

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-37798
	)	2-CA-37821
	)	2-CA-38187

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

Daniel L. Nash
Stacey R. Eisenstein
Anna E. Molpus
AKIN GUMP STRAUSS HAUER & FELD LLP
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for the Employer,
Starbucks Coffee Company

May 22, 2009

The General Counsel does not dispute the egregious misconduct and performance deficiencies leading to the discharges of Joseph Agins, Isis Saenz, and Daniel Gross. Instead, the General Counsel attempts to minimize the seriousness of their conduct by stripping out the context and treating multiple acts in isolation from one another. When viewed in their entirety in accordance with settled Board principles, however, it is clear that the abusive behavior of Agins and Saenz exceeded the permissible boundaries of the National Labor Relations Act (“Act”), and that Gross’ intentional failure to improve his subpar performance warranted his termination. It is also clear that the policy allowing partners (employees) to wear one pin displaying their support for the union—the only exception to Starbucks detailed dress code policy prohibiting pins or buttons that do not promote Starbucks business—does not unreasonably interfere with their right to display union insignia. Accordingly, as set forth below and as explained more fully in Respondent’s Brief in Support of its Exceptions to the Decision (“Resp. Brief”), these allegations should be dismissed.

I. STARBUCKS DID NOT DISCRIMINATE AGAINST AGINS

A. Agins’ Conduct Is Unprotected Under *Atlantic Steel*

The General Counsel does not dispute that Agins yelled profanities in front of customers and co-workers and told a customer and known manager “You can go fuck yourself, if you want to fuck me up, go ahead, I’m here.” (General Counsel’s Answering Brief (“GC”) 41; Tr. 1014-15).¹ Rather, the General Counsel asserts that Starbucks “varied” approach to discipline in “instances of profane outbursts” warranted the ALJ’s finding that the nature of Agins’ outburst weighs in favor of protection. (GC 41).

¹ The General Counsel’s contention that the ALJ accorded the first factor, location, “comparatively slight” weight has no basis in the Decision or the record. (GC 39). The Decision plainly states that the “first factor weighs against continued protection under the Act” (Dec. 50). The General Counsel’s assertion that this factor should be given less weight because Starbucks did not discipline Yablon for using profanity is similarly unavailing given the absence of any evidence establishing whether Starbucks disciplined Yablon for this incident. Moreover, whether Starbucks disciplined Yablon is irrelevant to whether the location of Agins’ conduct weighs against protection.

This assertion is contradicted by voluminous evidence establishing Starbucks intolerance for partners' profane and disrespectful conduct. (Resp. Ex. 53; Resp. Post-Hearing Brief 100-01, 107). Moreover, the General Counsel's argument that Starbucks "meted out lesser discipline" to other employees ignores Agins' prior suspension for engaging in similar misconduct. The Board has recognized that an employer's previous attempts to "correct similar misconduct" by the *same* employee bears directly on whether the nature of the employee's subsequent misconduct causes him to lose protection under the Act. *See Carolina Freight Carriers Corp.*, 295 N.L.R.B. 1080, 1084 n.1 (1989) (citations omitted).

The General Counsel next argues that the ALJ correctly found that Ifram Yablon provoked Agins. Yet the General Counsel concedes that Yablon did nothing more than ask Agins why a union was necessary and remind him of Starbucks "great benefits." (GC 33-34). Neither the General Counsel nor the ALJ suggests that Yablon engaged in any conduct challenged as an unfair labor practice. Instead, they argue that Yablon's alleged remark to Agins' father months earlier combined with his defense of Starbucks treatment of its employees "provoked" Agins. However, as the very cases relied on by the General Counsel recognize, the fourth factor will weigh against protection only where the employer's conduct rises to the level of an unfair labor practice or "clearly [seeks] to interfere" with the employee's right to engage in protected activity. *Overnite Transp. Co.*, 343 N.L.R.B. 1431, 1437-38 (2004); *Network Dynamics Cabling, Inc.*, 351 N.L.R.B. No. 98, 2007 WL 4661203, at *9 (Dec. 31, 2007). No such allegation has been made here.

B. Starbucks Would Have Discharged Agins Regardless of His Union Activities

The General Counsel argues that Starbucks cannot rely on Agins' profane and insubordinate behavior during the May 15 incident to support its burden under *Wright Line*

because Agins “was not on final warning” and had never been “formally disciplined” for this incident. (GC 47). In fact, the ALJ expressly found that Starbucks “suspended” Agins for this incident. (Dec. 37). Thus, there is no basis for discounting the May 15 incident, and it is clear from the comparator evidence that Starbucks would have discharged Agins regardless of his protected activities.²

Moreover, quite apart from the May 15 incident, Starbucks policy provides for the immediate discharge of employees who, like Agins, engage in “[h]arassment or abusive behavior toward partners, customers or vendors.” (Resp. Brief 49; Resp. Ex. 53). The General Counsel asserts that Respondent did not satisfy its burden under *Wright Line* because it did not show that the Company “consistently discharges employees who engage in serious outbursts while on the job.” (GC 48). However, Starbucks introduced numerous examples of employees who were discharged for profane and disrespectful conduct, and the Board has made clear that “it is not the law that an employer can prevail only by showing prior identical misconduct and discipline.” *Int’l Baking Co. & Earthgrains*, 348 N.L.R.B. No. 76, 2006 WL 3412554, *9 (Nov. 22, 2006). In any event, as the ALJ acknowledged, any disparate response to employee conduct “would be understandable given the number of facilities, employees and managers involved.” (Dec. 49).

The cases relied on by the General Counsel recognize that the *Wright Line* affirmative defense “does not fail simply because not all the evidence supports it, or even because some evidence tends to negate it.” *Avondale Indus., Inc.*, 329 N.L.R.B. 1064, 1066 (1999). Indeed, in contrast to the isolated examples alleged to evidence disparate treatment here, the General

² The isolated examples offered by the General Counsel are distinguishable in several respects. For example, unlike Agins, neither Noah Francis nor Carlos Martinez used profanity or yelled at a manager or customer in front of customers or co-workers. (GC Exs. 68, 74). Similarly, in contrast to Agins’ outbursts, which occurred within a matter of months and were addressed by the same manager, more than a year elapsed between the two instances involving Kevin Bruckner’s use profanity, and the incidents were addressed by separate managers. (GC Ex. 66). Moreover, there is no evidence in the record that Bruckner shouted or used profanity in front of customers.

Counsel in *Avondale* introduced evidence of 883 instances where the employer purportedly failed to discharge employees for engaging in comparable conduct. *Id.* at 1065-66.

II. STARBUCKS DID NOT DISCRIMINATE AGAINST SAENZ

Isis Saenz heckled Starbucks Regional Vice President Jim McDermet in front of on-duty and off-duty employees; urged employees to “spit” and “piss” on McDermet; and was part of a group that followed him and taunted him as he walked home. The General Counsel attempts to minimize this misconduct by treating each act in isolation and labeling Saenz’s actions merely a “disrespectful form of address.” (GC 28). This narrow focus should be rejected.

The General Counsel asserts that the first *Atlantic Steel* factor weighs in favor of protection because Saenz’s conduct took place away from the store and therefore did not “tend to affect workplace discipline.” (GC 27). In fact, the undisputed evidence established that off-duty employees witnessed Saenz heckle and mock McDermet, and that *on-duty* employees undoubtedly overheard Saenz’s comments as they entered and exited the store during the demonstration. (Resp. Brief 52-54). The fact that other employees witnessed this disrespectful conduct weighs heavily against continued protection under the Act. *Aluminum Co. of Am.*, 338 N.L.R.B. 20, 20-22 (2002) (outburst in non-working area overheard by other employees lost the Act’s protection because it undermined authority of supervisor). Moreover, to accept the General Counsel’s assertion that participating in a group following McDermet home at night weighs in favor of protection merely because it did not take place within a Starbucks establishment would be to exalt form over substance. In reality, the farther the group followed McDermet away from the store, the *more* threatening the conduct became.

As the ALJ and General Counsel acknowledge, the *context* of an employee’s conduct is integral to determining if it is protected by the Act. (Dec. 50 relying on “overall context of the discussion” during *Atlantic Steel* analysis; GC 42 (same)). *See also Earle Indus. Inc. v. N.L.R.B.*,

75 F.3d 400, 406 (8th Cir. 1996). Yet the ALJ and the General Counsel disregard the context in which Saenz’s conduct occurred. Saenz admitted that she not only catcalled and shouted at McDermet but also joined with a group following McDermet through the streets of New York at night while shouting threatening statements such as “We know where you live,” “[W]e’re following you now, boy!” and “Stand up for yourself.” (Tr. 342, 1370, 1396-99, 1695, 1701, 2096-97). Neither Saenz nor the General Counsel disputes that Saenz made no effort to repudiate these statements and instead continued to follow McDermet. (Dec. 53-54; GC 18-19). The nature of Saenz’s conduct was more threatening because it took place as part of a group under any common sense interpretation of this factor.³

Similarly, evidence that Saenz yelled “Spit on him” and “Piss on him” at McDermet—in front of the store and Starbucks partners—should be considered as part of the overall context of her conduct regardless of whether those statements specifically factored into Starbucks decision to discharge Saenz. The Board does not limit its analysis under *Atlantic Steel* to considering only conduct motivating an employer’s decision to impose discipline. The question is whether the conduct, viewed in its entirety, was so egregious that the employee lost protection under the Act. *Atlantic Steel Co.*, 245 N.L.R.B. 814, 816 (1979); *see also Verizon Wireless*, 349 N.L.R.B. 640, 646 (2007) (Walsh, concurring).⁴

³ In *In re Altorfer Machinery Co.*, 332 N.L.R.B. 130, 142 (2000), cited by the General Counsel for the proposition that strikers should not be accountable for violence without evidence that they participated in such violence, the Board clarifies that “bystander-strikers can be held accountable for misconduct which they ratify, counsel or incite, even though they are not actual participants.”

⁴ *Alton H. Piester, LLC*, 353 N.L.R.B. No. 33, 2008 WL 4492586 (Sept. 30, 2008) does not require the Board to confine its analysis as the General Counsel suggests. There, the Board found that an employee’s confrontation of a supervisor remained protected under *Atlantic Steel* without considering conduct that had occurred on *separate occasions*. Saenz made the comments in question during *the course of the conduct that directly led to her discharge*.

III. STARBUCKS DID NOT DISCRIMINATE AGAINST GROSS

The General Counsel argues that Gross' January 2006 review was discriminatory based on Gross' testimony that nothing had changed between his May 2005 review when he received a "meets expectation" rating and his January 2006 "needs improvement" rating. In fact, during the eight month period between the reviews, it is undisputed that Gross worked a *total* of only 25 hours, an average of three hours per month. (Resp. Ex. 59; Tr. 1233). Gross admitted that this was substantially fewer hours than he had worked during previous periods. (Tr. 1223, 1227).

As a result of his virtual failure to work during the period preceding his January 2006 review, Gross was unaware of the store's promotions and new drinks, and his manager and co-workers observed that, when he did work, Gross' performance was substandard. (Tr. 2324-25, 2328; Resp. Ex. 60). Indeed, even after he received explicit feedback in his January 2006 review, Gross admits he made no effort to improve his performance in any of the categories identified in his review, and the unrebutted evidence demonstrates that Gross consistently did no more than the "bare minimum," failed to take any initiative, and slowed down the team of partners at his store. (GC Ex. 42; Tr. 304, 2325-29, 2386).

With respect to Gross' discharge, the General Counsel argues that Starbucks cannot sustain its *Wright Line* burden by relying on Gross' acts of insubordination. (GC 66). However, the ALJ acknowledged that the record contained unrebutted evidence demonstrating Gross' deliberate attempts to undermine the authority of his managers including telling a co-worker that "it was not part of her job description to clean, and she was doing more work than she had to." (Dec. 75, 83). Indeed, contrary to the General Counsel's assertion, this conduct constitutes blatant insubordination and, as explained more fully in Respondent's Brief, plainly is not protected by the Act. *Neptco, Inc.*, 346 N.L.R.B. 18, 19 (2005) ("[T]he Act is not a shield protecting employees from their own misconduct and insubordination.").

There is also no merit to the General Counsel's assertion that Starbucks reliance on Gross' limited availability as a basis for his discharge was pretextual. (GC 67). The General Counsel ignores undisputed evidence that Gross' inadequate availability and limited hours worked comprised only one part of the basis for his discharge. Starbucks gave Gross feedback on several occasions as to the multiple areas of his performance that needed improvement, and Lopez testified without contradiction that he decided to discharge Gross based on his overall deficient performance as well as his failure to improve in any of the areas identified in his January 2006 review. (GC Exs. 5, 6, 35, 38, 39; Tr. 278-80, 297-304, 1206-08).

Moreover, Starbucks reliance, in part, on Gross' limited availability was consistent with its treatment of other partners. The record contains substantial evidence demonstrating that Starbucks routinely issued low performance ratings and even discharged other partners who, like Gross, did not work an adequate number of hours. (Resp. Exs. 54, 56, 62). For example, Starbucks discharged Melanie Marsh based in part on the fact that she was "available only 4 hrs a week." *Id.* Nephthys Antwine received a "1" in the category of "Maintains regular and consistent attendance and punctuality" on her March 7, 2005 evaluation, and less than one month later was separated from the Company because, after changing her availability, "the hours she [chose] to work did not suit our business." (Resp. Exs. 54, 58). The fact that other partners were actually separated from Starbucks specifically because of limited availability demonstrates that Starbucks did not discriminate against Gross.

The General Counsel asserts, however, that using Gross' availability as a basis for his discharge is pretextual because he received an improved rating in the category of "Maintains regular and consistent attendance . . ." in his April 14 performance update. (GC 67, 69). According to the General Counsel, the April 14 rating demonstrates that Gross' availability could

not serve as a basis for his discharge because his availability had not changed between January 2006, when he received a “needs improvement” rating in this category, and April 14 when Starbucks “upgraded” his rating. (GC 67). The General Counsel is mistaken. As the April 14 update states, Gross received a “meets expectations” in this category 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 performance update. (GC Ex. 5). The General Counsel contends that the subsequent “downgrading” of Gross’ rating in this category in his final review further undermines Starbucks claims with respect to Gross’ availability. However, it is undisputed that Gross’ efforts to increase his attendance were short-lived, as he returned to taking Sundays off following the April 14 meeting. (Tr. 1273).

The General Counsel’s attempt to cite to other partners with limited availability as evidence of disparate treatment is equally unpersuasive. (GC 68). The undisputed evidence establishes that Gross worked fewer hours per week on average than any other partner in his district. (Dec. 61; Resp. Exs. 57A, 57B). The General Counsel points to Monica Thompson. However, between May 2005 and November 2005, the relevant period for the purposes of Gross’ January 2006 evaluation, Thompson worked *98 shifts* compared to Gross’ *six*. (GC Ex. 79A; Resp. Ex. 59). Similarly, between January 1, 2006 and June 11, 2006 (when Thompson resigned), she worked a total of 32 shifts, many of which were opening shifts averaging more than six hours. (GC Exs. 79A, 79C). Gross worked only 19 shifts averaging four hours each during the same period. (Resp. Ex. 59). Nor can the General Counsel rely on Sarah Bender’s vague testimony that she and others worked limited schedules as evidence of disparate treatment, particularly given Bender’s testimony that her limited schedule lasted only for three months. (Tr. 1324-25). Similarly, Jenny Robateau testified that she worked an average of around 20 hours

per week, virtually the same amount of hours Gross worked over a period of *eight months*. (Tr. 2327). Simply stated, none of these individuals can be used as evidence of disparate treatment.

Finally, the General Counsel's contention that Gross' August 5 review evidences pretext lacks any support in the record. (GC 72). Even assuming that any part of Gross' review stemmed from his protected activities, which Starbucks disputes, Lopez unequivocally testified that he based his decision to discharge Gross on his overall substandard performance, and made the decision to discharge Gross prior to even learning about the July 15 incident between Gross and Allison Marx. (Tr. 303-04, 500-02, 510-11). Accordingly, even if Gross' threatening behavior toward Marx were protected, Lopez's undisputed testimony makes clear that Starbucks would have discharged Gross regardless of this incident.

IV. STARBUCKS PIN POLICY IS JUSTIFIED BY SPECIAL CIRCUMSTANCES

Both the ALJ and the General Counsel argue that Starbucks pin policy cannot be justified by special circumstances because partners are permitted to wear Company-issued pins designed to promote Starbucks products and to recognize employee achievements. (GC 9; Dec. 15; Tr. 196-99, 203-04, 651-52). This analysis ignores the Board's settled distinction between employer- and non-employer-issued pins and improperly usurps Starbucks right to define its desired public image. *See, e.g., Albis Plastics*, 335 N.L.R.B. 923 (2001) (policy permitting only employer-issued stickers on helmets lawful where union insignia could be displayed elsewhere); *Con-Way Cent. Express*, 333 N.L.R.B. 1073, 1075 (2001) (public image concerns justified policy allowing only employer-issued pins or buttons).

The General Counsel also overlooks the fact that Starbucks maintains a detailed dress code that significantly limits the jewelry and other accessories that may be worn by partners and prohibits partners from wearing *any* pins "that advocate a political, religious, or personal issue," *except* pins that express support for a union. (GC Ex. 3; Resp. Ex. 65); *W. San Diego*, 348

N.L.R.B. 372, 373 (2006) (employer lawfully prohibited employees from wearing union buttons despite permitting employer-issued pin “related directly to the employer’s business”). Moreover, Starbucks limitation on the *number* of union pins that may be worn contrasts markedly from the cases relied on by the General Counsel where employers imposed *complete bans* on union buttons.⁵ Starbucks more narrow limitation is consistent with the Board’s repeated recognition that employers can impose reasonable boundaries on an employee’s right to wear union insignia consistent with their business needs. *See, e.g., Con-Way Cent. Express*, 333 N.L.R.B. 1073, 1075 (2001); *United Parcel Serv., Inc.*, 195 N.L.R.B. 441 (1972).

V. CONCLUSION

For the foregoing reasons, Starbucks respectfully requests that the Board dismiss and 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.

Respectfully submitted,

AKIN, GUMP STRAUSS, HAUER
& FELD LLP

By /s/ Daniel L. Nash
Daniel L. Nash
Stacey R. Eisenstein
Anna E. Molpus
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for Respondent Starbucks Coffee Company

⁵ As set forth in Respondent’s Brief, *Serv-Air, Inc.*, 161 N.L.R.B. 382 (1966), is inapposite. The employer in *Serv-Air* allowed its employees to wear plastic name tags and to carry miscellaneous items in their breast pockets, substantially undermining its claims that wearing multiple union pins posed a *safety* hazard. In contrast, Starbucks – a retail establishment which emphasizes creating a hospitable, customer-focused atmosphere – has consistently used its dress code to promote a service-oriented image embodied in part by partners wearing Starbucks-issued pins that reward good service.

CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of May, 2009, I caused a copy of the foregoing Reply Brief in Further Support of Exceptions of Employer Starbucks Coffee Company to the Decision of the Administrative Law Judge to be served, via electronic mail on the following:

Burt Pearlstone
Counsel for the General Counsel
National Labor Relations Board
26 Federal Plaza, 36th Floor
New York, New York 10278
burt.pearlstone@nlrb.gov

Stuart Lichten
Counsel for the Charging Party
Schwartz, Lichten & Bright
275 7th Avenue, 17th Floor
New York, NY 10001
slichten@slblaborlawyers.com

Celeste Mattina
Regional Director
National Labor Relations Board, Region 2
26 Federal Plaza, Room 3614
New York, New York 10278
celeste.mattina@nlrb.gov

Respectfully submitted,

AKIN, GUMP STRAUSS, HAUER
& FELD, L.L.P.

By /s/ Daniel L. Nash
Daniel L. Nash
Stacey R. Eisenstein
Anna E. Molpus
1333 New Hampshire Ave., NW
Washington, DC 20036
(202) 887-4000 phone
(202) 887-4288 fax

Counsel for Respondent
Starbucks Coffee Company