UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
NEW YORK BRANCH OFFICE

THREE D, LLC d/b/a TRIPLE PLAY SPORTS BAR AND GRILLE

and **Case No. 34-CA-12915**

JILLIAN SANZONE, An Individual

THREE D, LLC d/b/a TRIPLE PLAY SPORTS BAR AND GRILLE

and **Case No. 34-CA-12926**

VINCENT SPINELLA, An Individual

Claire Sellers, Esq. and *Jennifer Dease, Esq.*
Hartford, Connecticut, for the Acting General Counsel
Melissa Scozzafava, Esq., Yamin & Grant, LLC,
for the Respondent

DECISION

Statement of the Case

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge filed on February 16, 2011, and amended on March 7, 2011 and April 5, 2011, by Jillian Sanzone, an Individual ("Sanzone"), and upon a charge filed on February 24, 2011, and amended on April 8, 2011, by Vincent Spinella, an Individual ("Spinella"), a Consolidated Complaint and Notice of Hearing issued on August 17, 2011. The Complaint alleges that Three D, LLC d/b/a Triple Play Sports Bar and Grille ("Triple Play" or "Respondent") violated Section 8(a)(1) of the Act by discharging Sanzone and Spinella on February 2 and 3, 2011, respectively, in retaliation for their protected concerted activities. The Consolidated Complaint also alleges that Respondent violated Section 8(a)(1) by coercively interrogating and threatening employees, informing them that they were discharged because of their protected concerted activities, threatening them with legal action in retaliation for their protected concerted activities, and maintaining an unlawful policy in its Employee Handbook. Respondent filed an Answer denying the material allegations of the complaint. This case was tried before me on October 18, 2011, in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the "General Counsel") and Respondent I make the following

Findings of Fact

I. Jurisdiction

Respondent is a Connecticut limited liability corporation with a place of business located in Watertown, Connecticut, where it operates a sports bar and restaurant. Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. Alleged Unfair Labor Practices

A. Background

Respondent began its operations in December 2009. At all times material to the events at issue in this case, Ralph DelBuono and Thomas Daddona have owned Respondent's business. DelBuono and Daddona oversee the restaurant's day to day operations, including the supervision of employees. DelBuono also responsible for Respondent's accounting. Respondent admits and I find that DelBuono and Daddona are supervisors within the meaning of Section 2(11) of the Act. Respondent also admits and I find that Lucio Dibona is an agent of Respondent within the meaning of Section 2(13) of the Act. Finally, Respondent admits and I find that its attorney, Joseph P. Yamin, was Respondent's agent within the meaning of Section 2(13) of the Act with respect to the actions he took on Respondent's behalf.

B. The Employment of Jillian Sanzone and Vincent Spinella, and their Alleged Protected Concerted Activity

Jillian Sanzone was hired by Respondent when its operations began in December 2009, and worked continuously until her discharge on February 2, 2011. Sanzone worked as a waitress on Monday evenings, and as a bartender on Wednesday evenings, Thursday during the day, Friday days and evenings, and Saturday evenings. She clocked in and out through Respondent's computer system, and received a paycheck every Friday. During her employment, Sanzone received two raises, one four or five months after her employment began, and the second around Thanksgiving 2010. She also received a cash Christmas bonus in 2010.

Vincent Spinella began working for Respondent as a cook in September 2010, and worked from Wednesday through Sunday, for at least eight hours per shift. He clocked in by punching a timecard, and received a paycheck every week. Spinella also received a cash Christmas bonus in 2010, together with a restaurant gift certificate.

Sanzone and Spinella both have accounts on the website Facebook, as does Respondent. Sanzone and Spinella both testified that prior to February 1, 2011 they had written about their employment with Respondent on their Facebook accounts. Sanzone had suggested that others visit the restaurant during her bartending shifts. Spinella had listed the restaurant's special dishes of the day, and suggested that others visit to watch particular sporting events. Both testified that prior to February 1, 2011 they had never been told that they were not permitted to write about Respondent on their Facebook accounts.

In January 2011,[1] when Sanzone filed her tax returns for 2010, she discovered that she owed taxes to the State of Connecticut. Sanzone testified that the Wednesday night prior to her discharge, waitress Amanda Faroni approached her and asked whether she had filed her tax return for the previous year. Sanzone said that she had done so, and that she owed about two hundred dollars in taxes to the State. Faroni said that she was required to pay additional taxes to the State as well. Waiter Anthony Cavallo then approached them, and said that he was getting his taxes done soon, and hoped that he did not owe anything. Daddona testified that he was aware that employees were concerned with this issue, and that as a result he and DelBuono had arranged for a staff meeting with Respondent's accountant and payroll company. This meeting was to take place a week or two after Sanzone and Spinella were discharged.

On February 1, Sanzone read and commented on a posting about Respondent on the Facebook account of a former employee named Jamie LaFrance. LaFrance had worked with Sanzone at the bar, and left her employment with Respondent in November 2010. Sanzone was "friends" with LaFrance on Facebook, meaning that she was permitted by LaFrance to write on the "wall" of LaFrance's Facebook account. On January 31, LaFrance posted a comment on her "wall" stating "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!" (emphasis in original). The postings on LaFrance's Facebook "wall" continued as follows:

> Ken DeSantis (customer): You owe them money...that's fucked up.
>
> Danielle Marie Parent (employee): I FUCKING OWE MONEY TOO!
>
> LaFrance: The state. Not Triple Play. I would never give that place a penny of my money. Ralph fucked up the paperwork…as per usual.
>
> De Santis: Yeah I really don't go to that place anymore.
>
> LaFrance: It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about 2000 in paychecks.
>
> LaFrance: We shouldn't have to pay it. It's every employee there that it's happening to.
>
> DeSantis: You better get that money…that's bullshit if that's the case I'm sure he did it to other people too.
>
> Parent: Let me know what the board says because I owe $323 and I've never owed.
>
> LaFrance: I'm already getting my 2000 after writing to the labor board and them investigating but now I find out he fucked up my taxes and I owe the state a bunch. Grrr.
>
> Parent: I mentioned it to him and he said that we should want to owe.

[1] All subsequent dates are in 2011 unless otherwise indicated.

LaFrance: Hahahaha he's such a shady little man. He probably pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. That goodness I got outta there.

Sanzone: I owe too. Such an asshole.

Parent: Yeah me neither, I told him we will be discussing it at the meeting.

Sarah Baumbach (employee): I have never had to owe money at any jobs…I hope I won't have to at TP…probably will have to seeing as everyone else does!

LaFrance: Well discuss good because I won't be there to hear it. And let me know what his excuse is ☺.

Jonathan Feeley (customer): And they're way too expensive.[2]

Spinella clicked "Like" under LaFrance's initial comment, and the text "Vincent VinnyCenz Spinella and Chelsea Molloy like this" appears beneath it. Spinella testified that at the time he clicked "Like," the last comment on the wall was LaFrance's statement, "It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about 2000 in paychecks."

Daddona testified that he learned of the discussion on LaFrance's Facebook account from his sister Jobie Daddona, who also works at the restaurant. He and DelBuono then logged onto Facebook,[3] and DelBuono printed out a hard copy of the comments from LaFrance's account.

C. The Discharge of Jillian Sanzone

Sanzone testified that when she arrived for work on February 2, Daddona spoke to her as she entered the building. Daddona told her that the company had to make some changes, and that they had to let her go. Sanzone treated the statement as a joke, and Daddona reiterated that they had to fire her. Sanzone asked why, and Daddona said that she was not loyal enough to be working with Respondent because of her comment on Facebook. Daddona said that he had learned about Sanzone's Facebook comment from customers. Sanzone protested that she worked hard, worked holidays, and did various favors for DelBuono and Daddona, all of which demonstrated her loyalty to the company. Daddona responded that Sanzone was not loyal because of her Facebook comment. Sanzone then asked for a "pink slip" and her last paycheck. Daddona did not respond, and Sanzone left.

Daddona testified that Sanzone was discharged because her Facebook comment indicated that she was disloyal, and based on several incidents where at the end of her shift her cash register held more money than could be accounted for by totaling individual receipts.

D. The Discharge of Vincent Spinella

[2] General Counsel's Exhibit 2. Participants have been identified, and minor spelling, grammatical and punctuation errors corrected, in the interests of clarity. Parent and Baumbach were employed by Respondent as of February 2011, but have since left Respondent's employ.

[3] Daddona testified that Respondent also has its own Facebook account.

Spinella testified that when he arrived at work on February 3, Daddona asked him to come to the office downstairs. DelBuono was in the office, and the Facebook comments on LaFrance's account were displayed on the screen of the office computer. DelBuono asked Spinella if there was a problem with him and Daddona, or with the company, and Spinella replied that he had no such problems. DelBuono said that LaFrance's Facebook wall indicated the opposite. DelBuono and Daddona proceeded to ask Spinella about the various comments, and about the significance of the "Like" option that Spinella had chosen. DelBuono asked Spinella whether he had written anything negative about DelBuono and Daddona, and Spinella said that he hadn't written anything; he had only clicked the "Like" option. DelBuono also asked Spinella who Chelsea Molloy was, and Spinella explained that he did not know. DelBuono then told Daddona that the "Like" option meant that Spinella stood behind the other commenters, and asked Daddona whether Spinella had their best interests in mind given that he clicked the "Like" option. Daddona responded that this demonstrated that Spinella did not have their best interests in mind. DelBuono then said that his attorney had informed him that he should discharge anyone involved in the Facebook conversation for defamation. Spinella stated that the restaurant was DelBuono and Daddona's business, and that if they believed that his clicking the "Like" option was grounds for discharge, he understood that they felt they had to do so. DelBuono told Spinella that it was time for him to go home for good, and Spinella then left. As Spinella was leaving, DelBuono told him that he would be hearing from Respondent's attorneys.

Daddona testified that Spinella was discharged for poor work performance, including excessive cell phone use, conversing with the waitresses, and cigarette breaks, and failure to perform his work in an expedient manner. Daddona testified that Spinella's having chosen the "Like" option on LaFrance's Facebook account was not a factor in the decision to discharge him, and was not discussed during the conversation terminating his employment. Daddona testified that when he and DelBuono met with Spinella, they asked whether he was happy working for them, and asked him to provide a reason why he should remain employed, given his work performance. Daddona testified that when Spinella did not respond, he and DelBuono felt that Spinella was not interested in continuing his employment.

DelBuono also testified regarding Spinella's discharge meeting. DelBuono said that he and Daddona decided to meet with Spinella because Spinella's "Facebook comment raised a red flag," and made it apparent that he was unhappy. During the meeting, DelBuono told Spinella that he was obviously not happy, and then "questioned him," asking him, "if he liked those defamatory and derogatory statements so much well why is he still working for us?" DelBuono told Spinella that because he "liked the disparaging and defamatory comments," it was "apparent" that Spinella wanted to work somewhere else. He asked Spinella to provide "one valid reason why you want to continue working for us," and Spinella made no response and left.

Spinella testified that later on the day of his discharge he called Daddona to inquire about his final paycheck. He left a message for Daddona, which DelBuono returned. After they arranged for Spinella to receive his paycheck, Spinella asked DelBuono whether he would need any additional paperwork to file for unemployment, and DelBuono stated that Respondent's attorneys would not permit him to receive unemployment benefits.

E. Respondent's Threat to Institute an Action for Defamation Against Sanzone

On February 4, Respondent's attorney Joseph P. Yamin of Yamin & Grant, LLC, wrote to Sanzone, stating as follows:

> We represent Three D, LLC d/b/a Triple Play Sports Bar and its principals, Thomas Daddona, Ralph Delbuono, and Lucio Dibona. Pursuant to Connecticut General Statute § 52-237 (a copy is attached), this letter is a formal request for you to retract, in as public a manner as they were made, the defamatory statements regarding Triple Play and its principals published to the general public on Facebook. To refresh your recollection of those statements, attached are the excerpts from the Facebook website. Provide us with written confirmation that you have retracted your defamatory statements. If such statements are not retracted within thirty (30) days, we will be forced to commence an action for defamation against you.

Because users of Facebook are unable to delete the comments they post on another user's account, Sanzone asked LaFrance to delete the comment she had made on LaFrance's "wall" regarding owing money on her taxes. LaFrance deleted Sanzone's comment.[4] LaFrance had been sent a letter identical to Yamin's letter to Sanzone, and LaFrance had posted a retraction. On February 26, Sanzone sent Yamin a letter stating that her comment on LaFrance's Facebook page had been erased, and that she had filed a charge with the National Labor Relations Board. On March 1, Yamin responded that "A retraction requires that you post a formal statement that the defamatory statements were not true. Provide us with written confirmation that you have retracted your defamatory statements." Sanzone did not respond, and did not post any other statement or communicate with Yamin again.

The evidence establishes that no lawsuit was ever filed against Sanzone, Spinella, or LaFrance.

F. Respondent's Internet/Blogging Policy

Respondent maintains a Handbook containing Employee Guidelines, which, according to Delbuono, was discussed with Respondent's initial employees when the restaurant began its operations in December 2009. Delbuono testified that at employee orientation the Handbook was passed around among the employees, and that he told the employees that they could request their own copy. As discussed above, Sanzone was one of Respondent's initial employees.

The "Internet/Blogging Policy" contained in Respondent's Employee Guidelines states as follows:

> The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

[4] Spinella testified that after Sanzone was discharged he rescinded his selection of the "Like" option on LaFrance's Facebook account.

III. Analysis and Conclusions

A. The Discharges of Jillian Sanzone and Vincent Spinella

1. Summary of the Parties' Contentions

General Counsel contends that Respondent's decision to discharge Sanzone and Spinella was based entirely on their having participated in the conversation on LaFrance's Facebook account. General Counsel argues as a result that the discharges must be considered pursuant to the analysis articulated by the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Under *Burnup & Sims*, an employer violates Section 8(a)(1) when the discharged employee was engaged in protected activity at the time of their purported misconduct, the employer knew of the protected activity, the basis for the discharge was the employee's alleged misconduct in the course of their protected activity, and the employee was not actually guilty of the misconduct. General Counsel thus argues that Sanzone and Spinella's participation in the Facebook conversation was protected concerted activity, that Respondent was aware of their participation, that Respondent discharged them for the comments constituting alleged misconduct, and that Sanzone and Spinella did not in fact commit misconduct causing them to lose the Act's protection. Applying the Board's analysis articulated in *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979), General Counsel argues that given the location and subject matter of the Facebook discussion, the nature of the "outburst," and the extent to which the outburst was provoked by Respondent's conduct, Sanzone and Spinella's comments on LaFrance's Facebook account remained protected activity. General Counsel also argues that Sanzone and Spinella's comments did not constitute disparaging and disloyal statements unprotected under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and its progeny. Finally, General Counsel contends that, to the extent that the *Wright Line* analysis may be applicable, it has established a *prima facie* case and Respondent has failed to establish by a preponderance of the credible evidence that it in fact discharged Sanzone and Spinella for other, legitimate, reasons.

Respondent contends in its Post-Hearing Brief that Sanzone was discharged for "disloyalty," consisting of her "disparaging attack" on DelBuono during the Facebook discussion, and repeated cash register inaccuracies. Respondent argues that Sanzone's comment on LaFrance's Facebook account was unprotected under *Jefferson Standard*. Respondent contends that Spinella was discharged for poor work performance, and not for any participation in the Facebook discussion. However, Respondent contends that even if Spinella had been discharged for his participation in the Facebook conversation, his having selected the "Like" option would constitute unprotected disloyalty and disparagement under *Jefferson Standard*. Respondent further contends that Sanzone and Spinella's comments were defamatory and unprotected under *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), in that they were made with knowledge that they were false or with reckless disregard for their truth or falsity. Finally, Respondent argues that Sanzone and Spinella's comments lost the protection of the Act under the *Atlantic Steel* analysis.

The evidence here establishes that General Counsel has satisfied the *Burnup & Sims* standard, and that Sanzone and Spinella's participation in the Facebook discussion did not lose its protected status under *Atlantic Steel*, *Jefferson Standard*, or *Linn*. The evidence further establishes that, with respect to Respondent's other asserted reasons for the discharges, General Counsel has established a *prima facie* case that Sanzone and Spinella were discharged in retaliation for their protected concerted activity. Finally, Respondent has not met

its burden to show by a preponderance of the evidence that Sanzone and Spinella were in fact discharged for legitimate, non-discriminatory reasons.

2. Sanzone and Spinella Engaged in Protected Concerted Activity by Participating in the Discussion on LaFrance's Facebook Account

The evidence establishes that Sanzone and Spinella were engaged in concerted activity within the meaning of Section 7 of the Act when they participated in the discussion on LaFrance's Facebook account. Section 7 of the Act provides that "employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is beyond question that issues related to wages, including the tax treatment of earnings, are directly related to the employment relationship, and may form the basis for protected concerted activity within the meaning of Section 7. *See, e.g., Coram Pond Diner*, 248 NLRB 1158, 1159-1160, 1162 (1980) (protected concerted activity involving employee complaint regarding employer's failure to deduct taxes from pay and provide W-2 forms). While LaFrance herself was a former employee and two customers posted comments as well, current employees Parent and Baumbach, as well as Sanzone and Spinella, were involved in the discussion.

The evidence also establishes that the Facebook discussion was part of a sequence of events, including other, face-to-face employee conversations, all concerned with employees' complaints regarding Respondent's tax treatment of their earnings. It is well-settled that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Worldmark by Wyndham*, 357 NLRB No. 104 at p. 2 (2011), *quoting Meyers Industries*, 281 NLRB 882, 887 (1986), *enf'd sub nom. Prill v NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); *see also KNTV, Inc.*, 319 NLRB 447, 450 (1995) ("Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action"). The specific medium in which the discussion takes place is irrelevant to its protected nature. *See, e.g., Timekeeping Systems, Inc.*, 323 NLRB 244, 247 (1995) (e-mail regarding vacation policy sent by employees to fellow employees and to management concerted activity).

The record here establishes that prior to the Facebook discussion several employees, including Sanzone, had spoken at the restaurant about Respondent's calculation of their tax withholdings, and that a number of them owed a tax payment to the State of Connecticut after filing their 2010 tax returns. Indeed, DelBuono and Daddona were aware that this was an important issue for a number of the employees, and had as a result scheduled a meeting between the employees and Respondent's payroll administrator for the week after Sanzone and Spinella were discharged. The employees who posted comments on LaFrance's Facebook account specifically discussed the issues they intended to raise at this upcoming meeting and avenues for possible complaints to government entities. As a result, I find that the employees' Facebook discussion was part of an ongoing sequence of events involving their withholdings and taxes owed to the State of Connecticut, and was therefore concerted activity. *See*, *e.g.*, *Tampa Tribune*, 351 NLRB 1324, 1325 (2007), *enf. denied*, 560 F.3d 181 (4th Cir. 2009) (single conversation concerted when "part of an ongoing collective dialogue" between Respondent and its employees and a "logical outgrowth" of prior concerted activity); *Circle K Corp.*, 305 NLRB 932, 933-934 (1991), *enf'd*, 989 F.2d 498 (6th Cir. 1993) ("invitation to group action" concerted activity regardless of its outcome).

I further find that Spinella's selecting the "Like" option on LaFrance's Facebook account constituted participation in the discussion that was sufficiently meaningful as to rise to the level

of concerted activity. Spinella's selecting the "Like" option, so that the words "Vincent VinnyCenz Spinella…like[s] this" appeared on the account, constituted, in the context of Facebook communications, an assent to the comments being made, and a meaningful contribution to the discussion. In fact, Spinella's indicating that he "liked" the conversation was sufficiently important to engender the meeting with DelBuono and Daddona which ended with his discharge. In addition, the Board has never parsed the participation of individual employees in otherwise concerted conversations, or deemed the protections of Section 7 to be contingent upon their level of engagement or enthusiasm. Indeed, so long as the topic is related to the employment relationship and group action, only a "speaker and a listener" is required. *KNTV, Inc.*, 319 NLRB at 450. I find therefore that Spinella's selecting the "Like" option, in the context of the Facebook conversation, constituted concerted activity as well.

I find that Sanzone and Spinella's Facebook comments were not sufficiently egregious as to lose the protection of the Act under *Atlantic Steel* and its progeny.[5] The *Atlantic Steel* analysis requires the consideration of four factors: (i) the place of the discussion; (ii) the discussion's subject matter; (iii) the nature of the outburst on the part of the employee; and (iv) whether the outburst was provoked by the employer's unfair labor practices. *See, e.g., Plaza Auto Center, Inc.*, 355 NLRB No. 85 at p. 2 (2010), *citing Atlantic Steel*, 245 NLRB at 816. These four criteria are intended to permit "some latitude for impulsive conduct by employees" during protected concerted activity, while acknowledging the employer's "legitimate need to maintain order." *Plaza Auto Center, Inc.*, 355 NLRB No. 85 at p. 2. As the Board has stated, the protections of Section 7 must "take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Company*, 282 NLRB 131, 132 (1986). Therefore, statements during otherwise protected activity lose the Act's protection only where they are "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204-205 (2007), *enf'd*, 519 F.3d 373 (7th Cir. 2008), *quoting Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976).

In order to apply the *Atlantic Steel* analysis, the specific statements at issue must be determined. Sanzone posted one comment on LaFrance's Facebook account: "I owe too. Such an asshole." Although Sanzone testified that she was using the word "asshole" to refer to the fact that she owed tax monies to the State of Connecticut, I find that the more plausible conclusion is that she was in fact referring to Ralph DelBuono, who was responsible for Respondent's accounting, and is discussed by LaFrance. Spinella clicked the "Like" option, resulting in the statement "Vincent VinnyCenz Spinella and…like this," which refers in the context of a Facebook discussion to the entire topic as it existed at the time.

I reject Respondent's contention that Sanzone and Spinella may be deemed responsible for comments that they did not specifically post, such as those of LaFrance. Respondent makes much of the fact that it did not discharge the other two employees – Danielle Marie Parent and Sarah Baumbach – who participated in the discussion, contending that this illustrates that Sanzone and Spinella's comments lost the Act's protection. Such an argument is not meaningful within the context of the *Atlantic Steel* analysis, and evidence that some employees

[5] Contrary to Respondent's contention in its Post-Hearing Brief, the *Atlantic Steel* analysis is not limited to statements made during formal grievance proceedings. *See, e.g., Plaza Auto Center, Inc.*, 355 NLRB No. 85 at p. 2 (statement made during meeting between employee and managers in non-unionized workplace); *Datwyler Rubber and Plastics*, 351 NLRB 669, 669-670 (2007) (outburst occurred during employee meeting).

involved in protected concerted activity were not subject to retaliation generally carries little weight in the *Wright Line* context. In any event, Respondent makes no attempt to explain why Parent and Baumbach should not be charged with having adopted LaFrance's comments, as were Sanzone and Spinella. In addition, the Board has emphasized that when evaluating the conduct of individual employees engaged in a single incident of concerted activity, each employee's specific conduct must be analyzed separately. *Crowne Plaza LaGuardia*, 357 NLRB No. 95 at p. 4-6 (2011) (only employees that deliberately attempted to physically restrain manager lost Section 7's protection; other employees involved in confrontation were unlawfully discharged). As a result, the two comments under consideration are Sanzone's remark, "I owe too. Such an asshole." and Spinella's statement "Vincent VinnyCenz Spinella [and…] like this."

The first of the *Atlantic Steel* factors – the place of the discussion – militates in favor of a finding that Sanzone and Spinella's comments did not lose the protection of the Act. The comments occurred during a Facebook conversation, and not at the workplace itself, so there is no possibility that the discussion would have disrupted Respondent's work environment. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB at 670 (outburst which took place during a meeting in the employee breakroom not disruptive to employer's work processes). Because DelBuono and Respondent's other owners were not present, there was no direct confrontational challenge to their managerial authority.

The evidence does establish, as Respondent contends, that two of its customers participated in the Facebook conversation. However, I find that this fact is insufficient to remove Sanzone and Spinella's comments from the protection of the Act. The Board has held that the presence of customers during brief episodes of impulsive behavior in the midst of otherwise protected activity is insufficient to remove the activity from the ambit of Section 7's protection where there is no evidence of disruption to the customers. *Crowne Plaza LaGuardia*, 357 NLRB No. 95 at p. 6 (presence of two hotel guests during employees' loud chanting and confrontation with manager insufficient to divest activity of statutory protection without evidence that services were disrupted); *Goya Foods of Florida,* 347 NLRB 1118, 1134 (2006), *enfd.* 525 F.3d 1117 (11th Cir. 2008) (brief episode of shouting inside supermarket insufficient to render activity unprotected in absence of evidence of customer disruption). In addition, the activity at issue here did not take place at Respondent's restaurant, but on the Facebook account of a former employee, whom customers would have to specifically locate and "befriend" in order to view. As a result, the situation at issue here is materially different from conduct occurring in an employer's establishment, which customers engaged in ordinary business transactions with the employer would be forced to witness. Finally, there is no evidence that the Facebook discussion somehow generally disrupted Respondent's customer relationships. Although Daddona testified that he had not seen one of the customers who participated in the conversation since that time, there is no evidence as to why this customer had not visited the restaurant. In fact, the other customer who participated in the conversation stated that in his opinion the restaurant was too expensive. As a result, there is insufficient evidence to find that Sanzone and Spinella's comments resulted in some sort of harm to Respondent's business.

For all of the foregoing reasons, I find that the first component of the *Atlantic Steel* analysis militates in favor of a finding that Sanzone and Spinella's participation in the Facebook discussion did not lose its protected character.

With respect to the second aspect of the *Atlantic Steel* analysis, the subject matter of the discussion, the evidence establishes that the Facebook conversation generally addressed the calculation of taxes on the employees' earnings by Respondent, and the fact that many of the employees ended up owing money to the State of Connecticut after filing their 2010 tax returns. Because the subject matter of the conversation involved and protected concerted activity, this

factor militates in favor of a finding that Sanzone and Spinella's activity remained protected under the Act. *Plaza Auto Center, Inc.*, 355 NLRB No. 85 at p. 2 (discussion involving intemperate comments addressed protected concerted activity pertaining to compensation).

As to the third factor, the nature of Sanzone and Spinella's "outburst" clearly did not divest their activity of the Act's protection under the *Atlantic Steel* line of cases. First of all, the comments were not made directly to DelBuono or Daddona, and did not involve any threats, insubordination, or physically intimidating conduct. *See Plaza Auto Center*, 355 NLRB No. 85 at p. 3-4 (nature of outburst "not so opprobrious" as to deprive employee of statutory protection where no evidence of physical harm or threatening conduct); *Tampa Tribune*, 351 NLRB at 1326 (employee's outburst remained protected where not directed at manager and unaccompanied by physical conduct, threats, or confrontational behavior). Spinella's comment contained no profanity, and Sanzone's use of the word "asshole" to describe DelBuono is clearly insufficient to divest her activity of the Act's protection.[6] *See Plaza Auto Center*, 355 NLRB no. 85 at 2-5 (employee referred to owner as a "fucking motherfucker," "fucking crook," and "asshole"); *Tampa Tribune*, 351 NLRB at 1324-1325 (employee called Vice President a "stupid fucking moron"); *see also Alcoa, Inc.*, 352 NLRB 1222, 1225-1226 (2008) (employee referred to supervisor as an "egotistical fucker"); *Burle Industries*, 300 NLRB 498 (1990), *enf'd*, 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a "fucking asshole").

Respondent contends that Sanzone and Spinella's remarks also lost the Act's protection in that they were disparaging and disloyal statements within the meaning of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). In that case, employee statements were found unprotected where they were made "at a critical time in the initiation of the company's business," were unrelated to any ongoing labor dispute, and constituted "a sharp, public, disparaging attack upon the quality of a company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. at 472; *see also Santa Barbara News-Press*, 357 NLRB No. 51, at p. 4 (2011); *Mastec Advanced Technologies*, 357 NLRB No. 17, at p. 5 (2011); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enf'd*, 188 LRRM 2384 (9th Cir. 2009). The Board has cautioned that "disparagement of an employer's product" and "the airing of what may be highly sensitive issues" must be carefully distinguished. *Valley Hospital Medical Center*, 351 NLRB at 1252. In order to lose the Act's protection, public criticism of the employer must be made with a "malicious motive." *Id.* In this respect, the Board has held that statements are "maliciously untrue" when "made with knowledge of their falsity or with reckless disregard for their truth or falsity."[7] *Mastec Advanced Technologies*, 357 NLRB No. 17, at p. 5. The fact that statements are "false, misleading, or inaccurate" is not sufficient to establish that they are maliciously untrue. *Id.*; *see also Valley Hospital Medical Center*, 351 NLRB at 1252.

[6] The epithet "shady little man" is also clearly insufficient to divest a statement from the protection of the Act under the *Atlantic Steel* line of cases, even in the event that Sanzone and Spinella could be deemed to have adopted this comment of LaFrance's.

[7] As Respondent discusses in its Post-Hearing Brief, the Supreme Court has also applied this standard, originating in *New York Times v. Sullivan*, 376 U.S. 254 (1964), to actions for defamation involving labor disputes and other conduct protected by the Act. *See Linn v. United Plant Guard Workers*, 383 U.S. 53, 64-65 (1966) (state law defamation actions based upon statements made in the course of a labor dispute permissible where the plaintiff can show that the defamatory statements were made with malice and caused damages); *see also Old Dominion Branch No. 496, NALC v. Austin*, 418 U.S. 264, 273 (1974).

As an initial matter, however, I find that the statements made by Sanzone and Spinella here never lost the Act's protection, in that they were not susceptible to a defamatory meaning under the relevant caselaw. It is axiomatic that prior to considering issues of reckless or knowing falsity, "there must be a false statement of fact." *DHL Express, Inc.*, 355 NLRB No. 144 at p. 1, fn. 3, p. 14 (2010), *quoting Steam Press Holdings v. Hawaii Teamsters Local 996*, 302 F.3d 998, 1009, fn. 6 (9th Cir. 2002). The Board and the courts have long recognized that in the context of a labor dispute, statements may be "hyperbolic," biased, "vehement," "caustic," and may even involve a "vigorous epithet," while retaining the Act's protection. *DHL Express, Inc.*, 355 NLRB No. 144 at p. 14, *quoting Joliff v. NLRB*, 513 F.3d 600, 609-610 (6th Cir. 2008); *see also Valley Hospital Medical Center*, 351 NLRB at 1253. Sanzone's statement, "I owe too…Such an asshole," accurately reflects the fact that she did owe a tax payment to the State of Connecticut, and her referring to DelBuono as an "asshole" constitutes an epithet, as opposed to an assertion of fact. *Joliff*, 513 F.3d at 609-610; *see also Moriarty v. Lippe*, 162 Conn. 371, 294 A.2d 326 (1972) (epithets such as "big fat oaf," "son of a bitch" and other "words of general abuse" are not slanderous per se, and require proof of special damages for recovery). Spinella's statement "Vincent VinnyCenz Spinella…like[s] this" is also not a statement of fact with respect to Respondent or DelBuono. As a result, Sanzone and Spinella's statements are not even potentially defamatory, and did not lose the protection of the Act under the *Jefferson Standard* line of cases. I would reach the same conclusion even if I found that Sanzone and Spinella had somehow adopted the comments of LaFrance and the other employees. *See Steam Press Holdings, Inc.*, 302 F.2d at 1002, 1005-1009 (accusations that company's owner was "making money" and "hiding money," which belied employer's asserted poor financial condition during negotiations, were not fact statements susceptible to a defamatory meaning).

I also find that the statements made by Sanzone and Spinella were not deliberately false, or made with reckless disregard for their truth or falsity, even assuming they somehow adopted LaFrance's comments that DelBuono "fucked up the paperwork," was "a shady little man," and "probably pocketed [the tax deductions] from all our paychecks." There is no real dispute that DelBuono was responsible for Respondent's accounting, and that many of Respondent's employees owed taxes to the State of Connecticut after filing their 2010 tax returns. Indeed, the evidence establishes that the problem was so widespread, and had caused such consternation among Respondent's employees, that a meeting had been arranged with representatives from the payroll service used by Respondent for the following week. In addition, Sanzone testified that her paycheck only reflected 40 hours of work per week regardless of her actual work hours, and that she was sometimes paid in cash for work in excess of 40 hours per week, and sometimes not paid at all for overtime hours. While DelBuono generally denied this during his testimony, Respondent provided no other meaningful evidence to rebut Sanzone's assertions.

Given the requirement of malice, the Board considers the perspective of the employee in order to determine whether statements, regardless of their actual truth, were made with knowledge that they were false or with reckless disregard for their truth or falsity. *Mastec Advanced Technologies*, 357 NLRB No. 17 at p. 5 (statements in dispute "fairly reflected [employees'] personal experiences" and were therefore not made maliciously); *Valley Hospital Medical Center*, 351 NLRB at 1253 (statements not maliciously false where they were based on employee's "own experiences and the experiences of other nurses as related to [employee]"). Assuming LaFrance's comments were adopted by Sanzone and Spinella, the evidence establishes that, given the employees' direct experience with their 2010 tax returns and Respondent's other payroll practices, they were not malicious. While they might be considered "hyperbolic," the evidence does not establish that they were made with knowledge of their falsity or reckless disregard for the truth. *See, e.g., Asplundh Tree Expert Co.*, 336 NLRB 1106, 1108

(2001), *vacated on other grounds*, 365 F.3d 168 (3rd Cir. 2004) (employee's statement that supervisor had "pocketed" the difference between employees' per diem and actual hotel expenses protected); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995) (accusation that employer had "cheated" employees through paid time off program protected); *KBO, Inc.*, 315 NLRB 570 (1994), *enf'd*, 96 F.3d 1448 (6th Cir. 1996) (statement that employer was "taking money out of the employees' profit sharing accounts to pay the lawyers to fight the Union" protected).

In addition, the evidence establishes that Sanzone and Spinella's statements were not directed to the public as part of a campaign to raise public awareness of the employees' dispute with Respondent. Other cases applying the *Jefferson Standard* analysis involve the deliberate dissemination of allegedly disparaging statements through the news media, or as part of a campaign specifically directed to the public at large. *See, e.g., MasTec Advanced Technologies*, 357 NLRB No. 17 at 3-4 (statements made on news broadcast); *Valley Hospital Medical Center*, 351 NLRB at 1250-1251, 1253-1254 (statements made at press conference organized by the union, on a website maintained by the union and accessible to the general public, and in a flyer distributed to the public by the union in front of the employer's facility). Here, by contrast, Sanzone, Spinella, and LaFrance's comments were posted on LaFrance's Facebook account, which was not accessible to the general public. Instead, each person wishing to view the account (including customers of Respondent) needed to obtain LaFrance's specific permission through an accepted request to become her "Friend." This militates against a finding that the statements made during the Facebook discussion were made with a malicious intent to injure Respondent's business and DelBuono's reputation in the eye of the general public. The more reasonable conclusion is that the participants were, in LaFrance's words, "venting" their frustration with one another regarding the tax withholding situation and discussing the upcoming meeting with representatives from Respondent's payroll service.

The other factors considered as part of the *Jefferson Standard* analysis also do not support a conclusion that Sanzone and Spinella's statements on LaFrance's Facebook account lost the protection of the Act. There is no evidence that the statements were made at a critical time during the initiation of the employer's business; Respondent's restaurant and bar had been operating since December 2009. The statements were directly related to the ongoing dispute between the employees and Respondent's management regarding the tax treatment of the employees' earnings, which had resulted in a number of the employees' owing taxes to the State of Connecticut. They were not a gratuitous attempt to injure Respondent's business. Finally, Sanzone and Spinella's statements were not an attack on Respondent's product. They did not address, for example, the quality of the food, beverages, services, or entertainment at Respondent's restaurant and bar,[8] but were solely related to the employees' owing taxes to the state.

For all of the foregoing reasons, I find that the third component of the *Atlantic Steel* analysis – the nature of the outburst – indicates that Sanzone and Spinella's statements did not lose their protected character.

[8] Indeed, the sole comment of this nature was offered, unsolicited, by customer Jonathan Feeley, who stated that Respondent's restaurant and bar were "way too expensive." Customer DeSantis stated, "Yeah I really don't go to that place anymore," but there is no evidence to establish why. In fact, because he made this comment during the discussion on LaFrance's Facebook account, he had presumably stopped frequenting Respondent's restaurant prior to that time.

As for the fourth of the *Atlantic Steel* criteria, whether the outburst was provoked by Respondent's unfair labor practices, General Counsel does not contend that Sanzone and Spinella's Facebook statements were provoked by any unfair labor practice of Respondent. Therefore, this component of the analysis militates in favor of a finding that Sanzone and Spinella's statements were not protected. However, in that I have concluded that factors one, two and three of the *Atlantic Steel* standard support a finding that Sanzone and Spinella's Facebook comments did not lose the protection of the Act, I find that they remained protected concerted activity.

3. Sanzone and Spinella's Discharges were Unlawful under the *Burnup & Sims* standard

As discussed above, the *Burnup & Sims* analysis involves the application of four factors: (i) whether the discharged employee was engaged in protected activity at the time of their purported misconduct; (ii) whether the employer knew of the protected activity; (iii) whether the basis for the discharge was the employee's alleged misconduct in the course of their protected activity; and (iv) whether the employee was actually guilty of the misconduct. When the evidence establishes that the employee was discharged based on alleged misconduct occurring in the course of protected activity, the burden shifts to the respondent to show that "it had an honest or good-faith belief that the employee engaged in the misconduct." *Alta Bates Summit Medical Center*, 357 NLRB No. 31, at p. 1-2 (2011); *see also Roadway Express*, 355 NLRB No. 23, at p. 8 (2010), *enf'd*, 190 LRRM 3166 (11th Cir. 2011). If the respondent does so, the burden then shifts back to the General Counsel to prove that the employee did not actually engage in the alleged misconduct. *Alta Bates Summit Medical Center*, 357 NLRB No. 31, at p. 2; *Roadway Express*, 355 NLRB No. 23, at p. 8.

The evidence establishes here, as discussed above, that Sanzone and Spinella were engaged in protected concerted activity – the discussion with other employees of Respondent's calculation of their tax withholdings – at the time of their alleged misconduct. The record also establishes that Respondent knew of this protected activity at the time that Sanzone and Spinella were discharged. Daddona testified that his sister informed him of the Facebook discussion on LaFrance's account, and that he viewed the discussion with DelBuono, prior to Sanzone and Spinella's discharge. In fact, Respondent admits that it discharged Sanzone in part for her comments, and as discussed below DelBuono testified that he initiated the meeting during which Spinella was discharged specifically to confront him about his having selected the "Like" option. Therefore, the first two components of the *Burnup & Sims* analysis are satisfied.

I also find that the evidence establishes that Sanzone and Spinella were discharged for alleged misconduct in the course of their protected activity, the third criterion of the *Burnup & Sims* analysis. Respondent admits that Sanzone was discharged for "disloyalty," comprised in part of her comment on LaFrance's Facebook account.[9] However, Respondent contends that Spinella was discharged for poor work performance, including failing to stock deliveries, unauthorized cigarette breaks, and excessive cell phone use and socializing with other staff. The evidence does not substantiate this contention. While Daddona testified that Spinella was not discharged because of his having selected the "Like" option on LaFrance's Facebook account, and that his having done so was not discussed during the meeting which culminated in his discharge, DelBuono thoroughly contradicted these assertions. Thus, DelBuono testified

[9] For the reasons discussed in Section 4 regarding Respondent's asserted reasons for Sanzone and Spinella's discharges based upon work performance under *Wright Line*, I find that Sanzone was not discharged for reasons relating to cash register inaccuracies.

that he and Daddona decided to confront Spinella because his "Facebook comment raised a red flag" that he was not happy working for Respondent. DelBuono testified that during the meeting he told Spinella that he was obviously not happy, and "questioned him" regarding the Facebook discussion, asking him, "if he liked those defamatory and derogatory statements so much well why is he still working for us?" DelBuono stated that he then told Spinella that because he "liked the disparaging and defamatory comments," it was "apparent" that Spinella wanted to work somewhere else. I therefore find based on DelBuono's testimony that Spinella was discharged because of his having selected the "Like" option on LaFrance's Facebook account, and that both he and Sanzone were discharged for alleged misconduct occurring in the course of their protected activity.

Finally, as discussed above, I have found that Sanzone and Spinella's comments did not lose the Act's protection under the four *Atlantic Steel* factors, and that they did not lose the protection of the Act under the *Jefferson Standard* analysis, in that they were not made with knowledge of their falsity or with reckless disregard for their falsity or truth. I therefore find that regardless of the character of any belief regarding misconduct held by Daddona and DelBuono, Sanzone and Spinella did not in fact commit misconduct by virtue of their participating in the discussion on LaFrance's Facebook account.

For all of the foregoing reasons, I find under *Burnup & Sims* that Respondent violated Section 8(a)(1) of the Act by discharging Sanzone and Spinella.

4. Respondent's *Wright Line* defenses

In addition to its arguments regarding the non-protected nature of Sanzone and Spinella's participation in the Facebook discussion, Respondent asserts reasons for Sanzone and Spinella's discharges based upon their work performance, and unrelated to their protected concerted activity. Respondent contends that Sanzone was discharged for repeated cash register inaccuracies, and that Spinella was discharged for poor work performance involving a number of issues. To the extent that Respondent has raised issues regarding its motivation for the discharges, I will analyze these contentions within the framework articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied, 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

To establish an unlawful discharge under *Wright Line*, the General Counsel must prove that the employee's protected conduct was a motivating factor in the employer's decision to take action against them by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). The burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Respondent must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., 321 NLRB at 280 fn. 12 (1996).

I find that General Counsel has established a *prima facie* showing that Sanzone and Spinella's protected concerted activity was a motivating factor in their discharges. As discussed above, Sanzone and Spinella's participation in the Facebook discussion remained protected activity throughout, and there is no question that at the time they were discharged Daddona and DelBuono were aware of their comments. Animus against their protected activity is evinced by the timing of their discharges immediately after the Facebook discussion, and Daddona and

DelBuono's comments while discharging them, some of which, as addressed below, constitute independent violations of Section 8(a)(1). *See, e.g., Manorcare Health Services – Easton*, 356 NLRB No. 39 at p. 3, 25 (2010), *enf'd*, --- F.3d ---, 2011 WL 5839631 (D.C. Cir. 2011) (discipline of employee "just days" after initial public support for the union indicative of unlawful motivation); *Austal USA, LLC*, 356 NLRB No. 65 at p. 1-2 (2010) (Section 8(a)(1) violations constitute evidence of animus).

The evidence presented here is insufficient to satisfy Respondent's burden to show that it discharged either Sanzone or Spinella for legitimate, non-discriminatory reasons. Respondent's asserted work-performance reasons for discharging Spinella are utterly unsubstantiated by the record. Both Daddona and DelBuono generally testified that Spinella failed to restock supplies in a timely manner, socialized excessively with waitresses, and took too many breaks to smoke cigarettes and use his cell phone. However, DelBuono testified that what "raised a red flag" and immediately precipitated the meeting which culminated in Spinella's discharge was his having selected the "Like" option on LaFrance's Facebook account. According to DelBuono, he then "questioned " Spinella regarding the Facebook conversation before asking him why he was still working for Respondent; the evidence does not establish that Spinella's various performance problems were not even touched upon during this meeting. Given DelBuono's testimony, Daddona's testimony that the Facebook discussion was not mentioned during the meeting and played no role in Respondent's reasons for discharging Spinella is obviously not worthy of belief, and undermines his credibility as a witness overall.

Other factors also contradict Respondent's assertion that it discharged Spinella for work performance problems. Daddona testified that he first noticed Spinella's poor work habits during the first two months of his employment, and discussed them with him on a minimum of six occasions. Although I do not find Daddona to be a credible witness, Spinella did testify that Daddona and DelBuono had a number of informal conversations with him and the other kitchen workers, which included suggestions for improvement. However, there is no evidence that Respondent issued written discipline to Spinella, and no evidence that Spinella was ever informed in any way that failure to improve would result in discharge. Crediting Spinella's testimony, I find that DelBuono and Daddona's discussions with him failed to rise to the level of meaningful disciplinary action. In any event, it is also well-settled that the imposition of discipline for conduct that has been tolerated or condoned constitutes evidence of unlawful motivation. *See, e.g., Air Flow Equipment, Inc.*, 340 NLRB 415, 419 (2003). As a result, I find that Respondent has failed to substantiate its contention that Spinella was discharged for work performance problems, as opposed to his protected participation in the Facebook discussion.

With respect to Respondent's assertion that Sanzone was discharged in part for cash register inaccuracies, the credible evidence establishes that Daddona informed her on one occasion that her cash drawer was short after a bartending shift some time in the fall of 2010. I do not credit Daddona's assertion that her cash drawer "somewhat regularly" contained funds in excess of what could be accounted for through sales at the end of her bartending shifts, which he purportedly first discovered in August 2010. Daddona claims he was told by a business acquaintance that this might mean that Sanzone was recording fewer drinks than were actually purchased by customers, and in effect stealing the difference. If this is the case, it is implausible that Respondent would not have taken more immediate action to discharge Sanzone given the direct impact on its business and the egregious nature of potential theft. The evidence also establishes that Sanzone received a raise in November 2010 and a Christmas bonus that same year, actions which no reasonable employer would take if it truly believed that she was possibly engaged in theft. Respondent also failed to offer a shred of documentary evidence to substantiate its contention that Sanzone's cash drawer regularly contained an overage of funds. Indeed, DelBuono, who has overall responsibility for Respondent's

accounting, was not even questioned regarding this asserted reason for Sanzone's discharge. As a result, I find that Respondent has failed to provide adequate evidence to substantiate its contention that Sanzone was discharged for cash register inaccuracies, as opposed to her comment during the discussion on LaFrance's Facebook account.

For all of the foregoing reasons, I find that Respondent has failed to meet its burden to establish that it discharged Sanzone and Spinella for legitimate, non-discriminatory reasons. I therefore find that Sanzone and Spinella's discharges violated Section 8(a)(1).

B. Threats to Initiate Legal Action

The Consolidated Complaint alleges that Respondent threatened employees with legal action in violation of Section 8(a)(1) on February 3 and 4. There is no dispute that Respondent's attorney and admitted agent, Joseph Yamin, wrote to Sanzone on February 4, threatening to institute a defamation action against her if she did not retract her statement on LaFrance's Facebook account. Sanzone had LaFrance delete her comment, and sent a letter to Yamin stating that her comment had been erased. Yamin then wrote to Sanzone stating that she was required to post a "formal statement that the defamatory statements were untrue," and demanded written proof that she had done so. Sanzone did not respond, and did not hear from Yamin again.

The evidence overall also establishes that Respondent threatened Spinella with legal action on February 3, as alleged in the Consolidated Complaint. I credit Spinella's testimony that as he was leaving the discharge meeting with Daddona and DelBuono on February 3, DelBuono stated that Spinella would be hearing from Respondent's lawyers. Daddona's testimony regarding this meeting is simply not believable, as he contended that Spinella's participation in the Facebook conversation was never discussed. DelBuono's testimony is more credible, as he admitted to "questioning" Spinella regarding the Facebook discussion, including asking Spinella "why is he still working for us?" given his affinity for "the disparaging and defamatory comments." Given DelBuono's corroboration of Spinella's account in this regard, and Respondent's written threat, by its attorney, to initiate an action against Sanzone, I credit Spinella's statement that DelBuono told him as he left the February 3 meeting that he would hear from Respondent's attorney. Given DelBuono's statements during the meeting that the comments were defamatory, and that his attorney had advised him to discharge anyone involved for that reason, Spinella would reasonably have interpreted DelBuono's statement that he would hear from Respondent's attorney as a threat of legal action.

There is no dispute that Respondent never filed an action for defamation against Sanzone, Spinella, or LaFrance.

General Counsel contends that Respondent's threats to sue Sanzone and Spinella for defamation violated Section 8(a)(1), in that they reasonably tended to interfere with, restrain, and coerce them in the exercise of their Section 7 rights. *DHL Express, Inc.*, 355 NLRB No. 144 at p. 1, fn. 3, p. 13-15 (2010); *see also Network Dynamics Cabling*, 351 NLRB 1425, 1427 (2007); *Postal Service*, 350 NLRB 125, 125-126 (2007), *enf'd*, 526 F.3d 729 (11th Cir. 2008). Respondent argues that its correspondence with Sanzone was permissible in that the filing and prosecution of a well-founded lawsuit does not violate Section 8(a)(1) even if initiated with a retaliatory motive, citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). Respondent

contends that an action for defamation against Sanzone would have had a reasonable basis, and therefore Respondent's threats to initiate one did not violate Section 8(a)(1).[10]

The Board has consistently held that threats to bring legal action against employees for engaging in protected concerted activity violate Section 8(a)(1), in that they reasonably tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. *DHL Express, Inc.*, 355 NLRB No. 144 at p. 1, fn. 3, p. 13, *citing S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977). In *BE & K Construction Co.*, 351 NLRB 451 (2007), the Board held that retaliatory but reasonably based lawsuits do not violate Section 8(a)(1). However, the Board has explicitly declined to apply this standard to threats to initiate litigation, even where they are "incidental" to the actual filing of the lawsuit itself. *Postal Service*, 350 NLRB at 125-126; *see also DHL Express, Inc.*, 355 NLRB No. 144 at p. 1, fn. 3. In addition, the Board has repeatedly held that, even if it had determined that the *BE & K* standard applied to threats of litigation "incidental" to the filing of a lawsuit, such threats cannot be considered "incidental" to litigation where, as here, a lawsuit was never filed.[11] *DHL Express, Inc.*, 355 NLRB No. 144 at p. 1, fn. 3; *Postal Service*, 350 NLRB at 125-126. As a result, I find that the *BE & K* standard is inapplicable.

As discussed in Section A(2), above, I find that Sanzone and Spinella's statements were not defamatory, and were not made with knowledge of their falsity or with reckless disregard for their truth or falsity. *DHL Express, Inc.*, 355 NLRB No. 144 at p. 13. I therefore find, as discussed above, that their participation in the Facebook conversation never lost the Act's protection.

As a result, the evidence establishes that Respondent's repeated threats to bring legal action against Sanzone and Spinella would reasonably tend to interfere with, restrain and coerce them in the exercise of their Section 7 rights. Indeed, Sanzone had LaFrance remove her statement from the Facebook account, and Spinella returned to the account to select the "Unlike" option. Even after Sanzone did so, Respondent's attorney wrote to her again demanding written proof that she had made "a formal statement" that her previous remark was "untrue." *See DHL Express, Inc.*, 355 NLRB No. 144 at p. 14-15 (threat to initiate legal action coercive where never retracted, even after "the allegedly offensive statements were corrected"). Sanzone and Spinella's responses to Respondent's threats of litigation, and Respondent's subsequent insistence on pursuing the matter through its attorney, further indicate that its conduct was impermissibly coercive. Thus I find that Respondent violated Section 8(a)(1) of the Act by threatening Sanzone and Spinella with legal action in retaliation for their protected concerted activity.

C. Other Statements by Daddona and DelBuono Allegedly Violating Section 8(a)(1)

The Consolidated Complaint alleges that Respondent also violated Section 8(a)(1) on February 2, when Daddona informed employees that they were discharged because of their protected concerted activities, and on February 3, when DelBuono interrogated employees regarding their protected concerted activities and threatened employees with discharge for that

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[10] Respondent does not advance any argument regarding DelBuono's threat to take legal action against Spinella.

[11] Sanzone's written response to Yamin's February 4 letter stating that she had had LaFrance remove her remark from LaFrance's Facebook account further supports the conclusion that the threat to initiate legal action against her was not "incidental" to the filing of a lawsuit. *See Network Dynamics Cabling*, 350 NLRB at 1427, fn. 14.

reason. I find that the evidence establishes that Respondent committed these additional violations of Section 8(a)(1).

Sanzone testified that while discharging her on February 2, Daddona stated that she "wasn't loyal enough to be working at Triple Play anymore," because of her comment on LaFrance's Facebook account. Daddona admitted that Sanzone was discharged because "her loyalty was not to us" after "we saw what was going on on Facebook and with the drawer;" however, he did not testify regarding his actual conversation discharging Sanzone. Because Sanzone's account is therefore not meaningfully rebutted,[12] the record establishes that Daddona told her that she was discharged because she was insufficiently "loyal" to work for Respondent given her comment on Facebook. As Sanzone's participation in the Facebook discussion constituted protected concerted activity, Daddona's statement to her that she had been discharged for that reason violated Section 8(a)(1). *Extreme Building Services Corp.*, 349 NLRB 914, 914, n. 3, 929 (2007), *reversed and vacated in part*, 166 F.3d 351 (11th Cir. 2008) (employer violated Section 8(a)(1) by telling an employee he was discharged because of his union membership); *Watts Electric Corp.*, 323 NLRB 734, 735 (1997) (employee unlawfully informed that he had been discharged for distributing union flyers).

The evidence also establishes that DelBuono coercively interrogated Spinella and unlawfully informed him that those employees who participated in the Facebook discussion would be discharged during their meeting on February 3. DelBuono admitted that he "questioned" Spinella during this meeting, and I credit Spinella's testimony that DelBuono asked him about the identities of the participants, the significance of the "Like" option, and, as DelBuono testified, "if he liked those defamatory and derogatory statements so much well why is he still working for us?" DelBuono admitted that he told Spinella that it was "apparent" that he wanted to work somewhere else, and given the threats to initiate legal action as discussed above, I credit Spinella's testimony that DelBuono told him that Respondent's attorney had advised discharging anyone involved in the Facebook discussion for defamation.

I find that DelBuono's questioning of Spinella was coercive and therefore unlawful. The Board determines whether questioning regarding protected activity is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer's hierarchy, the place and method of questioning, and the truthfulness of the employee's answer. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Here these factors overall establish that DelBuono's questioning was impermissibly coercive. DelBuono and Spinella's conversation was not a casual talk on a shop floor between individuals who had some sort of personal relationship. *See Manor Health Services-Easton*, 356 NLRB No. 39 at p. 17 (questioning impermissible where no evidence of personal friendship between agent and employees); *compare Smithfield Packing*, 344 NLRB 1, 2 (2004). DelBuono and Daddona specifically called Spinella into their office for a meeting, and had LaFrance's Facebook account displayed on the computer. *Manor Health Services-Easton*, 356 NLRB No. 39 at p. 18 (questioning coercive where interaction was "neither casual nor accidental"). Sanzone's discharge the previous day evinces a backdrop of hostility toward the employees' protected concerted activity. The meeting was characterized by unlawful conduct on the part of DelBuono, including the statement that Respondent's attorney had advised discharging all employees engaged in the discussion, and DelBuono's threat to initiate legal action against Spinella for participating in the Facebook conversation. *See Evergreen America Corp.*, 348

[12] I decline to draw an adverse inference based upon the failure of Daddona and DelBuono to address certain of the events of Sanzone and Spinella's discharges during their testimony, as suggested by General Counsel.

NLRB 178, 208 (2006), *enf'd*, 531 F.3d 321 (4th Cir. 2008) (questioning accompanied by statements evincing hostility toward union activities more likely to be coercive); *Demco New York Corp.*, 337 NLRB 850, 851 (2002). Finally, the meeting culminated in Spinella's unlawful discharge. In these circumstances, the truthfulness of Spinella's responses to DelBuono's questions is not significant.

I further find that DelBuono's statement that his attorney had advised him to discharge every employee who participated in the Facebook discussion, which occurred in the context of DelBuono's repeatedly demanding that Spinella provide a justification for his continued employment, constituted a threat of discharge in violation of Section 8(a)(1). *See White Transfer and Storage Company*, 241 NLRB 1206, 1209-1210 (1979) (employer's statement to employees that he "had been with his lawyer all day," who advised him "that if he had a good enough reason to terminate [employees], to go ahead and do it" unlawful threat of discharge).

For all of the foregoing reasons, I find that Daddona and DelBuono's statements to Sanzone and Spinella violated Section 8(a)(1) of the Act in the manner described above.

D. Respondent's Internet/Blogging Policy

It is well-settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), *enf'd*, 203 F.3d 52 (D.C. Cir. 1999). A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

General Counsel contends that Respondent's Internet/Blogging policy is unlawful, in that it states that employees may be "subject to disciplinary action" for "engaging in inappropriate discussions about the company, management, and/or co-workers." General Counsel contends that employees would reasonably construe the language of the policy to restrict Section 7 activity given the breadth of the word "inappropriate," and of the phrase "the company, management and/or co-workers." General Counsel also argues that the rule's failure to provide concrete examples of prohibited conduct which would lead employees to believe that it applies solely to serious misconduct leaves it susceptible to the interpretation that it encompasses protected concerted activity.

I find that Respondent's Internet/Blogging policy is not unlawful under the *Lutheran Heritage Village* standard. The policy does not explicitly restrict Section 7 activity, and was not issued in response to an organizing campaign or other protected concerted activity. Furthermore, there is no evidence that Sanzone and Spinella were discharged pursuant to the policy or that the policy has otherwise been applied to restrict employees' Section 7 rights. Therefore, the legality of the policy is contingent upon whether employees would reasonably construe it to prohibit Section 7 activity.

I find that under the existing caselaw, the Internet/Blogging policy would not be reasonably construed as prohibiting Section 7 activity.[13] I find that the Internet/Blogging policy's caution against "inappropriate discussions about the company, management, and/or co-workers" is similar to restrictions on speech having a potentially detrimental impact on the company which the Board has found to be permissible. *See Tradesmen International*, 338 NLRB 460, 462-463 (2002) (rule prohibiting "verbal or other statements which are slanderous or detrimental to the company or any of the company's employees" permissible). The Board has similarly found that rules prohibiting any conduct, on or off-duty, which could injure the company's reputation are not unlawful. *Tradesmen International*, 338 NLRB at 460 (prohibition on "any conduct which is disloyal, disruptive, competitive, or damaging to the company" permissible); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284, fn. 2, 1291-1292 (2001) (rules prohibiting "any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company," and "conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company" not unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288-289 (1999) (rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel" did not violate Section 8(a)(1)); *see also Albertson's, Inc.*, 351 NLRB 254, 258-259 (2007) (rule prohibiting "[o]ff the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity"); *Lafayette Park Hotel*, 326 NLRB at 825-826 (rules prohibiting conduct which does not meet employer's "goals and objectives," and "improper conduct, which affects the employee's relationship with the job, fellow employees, supervisors or the hotel's reputation or good will in the community").

This conclusion is supported by the context of the allegedly unlawful segment of the policy. The policy begins by stating that Respondent "supports the free exchange of information" among its employees, and states that only when electronic communications "extend to confidential and proprietary information" or "inappropriate discussions" would they potentially be subject to disciplinary action. Immediately following that statement is a requirement that employees clearly identify opinions they share regarding Respondent as their own, as opposed to those of Respondent. The policy closes by stating that it will have no effect to the extent it conflicts with state or federal law. Under the caselaw discussed above, I find that in this context the prohibition on "inappropriate discussions about the company, management and/or co-workers" would not be reasonably construed as restricting Section 7 activity.

General Counsel argues that the Internet/Blogging policy is impermissibly broad, in that it fails to provide specific examples of inappropriate discussions to clarify that it does not encompass protected activity. However, as the Board noted in *Tradesmen International*, the lawful rules at issue in *Lafayette Park Hotel*, *Ark Las Vegas Restaurant Corp.*, and *Flamingo Hilton-Laughlin* did not contain specific examples of conduct which would expose an employee to potential discipline for conduct injuring the employer's reputation. *Tradesmen International*, 338 NLRB at 461; *see Lafayette Park Hotel*, 326 NLRB at 824-827; *Ark Las Vegas Restaurant Corp.*, 335 NLRB at 1291-1292; *Flamingo Hilton-Laughlin*, 330 NLRB at 287-288, 295. General Counsel also argues that the policy here is similar to a policy the Board found unlawfully restrictive in *Claremont Resort and Spa*, 344 NLRB 832 (2005). In that case, the Board held

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[13] Although Respondent contends that it did not in fact maintain the policy, the evidence establishes that when Respondent began its operations in December 2009 the policies contained in Respondent's Employee Handbook were reviewed with Respondent's initial group of employees, including Sanzone, at a meeting. DelBuono also offered to provide the employees at this meeting with copies of the Handbook. Given the foregoing, I find that the policy was maintained by Respondent, despite the fact that Sanzone and Spinella never had their own physical copies of the Handbook.

that a policy which prohibited "negative conversations about associates and/or managers" could be reasonably construed as restricting Section 7 activity. *Claremont Resort and Spa*, 344 NLRB at 832. However, the facts at issue here are dissimilar. The prohibition on "negative conversations" in that case was issued to employees as part of a list of ten work rules, some of which addressed working conditions such as "clocking in and out procedures," so that the employees could assume that "negative conversations" regarding those conditions of employment were prohibited. *Claremont Resort and Spa*, 344 NLRB at 832, n. 5. Here, by contrast, Respondent's Internet/Blogging policy appears directed toward maintaining the company's reputation with respect to the general public, as were the policies in the cases discussed above. Furthermore, the ten work rules containing the unlawful restriction on "negative conversations" were issued in the midst of an organizing campaign, and a previous Administrative Law Judge's Decision had determined that the Respondent had unlawfully prohibited employees from discussing organizing activities while at work. *Claremont Resort and Spa*, 344 NLRB at 834, 836. As a result, I find that the facts at issue in *Claremont Resort and Spa* are distinguishable.

For all of the foregoing reasons, I find that Respondent's maintenance of the Internet/Blogging policy in its Employee Handbook did not violate Section 8(a)(1) of the Act.

Conclusions of Law

1. The Respondent, Three D, LLC d/b/a Triple Play Sports Bar and Grille, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by discharging Jillian Sanzone on February 2, 2011 in retaliation for her protected concerted activities.

3. Respondent violated Section 8(a)(1) of the Act by discharging Vincent Spinella on February 3, 2011 in retaliation for his protected concerted activities.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees with legal action in retaliation for their protected concerted activities.

5. Respondent violated Section 8(a)(1) of the Act by informing employees that they were being discharged because of their protected concerted activities.

6. Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge in retaliation for their protected concerted activities.

7. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their protected concerted activities.

8. Respondent did not violate Section 8(a)(1) of the Act by maintaining the Internet/Blogging policy in its Employee Handbook.

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

The Remedy

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having discriminatorily discharged Jillian Sanzone and Vincent Spinella in retaliation for their protected concerted activities, Respondent must offer Sanzone and Spinella full reinstatement to their former positions or to substantially equivalent positions. Respondent must also make Sanzone and Spinella whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination against them, plus interest, in the manner prescribed in *F.W. Woolworth*, 90 NLRB 289 (1950) and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds sub nom., *Jackson Hospital v. NLRB,* 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall also be required to remove from its files all references to Sanzone and Spinella's unlawful discharges, and to notify them in writing that this has been done and that the discharges shall not be used against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

Respondent Three D, LLC d/b/a Triple Play Sports Bar and Grille, Watertown, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

   (a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities.
   (b) Threatening employees with legal action in retaliation for their protected concerted activities.
   (c) Informing employees that they are being discharged because they engaged in protected concerted activities.
   (d) Threatening employees with discharge in retaliation for their protected concerted activities.
   (e) Coercively interrogating employees regarding their protected concerted activities.
   (f) In any like or related manner interfering with, restraining or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

   (a) Within 14 days of the date of this Order, offer Jillian Sanzone and Vincent Spinella full reinstatement to their former positions or, if those positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or to any other rights and privileges previously enjoyed.

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

(b) Make Jillian Sanzone and Vincent Spinella whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the Remedy section of this decision.

(c) Within 14 days of the date of this Order, remove from all files any reference to the unlawful discharges, and within 3 days thereafter, notify Sanzone and Spinella in writing that this has been done and that the discharges will not be used against them in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Watertown, Connecticut, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 9, 2010.

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

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

Dated: Washington, DC January 3, 2012

_____

Lauren Esposito
Administrative Law Judge

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

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities.

WE WILL NOT threaten you with legal action in retaliation for your protected concerted activities.

WE WILL NOT inform you that you are being discharged because you engaged in protected concerted activities.

WE WILL NOT threaten you with discharge in retaliation for your protected concerted activities.

WE WILL NOT coercively interrogate you regarding your protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed to you by Section 7 of the Act.

WE WILL within 14 days of the date of the Board's Order, offer Jillian Sanzone and Vincent Spinella full reinstatement to their former jobs, or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights and privileges previously enjoyed.

WE WILL make Jillian Sanzone and Vincent Spinella whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

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

THREE D, LLC d/b/a TRIPLE PLAY SPORTS BAR AND GRILLE

(Employer)

Dated _____ By _____

(Representative) (Title)

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

450 Main Street
Suite 410
Hartford, CT 06103-3022
Hours: 8:30 a.m. to 5 p.m.
860-240-3522

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

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 860-240-3006.