. It was thus improper to selectively discredit her testimony and e-mail recap about the November incident. (Dec. 36, 45). *YHA, Inc. v. NLRB*, 2 F.3d 168, 174 fn.2 (6th Cir. 1993) ("inexplicable and unsubstantiated adverse inferences" drawn against employer's witnesses "contribute to our conclusion that the ALJ's credibility determination is tainted").

Agins, on the other hand, repeatedly failed to recall specific facts about the November 21 incident, and his testimony contradicted in material respects his notes and pre-trial affidavit, as discussed above. (Resp. Ex. 18; Tr. 1003-04, 1025-27, 1028, 1030, 1036, 1041-42, 1043-44).

Notably, the ALJ observed, consistent with Respondent's account of both the May and

⁹ The ALJ also emphasized that James' December 5 statement included "narrative detail, such as a comparative description of Agins' height and weight as compared to James which I do not believe would have been included in any original account of events" and that the statement noted that Yablon was an assistant store manager at another Starbucks, which James admitted she did not know at the time. (Dec. 42, 46). However, even if these factually correct details were added during James' meeting with partner resources manager Wilk, James testified that the statement accurately reflected the events of November 21, 2005. (Tr. 2007-09). The inclusion of these two details following James consultation with Wilk in preparing her declaration has no bearing on whether James is credible. *See Upper Great Lakes Pilots, Inc.*, 311 N.L.R.B. 131, 138-39 (1993).

November incidents, that Agins “appeared to be highly anxious and predisposed to emotional responses.” (Dec. 46).

3. The General Counsel’s Other Witnesses Should Not Be Credited Where They Conflict with Tanya James

The ALJ further erred by crediting the testimony of witnesses for the General Counsel over the testimony of James. A review of the record reveals that these witnesses contradicted each other and Agins. *See Transp. Servs., Inc.*, 341 N.L.R.B. 761, 764 fn.5 (2004) (upholding an ALJ decision that found “testimony . . . inconsistent between witnesses” undermined the credibility of those witnesses). It is axiomatic that inconsistencies in the testimony of witnesses with similar interests in the litigation undermines the credibility of those witnesses. *Earthgrains Co.*, 351 N.L.R.B. 733, 746 (2007) (endorsing an ALJ decision finding that “inconsistencies . . . between the testimony of . . . witnesses with similar apparent interests” affects credibility); *Rogers Elec., Inc.*, 346 N.L.R.B. 508, 516 (2006) (same); *HMY Roomstore, Inc.*, 344 N.L.R.B. 963, 964 (2005) (same).

The ALJ acknowledged that the witnesses for the General Counsel testified inconsistently about Agins’ behavior during his outburst. (Dec. 44 (“the accounts of all of the General Counsel’s witnesses are not fully consistent”)). For example, both Malchi and Montalbano denied that Agins used profanity, whereas Ayala and Agins both testified that he did. (Tr. 696-97, 870, 1014, 1570). The ALJ concluded that the witnesses were “shading their testimony in an apparent attempt to protect Agins.” (Dec. 44). However, these witnesses’ accounts of the Yablon incident included material contradictions far beyond mere “shading” of their testimony. For example, Malchi denied hearing Agins use profanity and testified evasively about the volume of Agins’ voice. (Tr. 695-97). This testimony completely contradicts Agins’ admissions that he was

cursing loudly and told Yablon “you can go fuck yourself” (Tr. 1014-15). Ayala also testified that Agins was cursing in a raised voice and “getting pretty loud.” (Tr. 801, 870).

Oddly, the ALJ found that these inconsistencies made the witnesses credible and “would be characteristic of witnesses testifying truthfully, from their best recollection” (Dec. 44-45). Such a finding credits witnesses who proved to be inherently not credible. The Board need not and should not defer to this conclusion. *See NLRB v. McCullough Envtl. Servs., Inc.*, 5 F.3d 923, 928 (5th Cir. 1993) (disregarding finding based on witnesses whose testimony contradicted the record and each other).¹⁰

Because the ALJ erred in crediting the testimony of Agins and the other General Counsel witnesses over James, her findings based on these credibility determinations should be overturned. Taking these erroneous credibility determinations into account, there can be no question that Agins’ profane outburst caused him to lose protection under the Act.

¹⁰ Ayala also should not be credited because her credibility was impeached at the hearing. When testifying about Starbucks enforcement of its dress code, Ayala contradicted herself, and her discriminatory enforcement charge was ultimately dismissed. (Dec. 29). Ayala’s testimony also was impeached more than once on cross examination. For example, in her affidavit to the Board, Ayala swore that, prior to November 2005, she had received only one written warning. (Tr. 856-57). Yet, cross-examination revealed that Ayala in fact had received at least nine corrective actions for violations prior to that date. (Resp. Ex. 10; Tr. 859-62); *see also* (Resp. Exs. 11, 12, 13; Tr. 857-59, 863-67). These discrepancies undermine Ayala’s credibility and her testimony about the November 21 incident should not be credited. *See Windsor Convalescent Center of N. Long Beach.*, 351 N.L.R.B. No. 44, slip op. at 18 fn.39 (Sept. 30, 2007).

Similarly, Malchi’s testimony concerning his charge of disparate enforcement of the dress code was not credible, and the ALJ dismissed his charge. (Dec. 29). Malchi’s testimony was plagued with specificity problems, and he often failed to “recall” details. (Resp. Exs. 1, 2; Tr. 563, 627-28, 693-94, 715, 718, 738-39, 744-47, 749-50). His testimony contradicted his own notes (Tr. 669, 681, 743-47;), his own testimony (Tr. 698), and the testimony of other witnesses. (Tr. 696-97, 870, 1014-15, 2003). In light of these contradictions and Malchi’s vague recollection of relevant facts, his testimony should not be credited. *California Gas Transp., Inc.*, 347 N.L.R.B. 1314, 1339 (2006); *UXB Int’l, Inc.*, 321 N.L.R.B. 446, 452 (1996).

D. Respondent Would Have Discharged Agins Even In The Absence Of Union Activity

The ALJ similarly erred in concluding that Starbucks did not satisfy its burden under *Wright Line* to establish that it would have discharged Agins' for his profane outburst regardless of his union activity. *Wright Line, Inc.*, 251 N.L.R.B. 1083, 1085 (1980), *enfd.*, 662 F.2d 889 (1st Cir. 1981). In reaching this conclusion, the ALJ disregarded the record evidence and relied on several erroneous inferences and "credibility determinations." Her findings should therefore be reversed.

1. The ALJ Erred by Disregarding the May 15 Incident

The undisputed record evidence demonstrates that, prior to the November 21, 2005 incident that led to his termination, Agins had engaged in a similar insubordinate and profane outburst on the store floor. Specifically, on May 15, 2005, Agins lashed out at James for not coming to his assistance immediately. (Resp. Ex. 26; Tr. 1985-92).

The ALJ disregarded the significance of this incident based on her erroneous conclusion that Agins never physically received a final written warning. (Dec. 51-52). The ALJ relied on Agins' testimony that Smith told him he would "tear up" the final warning prepared for the May 15 incident. (Tr. 958, 987-89).¹¹ However, Smith denied telling Agins this, and the ALJ erred in crediting Agins testimony over Smith's. (Tr. 2473). As noted above, Section III.C.1, *supra*, Agins' recollection is not credible. Moreover, his own notes documenting his conversation with

¹¹ The ALJ credited Agins' testimony in part because the corrective action was not signed by Agins. Decision at 51. However, the record establishes that corrective actions are not always signed at Starbucks, and the lack of a signature does not establish that a partner did not receive a corrective action. (Tr. 2532-35). But more significantly, the ALJ notes that *Agins was suspended for the incident*.

Smith regarding the May 15 incident, which Agins attested were “accurate,” do not include any mention of Smith tearing up his corrective action. (Tr. 995-96, 1004).¹²

In any event, whether Agins actually received a “final written warning” is irrelevant given his acknowledgment that a final warning had been prepared. (Resp. Exs. 16, 17; Tr. 986, 988-89, 991-92, 996, 1002, 2470, 2473, 2531-32, 2539). As the ALJ found, the record establishes that Agins was aware that his behavior on May 15 constituted misconduct and that he was on notice that he would be disciplined if he repeated it. His handwritten notes state that “I admit I was wrong when I [replied] back at [James].” (Resp. Ex. 17; Tr. 996-97). As the ALJ acknowledged, “Agins apologized to Smith for using foul language on the floor in front of customers and also apologized to James for his attitude on the floor.” (Dec. 37 (internal quotations omitted); Tr. 991-93). Agins’ notes and testimony at the hearing also reveal that Warner told him he would be fired based on his conduct and that Agins thought he might lose his job because of his outburst. (Resp. Ex. 17; Tr. 995-96; 986-87, 2472 (Agins: “[Warner] told me ‘you will be fired.’”)). He was also counseled about his behavior by both James and Warner (Resp. Ex. 26), and was suspended for a period of time based on his outburst, which he acknowledged in his notes. (Dec. 37; Resp. Ex. 17; Tr. 1003). The ALJ therefore erred in relying on Agins’ assertion that he did not receive a written corrective action.

Finally, whether Agins received the corrective action has no bearing on the legitimacy of Starbucks decision to terminate him. Agins could have been terminated for the November

¹² The ALJ’s disregard of these omissions is particularly inconsistent with her findings with respect to Jose Lopez. (Dec. 72). According to the ALJ, Lopez’ description of Gross’ performance lacked credibility in large part based on the omission of any reference to certain performance issues in Lopez’ journal. *Id.* When compared to the ALJ’s total disregard for the absence of any reference to Agins’ uncorroborated accounts of portions of the May 15 and November 21 incidents in his sworn affidavit and personal journal, the ALJ’s disparate treatment of the evidence is apparent.

incident alone. (Tr. 2472, 2474). Starbucks harassment policy explains that “In cases of serious misconduct” including “[h]arassment or abusive behavior toward partners, customers or vendors” and “[v]iolence or threatened violence,” “immediate termination from employment may be warranted.” (Resp. Exs. 61, 65 at 22; GC Ex. 11 at 22). Thus, the ALJ’s attempt to impose a requirement of progressive discipline, where none exists under Respondent’s policies, is erroneous and should be overturned.

2. The ALJ Erroneously Concluded that Respondent Could Not Rely on Agins’ November 21 Outburst to Sustain its Burden

The ALJ erred by discounting the scope and nature of Agins’ conduct on November 21, 2005, finding that Respondent “exaggerated” the extent of Agins’ outburst and that its “proffer of a false reason for the discharge supports an inference that the real reason is one” Respondent sought to conceal. (Dec. 52). This conclusion is not supported by the record. *See supra* Section III.B. Further, to the extent this conclusion is based upon “credibility determinations,” they should not be given deference for the reasons set forth above.

The ALJ’s determination that it was a “foregone conclusion” that Respondent cannot rely on the November 21 profane outburst because it constitutes protected activity must also be rejected. (Dec. 52). As set forth in detail above, the ALJ erroneously concluded that Agins was engaged in protected activity on November 21, 2005.

3. The ALJ Erred by Ignoring Substantial Evidence in the Record Establishing that Starbucks Treated Agins Consistent with Other Employees

The ALJ erroneously concluded that Respondent did not satisfy its burden because “there is some evidence that Agins was treated in a disparate fashion from other employees.” (Dec.

52).¹³ As explained above, the ALJ's attempt to distinguish between Starbucks treatment of other employees and its treatment of Agins is unpersuasive, given her erroneous assumption that Starbucks never warned Agins following the May 15 incident.

The ALJ also ignored undisputed record evidence demonstrating that Starbucks routinely terminates partners for engaging in outbursts such as Agins'. (Resp. Ex. 53). For instance, one partner was terminated immediately after she "lost her composure on the floor and in front of her partners . . . and was disrespectful and insubordinate to her store [manager]." *Id.* Another partner was terminated after she "used [profane] language to other partners in the store" and "disrespected partners." *Id.* These and numerous other examples demonstrate that Starbucks acted consistently in discharging Agins, especially in light of the fact that this was his second serious incident of misconduct. *See Allied Mech. Servs., Inc.*, 349 N.L.R.B. 1327 (2007) (finding employer would have discharged employee based on profane outburst regardless of his union involvement where employer demonstrated another employee was discharged for similar misconduct).

The ALJ therefore erred in concluding that Starbucks did not sustain its *Wright Line* burden of proving by a preponderance of the evidence that it would have discharged Agins even in the absence of his union activity.

¹³ The ALJ acknowledged "Respondent's approach to [instances of misconduct] varies, as would be understandable given the number of facilities, employees and managers involved." (Dec. 49 fn.55). For this reason, any purported discrepancies between Starbucks treatment of Agins and other employees should not have any bearing on whether Respondent satisfied its burden under *Wright Line*. *See Kendall Co.*, 267 N.L.R.B. 963, 965 (1983) (reversing finding of discrimination where ALJ relied on isolated distinguishable violations). Moreover, isolated instances of slight deviations from a generally consistent application of employer rules is not enough to prove discriminatory treatment under Section 8(a)(3). *See Waste Stream Mgmt., Inc.*, 315 N.L.R.B. 1088, 1091 (1994) (evidence that one non-union employee was not similarly reprimanded for violating safety rule was insufficient to establish a pattern of disparate treatment and thus support a finding of discrimination).

IV. THE ALJ ERRED IN CONCLUDING THAT SAENZ'S DISCHARGE VIOLATED THE ACT

On October 26, 2006, Isis Saenz encouraged members of the group she was with to “spit on” and “piss on” Starbucks Regional Vice President Jim McDermet as he exited a Starbucks store at night. (GC Ex. 50; Tr. 1693). As McDermet walked home, Saenz, along with several others followed McDermet while chanting, taunting, and making threats such as “We know where you live,” and “[W]e’re following you now, boy!” (Tr. 1396-97, 1695, 1697, 1699-1702).

Out of fear, McDermet opted not to walk to his home, but rather walked circuitously around the city until the group stopped following him. He subsequently filed a police report because he felt threatened and intimidated. (Resp. Ex. 42; Tr. 346, 2456).

Starbucks discharged Saenz for engaging in such blatantly disrespectful and threatening behavior, consistent with its treatment of other partners who have violated its policies requiring employees to treat each other with respect and dignity. (Resp. Exs. 61, 65 at 4; GC Ex. 11 at 4).

The ALJ erroneously concluded that Saenz’s misconduct on October 26 did not remove her from the protections of the Act, despite clear and undisputed evidence that Saenz engaged in harassing, inappropriate, and threatening conduct toward a Regional Vice President. As explained above, *supra* Section III.B, though a certain amount of “impulsive behavior” is tolerated under the Act for employees engaging in concerted activity, such behavior must be balanced against an employer’s right to maintain order and respect in the workplace. *Verizon Wireless*, 349 N.L.R.B. 640, 642 (2007). Where, as here, an employee directs profane and disrespectful comments toward a supervisor while engaging in otherwise protected activity, she will lose protection of the Act. *See, e.g., DaimlerChrysler Corp.*, 344 N.L.R.B. 1324, 1329 (2005); *Aluminum Co. of Am.*, 338 N.L.R.B. 20, 21-22 (2002).

In determining whether an employee's actions forfeit protection of the Act, the Board applies a four-factor balancing test set forth *supra* Section III.B. *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979). When Saenz's conduct is viewed in its entirety, including her participation in the intimidating group that followed and threatened McDermet, the balance of these factors clearly demonstrates that Saenz lost the protection of the Act by and through her conduct on October 26.¹⁴

A. The Location Of Saenz's Conduct Weighs Against Protection

The ALJ concluded that the first factor under *Atlantic Steel* weighs in favor of continued protection because Saenz was off-duty at the time of the incident and there was "no evidence that on-duty employees had any knowledge of or were in a position to overhear any comments she may have made to McDermet." (Dec. 56). This finding both incorrectly heightens the Board's standard for evaluating this factor and contradicts record evidence. Board precedent establishes that the location of an employee's conduct weighs against protection where the employee engages in disrespectful, threatening, and profane conduct toward a supervisor in front of other employees. *See, e.g., Aluminum Co. of Am.*, 338 N.L.R.B. 20, 20-21 (2002) (finding employee's outburst overheard by supervisor and other employees lost the Act's protection because it would reasonably tend to affect workplace discipline by undermining the authority of the supervisor to whom the outburst was directed); *Kiewitt Power Const. Co.*, 2008 N.L.R.B. LEXIS 419, *36-37 (Dec. 31, 2008) (holding that threatening comments uttered by two employees toward a supervisor with other employees present were not protected by the Act). These cases thus do not require that an employee be on-duty at the time of her offending remarks.

¹⁴ Respondent agrees with the ALJ's finding that the fourth factor weighs against continued protection given the absence of any evidence that Starbucks provoked Saenz, and does not except to the ALJ's findings with respect to the second factor of the *Atlantic Steel* analysis.

Nor do they require evidence that on-duty employees overheard the remarks to find this factor weighs against continued protection. Rather, in examining this factor, the Board considers whether there is a “likelihood that other employees heard the remark and others would learn of the remark.” *Postal Serv.*, 350 N.L.R.B. 441, 459 (2007). Thus, in several cases, the Board has found this factor weighs against continued protection where the employee was not working at the time of the incident and despite the absence of direct evidence that the opprobrious remarks were heard by other employees. *See, e.g., Verizon Wireless*, 349 N.L.R.B. 640, 642 (2007) (finding the location of an employee’s comments weighed heavily against protection because the comments were made in a “large open area” where other employees were likely to hear the profanity).

Whether the employees who overheard the outburst were on or off duty is irrelevant to this consideration, as the potential to undermine the supervisor’s authority is the same. Thus, the Board in *Aluminum Company of America* found this factor weighed against protection where the misconduct in question occurred in an employee break room, an area presumably intended for employees to use during non-working or off-duty time. 338 N.L.R.B. 20, 21-22 (2002). The Board did not undertake any inquiry into whether the co-workers present at the time the misconduct occurred were on-duty, making clear that whether employees are on or off duty is not determinative. *Id.* The ALJ clearly departed from established Board precedent by relying on the distinction between on- and off-duty employees in her analysis of Saenz’s conduct.

In any case, the ALJ’s description of the October 26 incident as well as the video evidence entered into the record establish a strong likelihood that on-duty employees overheard Saenz’s comments. (GC Ex. 50). The ALJ found that Starbucks employees entered and exited the store throughout the course of the demonstration. She also referred to specific comments Saenz yelled toward non-demonstrating Starbucks employees exiting the store. (Dec. 53).

Moreover, the ALJ acknowledged that Saenz directed comments toward McDermet while he remained inside the store including “Hello Jim, we have a surprise for you.” (Dec. 53; GC Ex. 50; Tr. 1680-81, 1690-91). It is untenable to find that Saenz yelled at on-duty employees and made comments toward McDermet during the course of the protest while also concluding that there is no evidence that any on-duty employees were in a position to overhear Saenz’s comments directed at McDermet. Employees repeatedly came in contact with, and were in close proximity to, the demonstration during the course of the evening. Thus, there is a strong likelihood that on-duty employees heard Saenz’s disrespectful remarks, and this factor should weigh against continued protection. *Verizon Wireless*, 349 N.L.R.B. at 642.

Even if no *on-duty* employees heard Saenz’s comments toward McDermet, the location of her actions nonetheless weighs against protection. Undisputed evidence demonstrates that at least two current Starbucks partners – Sarah Bender and Peter Montalbano – participated in the events on October 26 and could hear Saenz’s comments directed toward McDermet while he was in the store and as he exited the store. (GC Ex. 50; Tr. 1167-68, 1301, 1329, 1541, 1602). This fact alone demonstrates that the location of Saenz’s offensive and disrespectful remarks toward a Regional Vice President weighs against protection. *See Aluminum Co. of Am.*, 338 N.L.R.B. at 22; *Waste Mgmt. of Arizona Inc.*, 345 N.L.R.B. 1339 (2005) (employee’s profane and threatening conduct directed toward a supervisor in front of co-workers was not protected). There was a clear likelihood that Saenz’s remarks would undermine McDermet’s authority vis-à-vis the other partners.

B. The Nature Of Saenz’s Behavior Does Not Weigh In Favor Of Protection

The ALJ erred in finding that the nature of Saenz’s outburst “militates in favor of continued protection.” (Dec. 57). The ALJ acknowledged that Saenz’s outburst strained the limits of protected activity but ultimately concluded that this factor weighed in favor of

protection because Saenz's conduct, viewed in isolation, was not sufficiently threatening or disrespectful so as to strip her of protection under the Act. (Dec. 56-57).

However, as with the first factor, the ALJ's analysis of the nature of Saenz's outburst overstates the evidence necessary to demonstrate that this factor weighs against protection and improperly disregards the context within which Saenz's conduct occurred. A review of the entire record, including the actions of others who threatened and harassed McDermet and whose conduct Saenz made no effort to disavow, makes clear that the nature of Saenz's threatening, profane conduct clearly weighed against continued protection under the Act.

The context of the misconduct is the key to deciding whether it is protected by the Act. *Earle Indus. v. NLRB*, 75 F.3d 400, 406 (8th Cir. 1996). This is particularly true, where, as here, an employee directs her disrespectful or threatening remarks toward a supervisor in front of co-workers. *Id.* at 407 (finding that an employee lost the protection of the Act by directing her misconduct toward a supervisor who "stood as a symbol of the Company's authority"); *Waste Mgmt. of Ariz.*, 345 N.L.R.B. 1339 (2005) (employee's public profane and threatening conduct was not protected, in part, because he refused repeated requests to move discussion to private area away from co-workers); *compare Wal-Mart Stores, Inc.*, 341 N.L.R.B. 796, 808 (2004) (holding that an employee did not lose the protection of the Act because his profanity-laced comments were not used to describe another employee or a member of management but rather a workplace practice).

Moreover, the Board has recognized that statements alluding to or threatening violence (implicitly or otherwise) will not be protected, even where such statements are made in the context of otherwise protected concerted activity. *See, e.g., Int'l Baking Co.*, 342 N.L.R.B. 136, 148 (2004) (affirming ALJ finding of lawful discharge where the employee's union organizing

included threatening coworkers); *Contempora Fabrics, Inc.*, 344 N.L.R.B. 851, 852 (2005) (“implicit” threat caused employee to lose protection under the Act). Here, the evidence established that Saenz yelled “Spit on him” and “Piss on him” at McDermet as he attempted to exit the store that evening. (GC Ex. 50; Tr. 1693).¹⁵ Saenz also admitted that she catcalled and shouted at McDermet, yelling, among other things, “Jimmy, Jimmy” multiple times. (Tr. 1370). Without question, following a co-worker for several blocks at night with several other people while taking pictures of him, yelling profanities, and taunting him is sufficiently intimidating and harassing to strip Saenz’s activities of the protection of the Act. *See, e.g., DaimlerChrysler*, 344 N.L.R.B. 1324, 1329 (2005); *Aluminum Co. of Am.*, 338 N.L.R.B. 20, 20-21 (2002).

Additionally, as in *Contempora*, the words and actions directed toward McDermet by the cadre of protestors who followed him, which Saenz never repudiated or distanced herself from, conveyed an “implicit warning” to McDermet that he would be subject to adverse consequences if Starbucks continued its course of conduct vis-à-vis the Union. Saenz’s willing participation in this conduct constituted a threat undeserving of protection under the Act.¹⁶

The ALJ acknowledged that Saenz’s behavior was “disrespectful,” but concluded that such “impertinence” did not remove Saenz from the protection of the Act. (Dec. 56-57).

¹⁵ The ALJ erred in finding that Saenz did not say “piss on him” and in disregarding these statements in the absence of evidence that Starbucks was aware of them prior to the time of the hearing. (Dec. 56). Starbucks knowledge of these statements is irrelevant to whether the nature of Saenz’s profane remarks weighs against protection, and this finding improperly injects motivational considerations into the ALJ’s *Atlantic Steel* analysis.

¹⁶ The fact that the managers accompanying McDermet as Saenz and others followed him purportedly “left him after a short while” does not undermine McDermet’s testimony that he perceived the group as threatening. (Dec. 56). In fact, the evidence shows that these individuals walked with McDermet for a significant period of time before leaving. (GC Ex. 50). Moreover, the ALJ’s finding in this regard constitutes speculation as to McDermet’s personal perception and is not entitled to deference. *See Betances Health Unit, Inc.*, 283 N.L.R.B. 369, 370 (1987) (“the judge is in no better position than the Board to assess inherent probabilities of testimony”).

Relying on *Aroostook Cty. Regional Ophthalmology Ctr.*, 317 N.L.R.B. 218, 220 (1995), the ALJ contends that the nature of Saenz’s conduct does not weigh in favor of losing protection under the Act because “impropriety alone does not strip concerted conduct of statutory protection.” (Dec. 57). However, the Board’s argument in *Aroostook* was expressly overruled by the D.C. Circuit which rejected “the Board’s reasoning that the employees could not have been dismissed unless they were involved in flagrant, violent, or extreme behavior” and held that the NLRA “does not impose such a stringent limitation upon employers.” *Aroostook Cty. Regional Ophthalmology Ctr. v. NLRB*, 81 F.3d 209, 215 fn.5 (D.C. Cir. 1996). Subsequent Board decisions similarly have failed to impose such a heightened standard for finding that this factor weighs against continued protection. *See, e.g., Verizon Wireless*, 349 N.L.R.B. at 642 (noting employees may lose protection of Act for profane or insubordinate comments); *DaimlerChrysler Corp.*, 344 N.L.R.B. at 317; *Aluminum Co. of America*, 338 N.L.R.B. at 21-22.

Notwithstanding this precedent, the ALJ found Saenz’s conduct insufficiently threatening because she was not in “physical proximity” to McDermet as she walked behind him and did not continue to follow him after having followed him down 29th Street and onto Madison Avenue. (Dec. 53-54). The ALJ’s finding completely disregards the fact that Saenz willingly and knowingly pursued McDermet as part of an admittedly threatening and intimidating group. (Dec. 54-55; Tr. 343-44). Saenz admitted to being part of a group of people that followed McDermet for more than one city block and shouted threatening and profane statements at him, including “We know where you live,” “Fuck Starbucks!” “Stand up for yourself!” and “We are following you now boy.” (GC Ex. 50; Tr. 1369-72, 1543-44, 1573-74, 1604-05, 1695, 1697, 1699-1702). The record further demonstrates that, at no time did Saenz make any effort to

disavow these threatening comments or otherwise disassociate herself with the individuals who made them at that time. Her conduct therefore weighs heavily against protection.

Thus, the *Atlantic Steel* factors support a finding that Saenz lost any protection she would have otherwise been entitled to under the Act. For these reasons, Saenz's conduct was not protected by the Act, and any action taken by Starbucks was therefore lawful.

V. THE ALJ ERRED IN CONCLUDING STARBUCKS DISCHARGE OF GROSS VIOLATED THE ACT

Starbucks could have discharged Gross for any number of reasons for over a year prior to his August 2006 termination. As the record shows, Gross barely worked, ignored express feedback, and deliberately sought to undermine the authority of his managers.

During the eight-month period between May 16, 2005 and January 28, 2006, for example, Gross worked a total of 25 hours. (Resp. Ex. 59; Tr. 1233). Thereafter, despite multiple unambiguous requests by his managers to increase his availability and hours worked, Gross continued to work an average of no more than four hours per week until his discharge in August 2006. By contrast, other partners working at his store worked an average of 20-30 hours per week. (Resp. Exs. 57A, 57B; Tr. 2327). In fact, Gross worked an average of fewer hours per week than any other partner in his district, and the ALJ found that "no other employee consistently worked as few hours as Gross did during the period from May 2005 up to the date of his discharge." (Dec. 61; Resp. Exs. 57A, 57B).

Lack of availability was only part of the problem. Between January 2006 and his termination in August 2006, Starbucks gave Gross explicit feedback on multiple occasions as to the areas of his performance that needed improvement. (GC Exs. 5, 6, 35, 38, 39; Tr. 265-66, 278-80, 1091-93, 1206-08, 1220, 1239). Gross made no "comment one way or the other" as to

whether he intended to improve in these identified areas, and the record demonstrates Gross in fact made no effort to address these deficiencies. (Tr. 1248).

To the contrary, Gross expressed his belief that his January 2006 review had no bearing on his performance and that, as of his April 14 meeting with his managers, he was “satisfied” with his own performance. (Tr. 1283-84). Thus, rather than attempt to improve in those areas identified in his January 2006 review, Gross decided that he would instead perform as he had been prior to receiving the review. (Tr. 1280, 1283-84). Gross also sought to undermine the authority of his managers by encouraging his co-workers not to perform functions of their jobs that were clearly within their job descriptions. (Tr. 298, 2345-46, 2383, 2550-51).

Even if the feedback received by Gross in January and April did violate the Act, which, as set forth below in Section VI, *infra*, it did not, his failure to perform in accordance with Starbucks expectations would still constitute a legitimate basis for both his August 5 review and his discharge. The ALJ therefore erred in ignoring these undisputed facts and in finding that Starbucks terminated Gross because of his union activities. In particular, the ALJ erred in finding that an alleged “escalation” of Gross’ union activities beginning in November 2005 created an inference that Gross’ union activities constituted a substantial factor in his discharge. (Dec. 82). The ALJ also erroneously concluded that Starbucks failed to “come forward with . . . sufficient probative evidence to rebut” the General Counsel’s prima facie case in the absence of evidence of insubordination, misconduct or refusal to follow work instructions. (Dec. 84). This finding should be reversed because it contradicts un rebutted evidence regarding Gross’ conduct at work and it is at odds with Board precedent recognizing that employers can satisfy their burden under *Wright Line* where, as here, the employee fails to improve his “marginal”

performance despite specific warnings as to areas needing improvement. *See Fredon Corp.*, 323 N.L.R.B. 564, 565 (1997).

Even under the ALJ's heightened standard, Starbucks has demonstrated it would have discharged Gross regardless of his union activities. Contrary to the ALJ's findings, Starbucks demonstrated that Gross (1) failed to increase his availability and work additional hours despite multiple admonitions for him to do so, and (2) repeatedly undermined his managers and sought to discourage co-workers from performing assigned tasks.

Accordingly, the ALJ's finding that Starbucks discharge of Gross violated the Act should be reversed.

A. The ALJ Erred In Finding The General Counsel Established A Prima Facie Case

The ALJ erroneously inferred that the timing of Gross' discharge created an inference of animus. In particular, the ALJ found that the record demonstrated a "particular escalation of Union activity beginning in November 2005 which was not only deemed disruptive by Respondent, but was highly publicized." (Dec. 82). However, the record shows no such escalation, and, in any case, escalation beginning nine months before Gross' discharge in August 2006 would not sustain the General Counsel's burden.

As the ALJ acknowledged, "Gross engaged in open and substantial Union activities throughout 2004, 2005, and 2006" (Dec. 82; Tr. 1053-55, 1071-74, 1078, 1083-85, 1103-05, 1125-35, 1250-60). Gross testified that he filed a Union representation petition with the Board in the summer of 2004 and served as the union representative at the representation hearing shortly thereafter. (Tr. 1053-54, 1060). Gross also explained that he authored and disseminated multiple press releases about Starbucks and the Union, "spoke to" and was "quoted in" the press throughout 2004, including in articles appearing in the New York Times and New York Daily

News. *See generally*, (Tr. 1054-60). Similarly, Gross participated conspicuously in multiple large-scale protests and “actions” against the company throughout 2004 and 2005.

Given Gross’ ongoing participation in these activities for more than two years prior to his termination, the ALJ’s finding that Gross was terminated following an “escalation” of his activities must be rejected. *See Geo V. Hamilton Inc.*, 289 N.L.R.B. 1335, 1341 (1988) (union activity was not a motivating factor in employee’s termination where employee’s longstanding union membership had transpired without incident). In fact, the timing undermines any claim that animus contributed to Gross’ discharge. Had Starbucks wanted to terminate Gross because of his Union activity, it could have done so much earlier. *Fredon Corp.*, 323 N.L.R.B. 564, 569 (1997) (fact that employer did not terminate employee shortly after he received warnings about his poor performance and began union campaign indicates discharge not unlawfully motivated).

B. The ALJ Erroneously Found that Starbucks Failed To Satisfy Its Burden

In finding that Starbucks failed to rebut the General Counsel’s prima facie case, the ALJ improperly heightened the Company’s burden of proof. The ALJ characterized Gross as “an employee who worked infrequently, whose primary goal was to organize employees on behalf of the IWW and was otherwise disengaged from the Starbucks employee culture.” (Dec. 83). Nonetheless, she found that Starbucks could not sustain its burden of proving it would have terminated Gross regardless of his union involvement because it could not point to any “incident where [he] was insubordinate, refused to follow work instructions or engaged in misconduct while on the job.” (Dec. 82). The ALJ also cited the lack of any evidence that Gross was “unable to perform the job responsibilities of a barista.” (Dec. 83).

However, the law does not require that a company continue to employ someone simply because it cannot point to documentary evidence of insubordination or misconduct. Nor does it require an employer to tolerate an underperforming employee who rarely works merely because

he is capable of performing the basic functions of his position. Indeed, such a conclusion ignores settled Board precedent making clear that an employers can sustain their burden and rebut a prima facie case based on ongoing performance issues as opposed to a particular act of misconduct or insubordination. *See, e.g., Ironwood Plastics, Inc.*, 345 N.L.R.B. 1244 (2005). Employers are free to discharge employees who fail to improve their sub-par performance after having been counseled to do so. *Id.*; *Fredon Corp.*, 323 N.L.R.B. 564, 569 (1997) (upholding finding that employee was lawfully terminated where employee failed to improve “poor work performance and outspoken indifference”); *see also Sunland Constr. Co., Inc.*, 307 N.L.R.B. 1036, 1041-43 (1992) (finding employer met *Wright Line* burden to prove it would have discharged underperforming union employee in the absence of his union activities; “Regardless of an employee’s union affiliation, an employer is not obligated to tolerate loafing to a extent greater than is tolerated by nonunion employees”). For this reason, the ALJ’s reliance on her finding that Gross could “adequate[ly]” prepare drinks and perform the job functions of a barista also contravenes Board precedent. (Dec. 83).

The record here shows that Gross was a below-average employee who rarely worked and who failed to improve his sub-par performance, despite explicit feedback as to the areas needing improvement. Gross’ store manager, assistant store manager, and co-worker all consistently testified that when Gross did work, he did the “bare minimum.” (GC Ex. 42; Tr. 304, 2386). Tiffany Scott, Gross’ assistant store manager, described his performance as “less than mediocre.” (Tr. 2553). Lopez explained that Gross “constantly” needed to be reminded to perform basic tasks that he should have known “[a]fter three years of working at Starbucks.” (Tr. 2385-88).

Gross’ coworker, barista Jenny Robateau, testified that Gross was not “very knowledgeable about things in the store” and failed to take initiative to clean during slower

periods, as other partners in the busy store did. (Tr. 2325-26). Robateau stated that Gross “usually” took more breaks “than he should be allowed for his shift.” (Tr. 2325, 2347). Compared to other baristas working at 36th and Madison, Gross “was not performing.” (Tr. 2326). He also took substantially more time than necessary to complete basic tasks. (Tr. 2387, 2550). Robateau described Gross as “slower than most people were, almost to the point where it seemed obnoxious and not productive” (Tr. 2327). She added:

[O]ur store is a very fast-paced store. Our customers want to get served quickly. . . . Dan, you know, . . . he was always interested in not working, you know, faster . . . Dan just stayed at the same pace the entire time. And, . . . it kind of slowed us down as a team.

(Tr. 2328-29).

Gross had been told at least four times that he needed to improve his communications with management and to recognize other partners’ achievements using the Company’s organizational methods, but he failed to improve in either area. (GC Exs. 5, 6, 35, 38, 39; Tr. 2391). Gross neither communicated with Lopez regarding store needs such as missing inventory nor informed Lopez as to any concerns raised by partners. (GC Ex. 42). Gross also made no attempt to train new partners. (GC Ex. 42; Tr. 1137, 1248-49, 1737).¹⁷

¹⁷ The ALJ discounted much of the probative evidence of Gross’ poor performance based in part on the fact that not every incident was detailed in the journal maintained by Lopez about happenings at his store. (Dec. 75-76). However, Lopez credibly testified that he counsels partners multiple times each day and that his journal does not purport to document each of those conversations. (Tr. 2410). (This is evidenced by Robateau’s and Scott’s testimony that corroborated much of Lopez’s testimony regarding Gross’ performance, including issues not recorded in Lopez’s journal). (Tr. 2327, 2550-51). Further, this “inference” directly contradicts the ALJ’s crediting of Agins’ testimony that Will Smith told him he would tear up his corrective action for the May 15 incident, despite the fact Agins’ detailed notes about the incident contain no reference to this conversation. (Dec. 51-52; Tr. 995-96, 1004). Such inconsistent findings should not be upheld.

Under these circumstances, the ALJ's findings that Gross could "adequately" prepare drinks and perform the job functions of a barista is legally insufficient to support her conclusion that the discharge was unlawful. (Dec. 83).

1. Gross' Acts of Insubordination Are Not Protected Activity

The ALJ acknowledged that the record contains several examples where Gross deliberately sought to undermine the authority of his managers. (Dec. 83). These include a conversation between Robateau and Gross wherein he "told her it was not part of her job description to clean, and she was doing more work than she had to" and an instance in which Gross discouraged assistant store manager Tiffany Scott from completing a task Lopez had assigned. (Dec. 75, 83).

Although the ALJ does not dispute that these un rebutted incidents constitute clear acts of insubordination by Gross, she concluded that they could not serve as the basis for his discharge because they somehow constitute concerted activity. (Dec. 83-84). However, Gross' insubordinate instructions to coworkers that they should not perform their job duties plainly are not protected by the Act. *See Amersino Mktg. Group*, 351 N.L.R.B. 1055, 1056-57 (2007) (discharge lawful where employee announced that he would no longer perform one of his required duties); *Hamburg Industries*, 271 N.L.R.B. 683, 684 (1984) (mocking the authority of a supervisor constituted unprotected insubordination).

The Act protects employees who act in concert "for the purpose of negotiating the terms and conditions of their employment." 29 U.S.C. § 151. But the law is clear that "the Act is not a shield protecting employees from their own misconduct or insubordination." *Neptco, Inc.*, 346 N.L.R.B. 18, 19 (2005) (quoting *Guardian Ambulance Serv.*, 228 N.L.R.B. 1127, 1131 (1977)); *see also Valley Mkts., Inc.*, 192 N.L.R.B. 125, 130 (1971) ("Poor performance, misconduct and insubordination . . . do not have to be tolerated merely because the offenders are among the

plant's most active union supporters.” (quoting *N.L.R.B. v. Bangor Plastics, Inc.*, 392 F.2d 772, 777 (6th Cir. 1967)).

Gross' instructions to his co-workers not to perform their duties constituted clear insubordination, and the Board has consistently held that insubordination – including the refusal to perform job duties – is unprotected by the Act. *See, e.g., Amersino Mktg. Group*, 351 N.L.R.B. 1055, 1056 (2007) (employee who “essentially told his boss that he was helping himself by refusing to do his assigned work” lawfully discharged); *Audubon Health Care Ctr.*, 268 N.L.R.B. 135, 137 (1983) (“[Employees] cannot pick and choose the work they will do or when they will do it . . . in defiance of their employer's authority”).

The ALJ found that an invitation to engage in concerted activity must disrupt the workplace to lose the Act's protection. (Dec. 83-84 (citing *Waste Mgmt. of Ariz., Inc.*, 345 N.L.R.B. 1339 (2005))). However, an invitation to a co-worker not to perform a lawful job duty does not amount to an invitation to engage in concerted activity. *See Meyers Indus.*, 281 N.L.R.B. 882, 887 (1986) (“*Meyers II*”) (for a conversation to constitute “concerted” activity it must be “engaged in with the object of initiating or inducing or preparing for group action” (quoting *Mushroom Transp. Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964))). Because Gross' instructions to a fellow barista and an assistant store manager not to perform their job duties were unprotected insubordination rather than protected concerted activity, the ALJ erred by finding these acts could not serve as the lawful basis of Gross' discharge. *See Allied Mech. Servs., Inc.*, 346 N.L.R.B. 326, 333 (2006) (finding Respondent met its burden under *Wright Line* by demonstrating that employee was discharged due to his “obstructionist attitude” and substandard performance); *El Paso Elec. Co.*, 350 N.L.R.B. 151, 153 (2007) (upholding as lawful discharge

based on employee's "poor job performance, and workplace attitude, which was found not to be conducive to teamwork."¹⁸

2. Gross' Limited Availability and Hours Worked Directly Impacted His Performance

The ALJ further erred in finding that Starbucks reliance on Gross' limited availability and hours worked was "pretextual" because of the absence of any "probative evidence that [Gross'] restricted work schedule concretely impacted his ability to perform the basic function of a barista, or otherwise disrupted the operations of the store." (Dec. 83).

To the contrary, the record contains numerous examples demonstrating the impact of Gross' limited hours worked on his performance. For instance, he often did not know the store's current drink promotions and had to be "constantly remind[ed]" by Lopez to "get caught up with all the new promotional material." (Tr. 2389). Lopez testified that "there were instances where Dan [Gross] walked in, started working, and received a beverage [order] that he didn't know how to make" *Id.* Robateau confirmed that Gross had "limited" knowledge about making drinks, and because he did not work very much, did not know new promotions or new drinks. (Tr. 2328). Gross "would have to . . . find out how to make them." *Id.*; *see also* (Resp. Ex. 60).

The ALJ also erred in concluding that the record contained no evidence that Starbucks informed Gross "that he had to increase his availability to receive a favorable performance review." (Dec. 83). Gross was on clear notice that he needed to increase his availability and work more hours. In his January 2006 performance review, Cannon rated Gross as needing improvement precisely because: "Dan does not maintain adequate hours of availability.

¹⁸ The ALJ also erred in ignoring comparative evidence demonstrating that employees who fail to improve their deficient performance after receiving negative feedback from their managers are routinely terminated, regardless of whether they engaged in a particular act of misconduct or insubordination. (Resp. Ex. 58).

Therefore he is rarely scheduled to work. When he is scheduled, Dan frequently asks other partners to work his shifts for him.” (GC Ex. 35); *see also* (Resp. Ex. 60 (February 6, 2006 partner action notice stating, “Dan did not work frequently enough to warrant [sic] a high score. We are hoping that with an increase of shifts that he works over the next review period that we can help him bring up his scores by exposing him to promos and partners.”)).

Cannon further included Gross’ limited availability as one of Gross’ performance improvement opportunities on his January 2006 review, stating that Gross needed to open up “his availability to give him exposure to and the opportunity to work with new partners and products.” (GC Ex. 35). Gross testified that, during the administration of his January 2006 review, his manager and district manager specifically asked him to increase his availability. (Tr. 1219-20, 1223). Gross also acknowledged that Cannon emphasized the impact his limited availability had on his performance evaluation. (Tr. 1219-20). Lopez noted the need for Gross to improve his availability and attendance record in his April 27, 2006 performance update, and specifically moved back the date of his next review to “give [Gross] a full six months to improve [his] availability” (GC Ex. 6). Gross acknowledged that opening up his availability to work with new partners and products “was always something that was recommended,” but because he did not “perceive” opening up his availability to be a “mandate,” he never followed that recommendation. (Tr. 1218-19). No stronger “mandate” was required.

The ALJ disregarded the evidence introduced by Respondent because Gross received an improved rating in the category of “maintains regular and consistent attendance and punctuality” in his April 14 updated review even though his availability did not change. The ALJ found that this undermined any suggestion that Starbucks informed Gross that he needed to increase his availability. (Dec. 83). The April 14 update states, however, that Gross’ rating improved to

meets expectation because, “as agreed to during his last review, [Gross] worked all of his shifts as scheduled” during the time between his January 29, 2006 meeting with Cannon and his receipt of the April 14 update. (GC Ex. 5). Unfortunately, following his April 14 meeting, Gross returned to taking Sundays off throughout the period between April and August 2006, even though this limited his availability to one four-hour shift per week. (Tr. 1273).

The ALJ further disregarded clear evidence that Gross failed to improve his availability because Starbucks “approved all of his requests for time off.” (Dec. 83). The record makes clear that Gross’ diminished work schedule was his own choice, and was not “approved” by Starbucks. Lopez routinely scheduled Gross for both Saturday and Sunday shifts absent a request by Gross to take off a particular Sunday. (Tr. 301). When Gross requested days off, Lopez granted his requests, consistent with Lopez’s treatment of other partners in his store. (Tr. 299). At the same time, Starbucks made its displeasure with Gross’ requests clear through its statements and warnings to him. The ALJ’s opinion that it should have denied those requests is no basis for finding that Starbucks was unconcerned about the resulting lack of availability and hours worked.

Accordingly, the ALJ’s finding that Starbucks failed to show it would have discharged Gross regardless of his union activities constitutes plain error, and her finding that Starbucks violated the Act by discharging Gross should be reversed.

VI. THE ALJ ERRED IN CONCLUDING THAT STARBUCKS DISCRIMINATED AGAINST GROSS THROUGH PERFORMANCE REVIEWS AND FEEDBACK

As the foregoing discussion shows, the discharge of Gross was the natural product of his sustained poor performance, and of the evaluations that reflect that performance. Starbucks would have terminated any employee who failed, as Gross did, to improve his performance after consistently receiving feedback and evaluations insisting on the need for improvement.

The ALJ found, however, that advising Gross of his performance deficiencies itself violated the Act. Specifically, the ALJ found that Starbucks violated Sections 8(a)(1) and 8(a)(3) of the Act by issuing Gross negative performance evaluations and/or updates on performance on January 29, 2006, April 14, 2006, April 29, 2006, and August 5, 2006. (Dec. 85). As explained below, these findings are erroneous and should be reversed.

A. The ALJ Erred In Finding Starbucks Rated Gross As “Needs Improvement” On His January 29, 2006 And August 5, 2006 Reviews Because Of His Union Activity

The ALJ erred in finding Gross’ overall rating of needs improvement on his January 2006 review violated the Act. The ALJ based this finding almost exclusively on the fact that in one out of 18 categories of his review, Gross’ manager, James Cannon, commented about Gross’ attitude at work. Based on this comment, and despite the absence of any evidence demonstrating animus harbored by the manager who prepared the evaluation, the ALJ found the General Counsel presented a “relatively weak” prima facie case. (Dec. 66). As discussed below, this finding is not supported by the evidence and contradicts well-settled Board law that recognizes that references to an employee’s attitude, without more, do not establish the requisite discriminatory intent.

The ALJ also erred by basing her finding that the General Counsel made out a prima facie case in part on Starbucks alleged failure to introduce evidence establishing “ways in which his poor attitude had some impact upon the way he performed his job.” (Dec. 66). Not only does this finding improperly shift the burden to Starbucks at the prima facie case stage, but it also contravenes direct evidence in the record evidencing both Gross’ failure to maintain a positive attitude and its impact on his performance.

Finally, the ALJ erroneously disregarded substantial evidence introduced by Starbucks demonstrating it would have given Gross an overall rating of needs improvement on this review

regardless of his union activity. Accordingly, the ALJ's conclusions regarding the January 2006 review should be overturned.¹⁹

1. The General Counsel Did Not Establish a Prima Facie Case

The ALJ acknowledged that it is “undisputed” that “Gross did not meet company standards” in several respects during the period encompassed by his January 2006 review, but concluded nonetheless that the General Counsel established a “relatively weak” prima facie case. (Dec. 66).²⁰ The ALJ found the General Counsel sustained his burden based on the inclusion of a single comment on Gross' review stating: “Dan does not display behaviors that would indicate a positive attitude about Starbucks to partner and customers.” (Dec. 63; Resp. Ex. 35). The ALJ determined that, by itself, this reference to Gross' attitude constituted a “veiled reference to his Union activities” sufficient to establish a prima facie case under *Wright Line*. (Dec. 66). This finding constitutes plain error.

a. Reference to an employee's “attitude” does not establish animus

Under well-settled Board law, rating employees based on “attitude” is not, by itself, evidence of union animus. *Missouri Portland Cement Co. v. NLRB*, 965 F.2d 217, 221 (7th Cir.

¹⁹ For similar reasons and as explained more fully above in Section VI, *supra*, Starbucks also has demonstrated that Gross would have received an overall rating of needs improvement in August 2006 review regardless of his Union activity. This is particularly true given Gross' admitted failure to make any effort to improve his performance in any of the categories identified as needing improvement in his January 2006 review. (Tr. 1280, 1283-84). Moreover, Respondent excepts to the ALJ's finding that “in several areas where Gross' performance was unsatisfactory, his protected conduct was cited as a basis for such a conclusion.” (Dec. 84). Even if certain ratings were related to allegedly protected conduct, which Respondent denies, it is undisputed that Gross was discharged for his overall “bare minimum” performance, his failure to improve in areas specifically identified as needing improvement and for his limited availability and hours worked, all of which are unrelated to the conduct cited as protected by the ALJ. (Tr. 297, 304).

²⁰ Specifically, it is undisputed that Gross did not meet company standards in areas including “utilizing existing organizational methods to recognize coworkers, training new hires and communicating partner morale issues to store management” during the review period. (Dec. 64-65).

1992) (finding “nothing suspicious” about an employer’s reliance on “attitude” ratings in evaluations to make employment decisions, explaining that “attitude is a valid employment criterion”) (citing *N.Y. Telephone*, 300 N.L.R.B. 894 (1990)). This is particularly true where, as here, the record contains evidence that the employer has disciplined other employees for poor attitude, and the employee has testified that the position required that she perform her duties “in a professional manner with a positive attitude.” *Cast-Matic Corp.*, 350 N.L.R.B. No. 94, slip op. at 8-10 (Sept. 17, 2007) (no violation where employer issued final warning to employee based on her poor “attitude” at work and toward co-workers, where employee herself testified that her position required a good attitude, and evidence demonstrated she failed to do certain key job responsibilities, stating “it wasn’t my job”); (Tr. 1209-10) (Gross: “a good attitude [is] relevant to the position of Barista.”).

In fact, Board precedent recognizes that employers do not violate the Act where they terminate employees based on their “attitudes” in the workplace. *See, e.g., Allied Mech. Servs., Inc.*, 346 N.L.R.B. 326, 333 (2006) (finding Respondent met its burden under *Wright Line* by demonstrating that employee was discharged due to his “obstructionist attitude” and substandard performance including the “inordinate amount of time” it took for the employee to complete assigned tasks despite a lengthy tenure with the company); *El Paso Elec. Co.*, 350 N.L.R.B. 151, 153 (2007) (upholding as lawful discharge based on employee’s “poor job performance, and workplace attitude, which was found not to be conducive to teamwork”).

Nor do the cases relied on by the ALJ support her inference of animus based on the review’s reference to “attitude.” (Dec. 65). The Board in *Climatrol, Inc.*, found unlawful a statement that the employer would not assign work until the employees’ “attitudes” changed. 329 N.L.R.B. 946, 946 (1999). This reference to attitude, however, was accompanied by another

statement that the employer “had work it could do, but was not going to do it until the [employer] saw what would happen *with the Union.*” *Id.* (emphasis added). The Board also emphasized that these comments were made in the context of significant layoffs, and therefore “unlawfully conveyed that work opportunities had been, and would continue to be, reduced as long as employees supported the Union.” *Id.* *Climatrol* does not stand for the proposition that an isolated reference to an employee’s attitude, unconnected to any reference to a union, is sufficient to establish union animus as the ALJ found.

The ALJ’s reliance on *Children’s Studio School Public Charter School*, 343 N.L.R.B. 801, 805-06 (2004), is similarly misplaced. There, the Board relied on evidence of at least four remarks the Board found to be veiled references to the teacher’s protected activity and cited extensive evidence that the school previously considered her to be an excellent employee. *Id.* No such evidence exists here.

b. The record contains no evidence to rebut Gross’ ratings

The ALJ further relied on a portion of Gross’ testimony – the “only evidence” adduced by the General Counsel regarding Gross’ work performance during the review period – to find that Gross “rebutted the downgrading of his performance in areas such as composure, his ability to anticipate store needs and his punctuality.” (Dec. 66). However, this self-serving testimony merely consisted of counsel for the General Counsel asking Gross whether, during either the January 29 or April 14 meetings, his managers explained to him “what they meant” by the ratings or comments in his review pertaining to his demeanor, attitude and his ability to anticipate store needs. (Dec. 63-65).

Gross does not rebut any of his ratings, but merely described his attendance record and stated that none of his managers provided him with an explanation as to the basis of 2 out of 18

ratings on his review during their January 29 or April 14 meetings.²¹ This testimony directly contradicts Gross' testimony that Cannon "went through . . . the various categories of the performance review" during the January 29 meeting. It is further undermined by Gross' admission that he did not ask Cannon any questions about the meaning of his ratings despite being given the opportunity to do so. (Tr. 1090, 1220-21).

Indeed, Gross' self-serving, vague testimony in no way rebuts the ratings in the review, much less establishes that Starbucks gave Gross an overall rating of needs improvement because of his union activities.²² *See, e.g., Alstyle Apparel*, 351 N.L.R.B. 1287, 1292 (2007), slip op. at 1292-93 fns.8, 10 & 18 (not crediting witnesses' vague testimony); *California Gas Transp., Inc.*, 347, 1314, 1339 (2006) (witness not credible where testimony vague, artificial, and self-serving). This is particularly true given the ALJ's finding that Gross' testimony was "needlessly evasive" in certain respects, and Gross' failure to offer any testimony as to whether he, in fact, maintained a positive attitude in the workplace. (Dec. 60, 63).²³

²¹ Gross' testimony that his attendance and punctuality did not change during the review period also fails to rebut the basis for his ratings. Gross received a "needs improvement" rating in the category of "Maintains regular and consistent attendance and punctuality" not because of any "no call, no shows" or instances of being late, but because he did "not maintain adequate hours of availability" and "frequently ask[ed] other partners to work his shifts for him." (GC Ex. 35).

²² The ALJ should have drawn an adverse inference based on the General Counsel's failure to call Charles Polanco to rebut Respondent's evidence regarding Gross' substandard performance. Polanco worked with Gross at 36th and Madison during this period, supported the Union, and no longer works for the Company. (GC Ex. 82, at 24, Tr. 1471). *See Mail Contractors of Am., Inc.*, 346 N.L.R.B. 164, 166 (2005) ("When a party fails to call a witness, who 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.").

²³ Nor does the record contain any evidence that James Cannon, the manager who prepared the January 2006 evaluation, acted with union animus. To the contrary, the record demonstrates that Cannon rated Gross on at least two occasions prior to January 2006. (GC Exs. 38, 39). On the first evaluation, administered by Cannon 10 days after Gross publicly announced his support for the Union in May 2004, Cannon rated Gross as exceeding expectations. (GC Ex. 38; Tr. 1053, 1185). Gross himself described this review as "positive." (Tr. 1185, 1212). The review Cannon prepared for Gross in May 2005 also contained several ratings of "3," or consistently exceeds

c. The ALJ ignored evidence demonstrating Gross' failure to display a positive attitude

The ALJ also erred in finding that the General Counsel established a prima facie case in part based on the purported failure of Starbucks to adduce evidence “of ways in which [Gross’] poor attitude had some impact on the way he performed his job.” (Dec. 66). Even if this were a correct characterization of the record, the ALJ’s skepticism about the significance Cannon attached to Gross’ poor attitude does not establish that the evaluation was discriminatory. *Berry Sch. v. NLRB*, 653 F.2d 966, 971 (5th Cir. 1981) (factually inaccurate evaluation lawful because the supervisor “did not express any animus toward the exercise of protected rights . . . it would be pure speculation to say her evaluation was based on [employee’s] protected activity [and] [a]n unlawful purpose is not lightly to be inferred”); *El Paso Elec. Co.*, 350 N.L.R.B. 151, 156 (2007) (evaluation with poor ratings in several areas not discriminatory where at most one such rating was pretextual and other criticisms were supported by the record).

Moreover, the ALJ’s finding ignores direct, uncontradicted evidence in the record that Gross’ attitude did impact his performance. Jenny Robateau, a barista who worked with Gross during the review period, testified that when Gross observed her cleaning the store, something baristas are expected to do, he would tell her she did not “have to really do that” and that it was “not part of [her] job description to clean.” (Tr. 2325-2326). He advised her, “You’re doing more work than you have to.” *Id.* Robateau also testified that Gross failed to take initiative to do things like cleaning during slower periods despite the fact that other partners did so. (Tr.

expectations, and gave Gross an overall rating of “2” or “meets expectations.” (GC Ex. 39). These evaluations defeat any contention that Cannon acted with animus in preparing Gross’ less favorable January 2006 review. *Colegio Universitario Turabo*, 251 N.L.R.B. 1531, 1534 (1980) (no discrimination when professor union supporter was denied tenure based on new minimum requirements, where professor had previously received favorable ratings in his evaluations after his union support was known).

2325-26). Compared to other baristas working at 36th and Madison, Robateau described Gross as “slower than most people were, almost to the point where it seemed obnoxious and not productive” (Tr. 2326-27). Plainly, then, Gross’ “attitude” during the review period spilled over into his performance.

The review itself also supports Cannon’s comment that Gross did not display a positive attitude about Starbucks to other partners. In particular, Gross received needs improvement ratings in at least three categories bearing directly on his attitude toward his co-workers: (1) “recognizes and reinforces individual and team accomplishments by using existing organizational methods”; (2) “contributes to a positive team environment by recognizing alarms or changes in partner morale”; and (3) “assists with new partner training by positive reinforcing successful performance and giving respectful and encouraging coaching as needed.” (GC Ex. 35). As the ALJ expressly acknowledged, it is “undisputed” that Gross “did not meet company standards” in any of these categories. (Dec. 64). Unquestionably, Gross’ failure to “contribute to a positive team environment,” to recognize other employees’ accomplishments or to give “respectful and encouraging coaching” to less tenured employees corroborates the statement that he did not take any steps to evidence a positive attitude about Starbucks to other partners.

The ALJ also ignored multiple examples introduced by Starbucks demonstrating that other partners, with no apparent connection with the Union, also have been counseled about their attitude. Thus, Lena Brown, who worked at Gross’ store, received a corrective action in part because of her “attitude.” (GC Ex. 4). In addition, Kevin Laux, a partner cited on the General Counsel’s own summary exhibit regarding “needs improvement” reviews, was told that he “does not display a customer come first attitude. He doesn’t always greet customer[s] or say good bye

with a welcoming attitude.” (GC Ex. 93; Resp. Ex. 58). Similarly, partner Atosha Humbert’s review noted that her “attitude and attendance are ongoing issues that need to be changed. If she does not improve in 2 months she may face termination.” (Resp. Ex. 52).

These examples confirm the Company’s emphasis on partners’ attitude. Moreover, Gross himself testified that having a “good attitude” is important to the job duties of a barista. (Resp. Ex. 19; Tr. 1180). As Gross admitted, “because at Starbucks baristas work side by side, having a good attitude with co-workers and managers is . . . important.” (Tr. 1180, 1209). Under these circumstances, the ALJ’s reliance on Starbucks reference to Gross’ attitude cannot sustain her finding that the General Counsel established a prima facie case.

2. Starbucks Demonstrated that Gross Would Have Received a Needs Improvement Rating Regardless of His Union Activity

The ALJ failed to give sufficient weight to the substantial evidence introduced by Starbucks demonstrating that Gross would have received an overall rating of needs improvement regardless of his union activities. Thus, although the ALJ acknowledged that documentation recording Gross’ January 2006 review “specifically tied Gross’ lack of hours to his poor work performance,” the ALJ dismissed this evidence as insufficient based on Gross’ meets expectations ratings in certain categories related to his customer service and drink preparation. (Dec. 66). However, the fact that Gross may have received meets expectation in certain customer service categories has no bearing on the validity of Gross’ needs improvement ratings in other categories such as “assists with new partner training,” communicating with management, and recognizing employee accomplishments, all of which correlate directly with the minimal amount of time Gross spent in the store. (GC Ex. 35).

The ALJ also erred in wholly ignoring evidence establishing that between May 27, 2005 and August 2006, Gross worked fewer hours per week than *any other partner in his entire*

district, (Resp. Exs. 57A, 57B), and Gross admitted that between May 2005 and January 2006 he worked a total of 25 hours *during this entire period*, (Resp. Exs. 57A, 57B; Tr. 1222, 1233).²⁴ The fact that Gross adequately prepared drinks and served customers during these few hours hardly suggests that he was meeting expectations overall.

The ALJ similarly disregarded record evidence demonstrating that several of the areas identified in the January 2006 evaluation as needing improvement had been consistently raised in Gross' evaluations since at least May 2004. (GC Exs. 35, 38, 39). Gross' May 2004 and May 2005 reviews both emphasized his need to improve communication with management and to recognize the contributions of his co-workers using Starbucks organizational recognition methods. (GC Exs. 38, 39). *See R.H. Macy & Co., Inc.*, 267 N.L.R.B. 177, 182-84 (1983) (unsatisfactory reviews were not discriminatory where employees previously received similar negative performance reviews with "unsatisfactory or marginal ratings").

The ALJ further erred in completely ignoring the comparative evidence introduced by Starbucks demonstrating that other partners with extremely limited availability similarly received overall ratings of needs improvement. (Resp. Exs. 54, 62). For instance, Danielle Napier received an overall "needs improvement" review in which she earned a "1" in the category "Maintains regular and consistent attendance and punctuality" because she was "consistently getting her shifts covered" (Resp. Ex. 56). Like Gross, Napier also received a "1" in "recognizes and reinforces individual and team accomplishments" because she "has not had the opportunity to recognize or reinforce individual and team accomplishments" and a "1" in the category of assisting with new partner training. (Resp. Ex. 58). Former Starbucks partner

²⁴ Gross also admitted that, during this time, he was both giving away his scheduled shifts to co-workers and requesting time off. (Tr. 1098-1100, 1237-38). This was true despite the fact that, as Gross admitted, Cannon had admonished him in the "fall or winter" of 2005 for giving away too many shifts and had advised him that he needed to be in the store more. (Tr. 1100, 1237-38).

Gordon Wunchel also received an overall rating of “1” on his performance evaluation based in part on his failure to maintain regular availability. (Resp. Ex. 62). Other partners’ limited availability resulted in their *separation* from the Company. (Resp. Ex. 54).

The record also shows that many other partners received “1”s, or “needs improvement” ratings in the same categories, and for similar reasons, as Gross. (Resp. Ex. 52). For example, former partner Birmania Morel received a “1” rating in the category “Acts with integrity honesty and knowledge that promote the culture, values and mission of Starbucks,” with her manager noting that “Bibi needs improvement in this area. I would like to see Bibi get with the mission that promotes the Starbucks culture . . . all the time.” *Id.* The fact that other partners, with no demonstrated union affiliations, were also issued low ratings in these categories undercuts any suggestion that Gross’ evaluations were the result of his union activities and demonstrates that Starbucks would have given Gross a “needs improvement” rating regardless of his union activity.

B. The ALJ Erred In Finding Starbucks Performance Feedback Meetings With Gross On April 14 And April 29 Violated The Act

The ALJ erred in finding that an April 14, 2006 evaluation follow-up with Gross was “pretextual” and “discriminatory,” and that an April 29, 2006 performance update was “tantamount to a negative performance evaluation” violative of Section 8(a)(1) and (3) of the Act. (Dec. 70, 72). Documents like these, which do not impact an employee’s terms and conditions of employment, are not adverse employment actions and therefore do not violate the Act. *See DaimlerChrysler Corp.*, 344 N.L.R.B. 1324, 1327 (2005).

Even if the feedback meetings and documentation on April 14, 2006 and April 29, 2006 could be characterized as adverse employment actions, the ALJ erred by finding them discriminatory. The ALJ largely ignored evidence in the record that updating Starbucks partners on their performance 90 days after a performance review was a typical practice. (Resp. Exs. 56,

58; Tr. 469-70, 2619-20). This comparator evidence undermined the General Counsel's argument that the April 14, 2006 and the April 29, 2006 performance updates were discriminatory and motivated by Gross' union activities.

1. The Performance Updates Were Not Adverse Employment Actions.

The documents given to Gross at the April 14, 2006 and April 29, 2006 meetings did not constitute adverse employment actions because neither one raised any performance issues that had not previously been brought to Gross' attention, and neither had any impact on his terms and conditions of employment. *See DaimlerChrysler*, 344 N.L.R.B. 1324, 1327 (2005) (no violation because low ratings and critical comments in performance review did not affect terms and conditions of employment); *see also East Buffet & Rest., Inc.*, 352 N.L.R.B. 975 (2008) (no violation where employer's critical comment to employee – preceded by criticism of employees' decision to join the union – was “insufficient to show a change in the [employer's] employment practices”); *Success Village Apartments, Inc.*, 350 N.L.R.B. 908, 909 (2007) (even if change to housing policy was discriminatorily motivated, no violation because “[s]imply put, as to working conditions, nothing changed”).

Section 8(a)(3) only “come[s] into play when the subject matter at issue pertains to the employment relation, i.e., a term or condition of employment.” *Success Village Apartments, Inc.*, 350 N.L.R.B. at 909. Far from being “adverse,” the April 27 memorandum confirmed that the date for Gross' next performance review would be extended to give Gross additional time to improve his performance. Lopez prepared this memorandum with the “intention . . . to communicate clearly” how Gross could use this extra time to improve; he did not intend the memorandum to be disciplinary in nature. (Tr. 278, 283). As Lopez explained, the memorandum “wasn't a warning,” but an “up-to-now . . . recap of his performance, which was

another opportunity for Dan to really understand where he was” and what he needed to do “in order to maintain a meets expectation level at Starbucks.” (Tr. 278, 2359). Thus, Lopez stated:

Dan, it is my intention to set you up for success and to provide you with the tools and resources you need to excel in your role. To date, I have not seen marked improvement in the areas listed above. However, I am committed to working with you so that you can fulfill all of the areas of opportunity identified in your performance review.

(GC Ex. 6).

Gross himself testified that Lopez told him that the purpose of the meeting and the memorandum was to “set [Gross] up for success.” (Tr. 1244). Similarly, Lopez’s own notes about the April 29 meeting, recorded contemporaneously in his journal, reflect that Lopez told Gross that his “ultimate goal” was to make Gross successful and that he had pushed back the date of Gross’ next review “in fairness” to Gross so that he could address the performance issues.

(GC Ex. 4; Tr. 2361-64).

Similarly, Cannon’s purpose in holding the April 14 meeting was to introduce Lopez and Gross and to give them an opportunity to discuss those areas of Gross’ performance previously identified by Cannon as needing improvement. Thus, the evidence in the record demonstrates that neither performance update constitutes discipline.

In *DaimlerChrysler*, the Board held that even the inclusion of critical union-related comments in a performance review containing no positive ratings did not amount to an “adverse personnel action” because the review did not affect his terms and conditions of employment. 344 N.L.R.B. 1324, 1327 (2005). As the ALJ correctly noted, Gross was not due for his semi-annual performance review until July 2006, and thus was not eligible for a wage raise until that time. (Dec. 69 fn.76; GC Ex. 6; Tr. 1244-45, 1278). Accordingly, any documentation that he received in the interim could not have affected his pay rate or any other term or condition of his employment. There was no evidence in the record that the April performance updates were

accompanied by any changes in Gross' job duties or compensation, nor was Gross disciplined or placed on probationary status. Under these circumstances, the ALJ's finding that these updates violated the Act must be overturned.

2. The Performance Updates Were Not Discriminatory

Even if the meetings and documents provided to Gross did constitute adverse personnel actions, the ALJ erred in concluding that these actions occurred because of Gross' union activities. *See, e.g., Wegman's Food Mkts., Inc.*, 351 N.L.R.B. 1073 (2007) (recognizing that a nexus between animus and discipline "is essential to establish a violation" of 8(a)(3)); *Tracker Marine, L.L.C.*, 337 N.L.R.B. 644 (2002). The record contains no evidence to demonstrate that Starbucks treated Gross differently than other partners who have received overall ratings of "needs improvement." To the contrary, the evidence establishes that Starbucks managers routinely monitor the performance and progress of partners who receive such ratings, and the record includes numerous examples of this recommended practice. (Resp. Exs. 56, 58; Tr. 469-70, 2619-20). In fact, Starbucks directs its managers to have regular "check-in" conversations with the partner, and then conduct a more "formal follow-up" approximately 90 days after the "needs improvement" evaluation. (Tr. 469-71, 2619-20). Partner resources recommends that managers give the partners something in writing outlining the partners' progress. (Tr. 2620).

In her decision, the ALJ acknowledged that "the record does demonstrate instances where employees have received 90 day interim performance evaluations after receiving a 'needs improvement' review." (Dec. 69). The ALJ therefore explained that she would not "draw any conclusions from this fact, standing alone." She then proceeded to base her finding that the April 14 performance update was discriminatory almost entirely on "non-specific comments about Gross' attitude and lack of adherence to Starbucks values, culture, and ethics[.]" (Dec. 69). But, as addressed above, *supra* Section VI.A.1.a., "attitude is a valid employment criterion."

The ALJ also erred in finding that the April 29 performance update was discriminatory. The evidence in the record establishes that Starbucks practice is to follow up with partners with identified areas of improvement. Partner resources manager Traci Wilk testified without contradiction that she recommends that managers provide written feedback to partners who receive overall “needs improvement” ratings, but that there is no specific format or form that managers are required to use to document such follow-up conversations. (Tr. 2662-64). In fact, the record reflects that the performance check-ins provided to partners who receive “needs improvement” reviews range from formal “corrective action plans” that set out improvements to be made and establish a set date for “follow-up,” to entirely new performance evaluations 60 to 90 days later showing the partner’s improvement, if any, to memoranda such as the one given to Gross detailing the partner’s performance issues and setting expectations for future performance. (Resp. Ex. 58 (files of Gustavo Garcia, Roberta Desir, and LaBlessing Snipes)). Thus, the document Gross received was well within the range of Starbucks usual practice for similarly situated partners.

Finally, the April 14 and April 29 performance updates were provided in an effort to aid Gross and give him additional time to improve his performance. This fact further undercuts the ALJ’s finding of union animus. *See Knogo Corp.*, 265 N.L.R.B. 935, 949 (1982) (finding employer’s extension of poor-performing employee’s “trial period” undercut claim of union animus).

Accordingly, because the weight of the evidence in the record establishes that the April 14 and April 29 performance updates did not constitute adverse employment actions, and because the General Counsel failed to establish that these updates were discriminatorily motivated, the Board should reverse the ALJ’s findings that these measures violated the Act.

VII. THE ALJ'S REMEDY AND ORDER ARE INAPPROPRIATE

As set forth above, the ALJ's findings and conclusions are inconsistent with the record evidence and applicable law. As a result, the ALJ's recommended remedy and order are also inconsistent with the record evidence and applicable law, and therefore should not be adopted.

CONCLUSION

For the foregoing reasons, the Employer respectfully requests that the Board refuse to adopt the ALJ's findings and conclusions with regard to the allegations in Paragraphs 12(a)-(c), 22(a)-(c), 23(a)-(d), and 24(a)-(c) of the Amended Complaint, and dismiss the unfair labor practice allegations in those paragraphs.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2009, I caused a copy of the foregoing Brief in Support of Exceptions of Employer Starbucks Coffee Company to the Decision of the Administrative Law Judge to be served, via electronic mail and overnight mail, on the following:

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