

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 34**

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

and

JILLIAN SANZONE, AN INDIVIDUAL

Case 34-CA-12915

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

and

VINCENT SPINELLA, AN INDIVIDUAL

Case 34-CA-12926

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO THE BOARD**

**Respectfully submitted,**

**Claire T. Sellers  
Counsel for the Acting General Counsel  
National Labor Relations Board  
Region 34  
Hartford, Connecticut**

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Pursuant to Section 102.46(d) of the Board's Rules and Regulations, Counsel for the Acting General Counsel files the following Brief in Response to the Exceptions and Brief in support thereof filed by Respondent.

**I. STATEMENT OF THE CASE**

On January 3, 2012, Administrative Law Judge Lauren Esposito issued her Decision in the instant case, finding that Three D, LLC d/b/a Triple Play Sports Bar and Grille (herein called Respondent) committed numerous violations of Sections 8(a)(1). Judge Esposito found that Respondent violated Section 8(a)(1) by discharging its employees Jillian Sanzone and Vincent Spinella, by threatening employees with legal action in retaliation for their protected concerted activities, by informing employees they were being discharged because of their protected concerted activities, by threatening employees with discharging in retaliation for their protected concerted activities, and by coercively interrogating employees regarding their protected concerted activities. (ALJD 22, line 25-41).<sup>1</sup> Respondent excepts to all of these findings.

On February 27, 2012, Respondent filed 37 exceptions to the judge's findings and recommended order, and a supporting brief. For the reasons set forth below, and based upon the record as a whole, Counsel for the Acting General Counsel respectfully urges the National Labor Relations Board (the Board) to reject all of Respondent's

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<sup>1</sup> References to the exhibits of Counsel for the Acting General Counsel and Respondent will be cited herein as "GCX\_\_" and "RX\_\_", respectively, followed by the appropriate exhibit number or numbers, and where appropriate, the page number(s). Joint exhibits will be cited herein as "JTX\_\_," followed by the appropriate exhibit number. References to the official transcript of the instant hearing are cited as "Tr.\_\_", followed by the appropriate page numbers or number(s). References to the judge's Decision will be cited herein as "ALJD \_\_\_", followed by the appropriate page and line numbers. References to Respondent's Brief to the Board will be cited herein as "R. Br. to Board, at \_\_\_", followed by the appropriate page number.

exceptions and to affirm the Administrative Law Judge's rulings, findings and conclusions, and to adopt her recommended Order, as described herein.<sup>2</sup>

## II. OVERVIEW

These cases concern Respondent's unlawful reaction to its employees' engaging in protected concerted activity through a relatively new medium, Facebook. Employees Jillian Sanzone and Vincent Spinella participated in a Facebook conversation focused on their concerns about tax withholdings from their paychecks and the employees' plans to address their concerns. Judge Esposito correctly found that Respondent unlawfully reacted to the employees' protected and concerted Facebook conversation by interrogating employees about the Facebook conversation and threatening them with termination and legal action for this conduct, and discharging Sanzone and Spinella for their participation in the protected Facebook conversation, and threatening employees with legal action for their conduct. Respondent's sole defense at hearing was that Sanzone and Spinella were rightfully discharged because their participation in the Facebook conversation was defamatory. Following a one-day hearing and consideration of each party's briefs, Judge Esposito properly dismissed Respondent's defenses. Respondent's appeal followed. For the following reasons, the Board should reject Respondent's rehashed argument set forth in their Exceptions, and affirm the judge's well-reasoned decision.

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<sup>2</sup> Counsel for the Acting General Counsel has taken Exceptions, submitted separately, to the judge's recommendation to dismiss the Internet/Blogging policy in Respondent's Employee Handbook alleged in the Consolidated Complaint that she did not find to be unlawful.

### III. RESPONDENT'S EXCEPTIONS ARE WITHOUT MERIT

As noted above, Respondent filed 37 Exceptions to the judge's decision. Exceptions 1, 3, 4, 6 – 19, 24, and 26 concern the judge's analysis of Sanzone's and Spinella's discharges under *Atlantic Steel Co.*, 245 NLRB 814 (1979); *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); and *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966) and whether their participation in the Facebook discussion thus caused them to lose protection under the Act. Exceptions 1, 2, 5, 20 – 22, 26, and 31 – 32 except to the judge's analysis under *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964) and *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert denied*, 455 U.S. 989 (1982) in determining that Sanzone and Spinella engaged in protected concerted activity. Exceptions 23, 25, and 33 except to the judge's finding that Respondent violated the Act by threatening employees with legal action in retaliation for their protected concerted activities. Exceptions 27 – 29 and 36 dispute the judge's determination that Respondent coercively interrogated employee Spinella and except to her finding that Respondent's coercive interrogation of Spinella regarding employees' protected concerted activities violated the Act. Exceptions 34 and 37 attack the judge's determination that Respondent informed employees they were being discharged because of protected concerted activities and protest the judge's finding that Respondent violated the Act by informing employees that they were being discharged because of their protected concerted activities. Finally, exception 30 and 35 contest the judge's determination that Respondent threatened employees with discharge for their protected Facebook comments and to her finding that Respondent violated the Act by making said threat.

**A. Respondent's exceptions concerning whether Sanzone and Spinella lost the protection of the Act under Jefferson Standard and Atlantic Steel**

Respondent's brief reveals that it fundamentally misunderstands the legal standards set forth in the applicable cases. Respondent argues that because Facebook is a public forum where disparaging comments are made to third parties, *Jefferson Standard* provides the suitable framework for analysis. However, Respondent fails to understand, as the judge explained, that the *Jefferson Standard* test requires intent not only to appeal to a third party but also intent to mislead. (ALJD 11, lines 34-38; ALJD 13, lines 9-26). No such intent exists here.

When it established the *Jefferson Standard* test, the Supreme Court analyzed handbills that employees distributed as part of an intentional public appeal. *Id.* at 468-69. Additionally, the handbills attacked the employer's policies and business decisions "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 a company's reputation and reduce its income." *Id.* at 471-472; (ALJD 11, lines 23-31); see also *Santa Barbara News-Press*, 357 NLRB No. 51, slip op. at 4 (2011); *Mastec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), *enfd.* 188 LRRM 2384 (9th Cir. 2009). The Board has applied the Court's *Jefferson Standard* test only to employee communications that are intended to appeal directly to third parties, and considers whether those communications reference a labor dispute and are so disparaging of the employer or its product as to lose the protection of the Act. See, e.g.,

*Tradesman International, Inc.*, 332 NLRB 1158, 1160-1161 (2000) (applying *Jefferson Standard* analysis to testimony at contractor's council meeting), vacated, 275 F.3d 1137 (D.C. Cir. 2002); *Montauk Bus Company*, 324 NLRB 1128, 1138-39 (1997) (applying *Jefferson Standard* analysis to letters sent to school board); *Richboro Community Mental Health Council*, 242 NLRB 1267, 1267-68 (1979) (analyzing letters sent directly to congressmen, federal agency, local newspaper, and employer under *Jefferson Standard* "disloyalty" test).

Here, unlike the dissemination of flyers in *Jefferson Standard*, the Charging Parties' postings were not specifically directed toward third parties or the general public, nor were the postings a "gratuitous attempt to injure Respondent's business." (ALJD 11, lines 9-13, 35). In fact, the judge correctly found that the posting was not visible to the general public but instead it could only be viewed by the Facebook "friends". (ALJD 11, lines 18-21). And, unlike *Jefferson Standard*, the fact that some of the "friends" who viewed the posting may have been third parties was merely incidental and not part of an intentional campaign to raise public awareness about the employees' dispute. (ALJD 10, lines 21-42; ALJD 13, lines 19-21).

Considering the above, the judge correctly concluded that *Jefferson Standard* is not the appropriate legal standard upon which to analyze the Facebook postings in this case. Instead, the judge reasoned that because the Facebook discussion was more analogous to a conversation amongst employees that is overheard by third parties than an intentional dissemination of employer information to the public seeking their support, an *Atlantic Steel* analysis was arguably more appropriate. The judge also carefully considered that since an *Atlantic Steel* analysis does not usually consider the impact of

disparaging comments made to third parties, a modified *Atlantic Steel* analysis was necessary. As such, the judge considered not only the disruption to workplace discipline under *Atlantic Steel*, but also analyzed the alleged disparagement of Respondent's products and services under *Jefferson Standard*.

Applying this modified *Atlantic Steel* analysis, the judge concluded that the employees' Facebook discussion did not lose the protection of the Act. (ALJD 9, lines 13-14; ALJD 12, lines 1-3; ALJD 14, lines 5-8). The Board in *Atlantic Steel* established that "an employee who is engaged in concerted protected activity can, by opprobrious conduct, lose the protection of the Act." 245 NLRB 814, 816 (1979). The judge properly noted that in determining whether an employee loses the protection of the Act due to opprobrious conduct in the course of such activities, the Board will consider: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was provoked by the employer's conduct, including unfair labor practices. (ALJD 9, lines 14-17). The judge's analysis of the second factor, the subject matter, and the fourth factor, whether the discussion was provoked by an unfair labor practice, was straightforward. The judge correctly found that the subject matter of the posting weighed in favor of protection as it involved a discussion about employees owing money after filing their 2010 tax returns – a clear term and condition of employment. (ALJD 10-11). Weighing against a finding of protection is the fact that the discussion was not provoked by an unfair labor practice. However, this does not mean that the statements will be unprotected. (ALJD 14, lines 1-8). Furthermore, while the conversation did not stem from unfair labor practices and

was not directly provoked by Respondent's conduct, it certainly was in response to Respondent's actions and was a reasonable means for addressing those concerns.

The judge adapted the remaining *Atlantic Steel* factors – the location of the conversation and the nature of the outburst –to reflect the inherent difference between a Facebook discussion and an outburst in the workplace. The judge found that the “conversation” did not occur at the workplace nor were the comments posted while employees were at work. (ALJD 10, lines 13-15). Since the comments occurred off duty, there was no possibility that the discussion would have disrupted Respondent's work environment so as to weigh in favor of losing protection under a traditional *Atlantic Steel Analysis*. *Id.* Further, as to the nature of the outburst, these complaints were not accompanied by any verbal or physical threats, and the Board has found far more egregious personal characterizations and name-calling than “such an asshole” to be protected. (ALJD 12, lines 10-23); see also *Alcoa, Inc.*, 352 NLRB 1222, 1225 (2008) (referring to a supervisor as “egotistical fucker”); *Union Carbide Corporation*, 331 NLRB 356, 359 (2000) (calling supervisor a “fucking liar”); *Burle Industries*, 300 NLRB 498, 502, 504 (1990) (calling supervisor a “fucking asshole”); *Thor Power Tool Co.*, 148 NLRB 1379, 1380 (1964), *enfd.* 351 F.2d 584 (7th Cir. 1965) (referring to supervisor as a “horse's ass”). See also *Max Factor & Co.*, 239 NLRB 804, 818 (1978); *Postal Service*, 250 NLRB 4 (1980).

Despite the utter lack of evidence, Respondent recycles its argument that the Facebook conversation constituted a “direct confrontational challenge to Respondent's managerial authority and had a high likelihood of disrupting the Respondent's work environment.” (R. Br. to Board, at 13). As Judge Esposito properly found, this claim is

unsupported by any evidence (ALJD 10, lines 36-37) and is entirely speculative (ALJD 10, lines 14-15). Respondent never provided any evidence that the Facebook conversation disrupted the workplace. Respondent also asserts that because it could access the Facebook page through its “friend” status with employees, the conversation was a direct confrontation of Respondent’s managerial authority. Yet Respondent also admits that it only viewed the conversation after the fact – like watching a video recording of employee protected concerted activity. (R. Br. to Board, at 17). Therefore, correctly noting that none of Respondent’s owners were present, and that there clearly was no “direct confrontational challenge to their managerial authority” (ALJD 10, lines 17-19), the judge properly rejected these claims.

The judge’s decision reflects that she carefully considered all of Respondent’s arguments. Noting that the conversation was viewed by some small number of non-employee members of the public (two of Respondent’s customers participated in the Facebook conversation) the judge considered the impact of Sanzone’s and Spinella’s postings on Respondent’s reputation and business. The judge considered this inquiry within the “location” and “nature of the outburst” factors of *Atlantic Steel* because it is the “location” of the discussion on Facebook that makes it available to outside third parties, and given this fact, requires consideration of the impact (if any) on these third parties. For this inquiry, the judge borrowed from the *Jefferson Standard* line of cases, which (as noted previously) the Board has developed to determine the extent of protection afforded to potentially damaging statements made by employees regarding their employer that are seen or heard by third parties.

In the instant case, Respondent argues that Sanzone's Facebook comment "I owe too. Such an asshole" and Spinella's "liking" of the conversation constituted a "disparaging public attack against Triple Play and Ralph DelBuono," and as such justified their discharges. (R. Br. to Board, at 22-23). Respondent claims that the *Jefferson Standard* test merely requires that the discharge be for insubordination, disobedience or disloyalty to the employer and since the discharges were "for cause," they cannot constitute an unfair labor practice. (R. Br. to Board, at 19-20).

Statements have been found unprotected where they constitute "a sharp, public, disparaging attack upon the quality of the company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Jefferson Standard*, 346 U.S. at 472, quoted with approval in *Valley Hospital Medical Center*, 351 NLRB at 1252. Respondent's latest brief curiously omits any mention of the fact (noted by the judge), that "[i]n determining whether an employee's communication to a third party constitutes disparagement of the employer or its product, great care must be taken to distinguish between disparagement and the airing of what may be highly sensitive issues." (See ALJD 11, lines 31-33). See also *Allied Aviation Service Company of New Jersey*, 248 NLRB 229, 231 (1980), *enfd.* 636 F.2d 1210 (3d Cir. 1980). Respondent simply cannot avoid the fact that here the alleged "disparaging public attack" was of a nature routinely found protected by the Board, and the judge correctly found that the Facebook comments were not in any way critical of Respondent's product or business policies. (See ALJD 13, lines 35-39). See also *Montauk Bus Company*, 324 NLRB 1128, 1138-1139 (1997) (characterizing employer's owners as belligerent and arrogant); *Emarco, Inc.*, 284 NLRB 832, 833-834 (1987)

(statements that the employer “can’t finish the job . . . [and] never pays their bills” and president of company is “no damn good” and a “son of a bitch”). Given the above, the judge reached the well-reasoned decision that “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,” adding further that she would reach the same conclusion even if she found that Sanzone and Spinella had somehow adopted the comments of others. (ALJD 12, lines 17-24).

Undeterred, Respondent further argues that the comments lost the protection of the Act because they “were deliberately false and/or were made with reckless disregard for their truth or falsity.” (R. Br. to Board, at 24). Citing *Linn v. Plant Guard Workers*, 383 U.S. 53 (1966), and *Montefiore Hospital & Medical Center*, 621 F.2d 510 (2d Cir. 1980), Respondent claims that “Sanzone and Spinella made and/or publicly adopted statements about Triple Play and Ralph DelBuono with knowledge of their falsity and/or reckless disregard for the truth or falsity of such statements.” (R. Br. to Board, at 25). However, as the judge correctly articulated, the Board has held that in order to lose the Act’s protection, “public criticism of the employer must be made with a ‘malicious motive’”. (See ALJD 11-12). The fact that the statements may be “false, misleading, or inaccurate” is insufficient – the statements must be “made with knowledge of their falsity or with reckless disregard for their truth or falsity.” (ALJD 11, lines 31-38); see *Valley Hospital Medical Center*, supra at 1252; *Mastec Advanced Technologies*, supra, 357 NLRB at 5.

In applying the relevant standard, the judge correctly found “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 [others'] comments that DelBuono 'fucked up the paperwork,' was 'a shady little man,' and 'probably pocketed [the tax deductions] from all our paychecks.'" (ALJD 12, lines 26-29). The judge's finding is supported by the fact that the Board routinely considers the employees' personal experiences as to whether such statements were made regardless of their actual truth. See, e.g., *Mastec Advanced Technologies*, supra at 5 (statements in dispute "fairly reflected [employees'] personal experiences" and were therefore not made maliciously); *Valley Hospital Medical Center*, supra 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]"). The judge reasoned that employees would not believe these statements were deliberately false even if they might be considered "hyperbolic," given employees' own experiences with their 2010 tax returns and Respondent's less than upright payroll practices. (ALJD 12, lines 29-38, 48-52); see, e.g., *Asplundh Tree Expert Co.*, 336 NLRB 1106, 1108 (2001), vacated on other grounds, 365 F.3d 168 (3d 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), enfd. 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 sum, Judge Esposito, weighing every possible relevant factor, correctly found that the subject matter of the discussion weighs in favor of retaining the protection of the

Act. A modified *Atlantic Steel* analysis that considers the nature of the discussion in light of the fact that it can be viewed by the public also weighs in favor of protection because the comments were not so disparaging of Respondent's product as to cause them to lose the protection of the Act. Weighing all of those factors against the lone fact that the discussion was not provoked by an unfair labor practice, the judge correctly held that Sanzone and Spinella's Facebook postings retained the protection of the Act under *Atlantic Steel*. (ALJD 14, lines 6-8).

**B. Respondent's exceptions concerning whether Sanzone's and Spinella's discharges violated the Act under *Burnup & Sims***

Respondent also excepts to the judge's conclusion that Sanzone's and Spinella's discharges were unlawful under the *Burnup & Sims* standard because "*Burnup & Sims* is entirely inapplicable to the present case." (R. Br. to Board, at 7). In doing so, Respondent reveals its confusion concerning the burdens under *Burnup & Sims* by stating that the analysis does not apply here because no good faith or mistaken belief defense has been raised by the Respondent. (R. Br. to Board, at 7). Respondent fails to understand, as correctly articulated by the judge, that the *Burnup & Sims* standard applies 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." (ALJD 7, lines 12-16). Then, if the evidence establishes (as the judge found it applies here) 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.” (ALJD 14, lines 17-25). Here, simply because Respondent admits that it did not have a good faith or mistaken belief as to the alleged misconduct does not render *Burnup & Sims* inapplicable.

Respondent disagrees with the judge’s application of *Burnup & Sims*, but misses the point of the entire analysis. (See R. Br. to Board, at 8-9). Respondent notes that it “has not raised a mistake belief defense,” (R. Br. to Board, at 8) so a *Burnup & Sims* analysis is misplaced. However, *Burnup & Sims* assumes that the employee engaged in protected activity. Respondent simply cannot concede or accept the fact that this case concerns protected activity. The evidence showed quite clearly that the employees engaged in protected activity and were discharged for this conduct. Under *Burnup & Sims*, the inquiry shifts to factors two and three of the *Burnup & Sims* analysis. The judge correctly found that, based upon the evidence, these criteria were met, and so proceeded to the fourth factor: whether the employees were in fact guilty of misconduct. (ALJD 15). Having previously found that the employees’ comments did not lose the Act’s protection under either the four *Atlantic Steel* factors or under a *Jefferson Standard* analysis, the judge properly found 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.” (ALJD 15, lines 15-18). Thus, the judge properly found a violation of Section 8(a)(1) under *Burnup & Sims*, and Respondent’s exceptions are utterly without merit.

**C. Respondent's remaining exceptions concerning the discharge are similarly meritless**

Respondent further excepts to the judges finding that Sanzone and Spinella were not discharged for legitimate, non-discriminatory reasons. Specifically, Respondent claims that its witness Daddona testified that neither Sanzone nor Spinella were “terminated for discussing income tax withholdings with other employees or engaging in other concerted activities on Facebook.” (R. Br. to Board, at 28). This is a clear case of credibility. Here, Respondent has mischaracterized the evidence by characterizing its witness’s testimony as the “facts”, when the judge clearly found otherwise. Respondent admitted that Sanzone was discharged at least in part for her Facebook comments, which (as discussed above) are concerted activities. Furthermore, while Daddona may have testified that Spinella was not discharged because of his participation in the Facebook conversation, the judge found this was not the case because Daddona’s partner, DelBuono, “thoroughly contradicted these assertions.” (ALJD 14, lines 44-47). Instead, the judge credited DelBuono’s testimony and found that Spinella was discharged because of his participation in the Facebook conversation. (ALJD 15, lines 7-10).

It is well established that the Board has a long-standing policy of acceding to the judge’s credibility findings unless the preponderance of the evidence convinces the Board that they are wrong. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). Here, the clear weight of the evidence shows that Judge Esposito’s detailed credibility findings are all supported by the record evidence. Respondent’s exceptions to and mischaracterizations of the judge’s credibility findings are simply without merit.

However, giving Respondent the benefit of the doubt, the judge considered Respondent's remaining *Wright Line* defenses: that Sanzone was discharged for repeated cash register inaccuracies, and that Spinella was discharged for poor work performance. (ALJD 15, lines 25-30). In its brief, Respondent states that Sanzone was discharged for her disloyalty, and that her specific acts of disloyalty were her participation in the Facebook conversation as well as her "continuous cash register inaccuracies." (R. Br. to Board, at 4). Spinella's discharge was supposedly based solely upon his poor performance. (R. Br. to Board, at 4). Here, as before, Respondent seems to misunderstand the shifting *Wright Line* burdens, given that it admits that Sanzone's participation in the Facebook conversation contributed to her discharge. In any event, the judge found, based upon the evidence, that Respondent's assertion regarding Spinella's discharge for poor performance is "utterly unsubstantiated by the record." (ALJD 16, lines 10-11).

Under *Wright Line*, when the General Counsel has established a *prima facie* showing that the employees' protected concerted activity was a motivating factor in their discharges, the burden of persuasion shifts to Respondent to show that it would have taken the same action even in the absence of the protected conduct. 251 NLRB at 1089; *T. Steele Construction*, 348 NLRB 1173, 1183 (2006); *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Respondent may not simply make up other reasons for the discharge but must "persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct." (ALJD 15, lines 44-45) (emphasis added).

In this case, Respondent provided no documentation of Spinella's alleged poor performance or of any steps taken by Respondent to address his "poor performance". Furthermore, Daddona testified that what "raised a red flag" and led to Spinella's discharge meeting was his participation in the Facebook discussion – not his poor performance! Finally, it was only during a meeting in which Respondent "questioned" Spinella and threatened him regarding the Facebook conversation (resulting in two more independent violations of Section 8(a)(1)) that Respondent fired Spinella. (ALJD 16, lines 10-36). Based on the foregoing, the judge correctly determined that Respondent "failed to substantiate its contention that Spinella was discharged for work performance problems, as opposed to his protected participation in the Facebook discussion." (ALJD 16, lines 34-36).

With respect to Sanzone, Respondent admits that Sanzone was discharged in part for her Facebook conversation. (R. Br. to Board, at 4). Respondent does not assert that Sanzone's cash register inaccuracies would have led to her discharge absent her "disloyal" Facebook comment. Furthermore, the one cash register inaccuracy that Respondent testified about with any specificity happened at least four months before Sanzone's discharge. As the judge found, it is simply "implausible" that the alleged inaccuracies played any role in Sanzone's discharge. (ALJD 16, lines 45-52; ALJD 17, lines 1-4). As such, the judge correctly found that Respondent failed to meet its *Wright Line* burden to establish that it discharged Sanzone and Spinella for legitimate, non-discriminatory reasons.

**D. Respondent's exceptions to the remaining Section 8(a)(1) violations**

Respondent excepts to the judge's decision that it violated the Act by threatening Sanzone and Spinella with legal action in retaliation for their protected concerted activities. In its brief, Respondent does not deny that it threatened Sanzone and Spinella with legal action. Instead, Respondent argues that under *Bill Johnson's Restaurants, Inc. v. NLRB*, 461 U.S. 731 (1983), its threats were not an unfair labor practice. Once again, Respondent fails to grasp the intricacies of labor law. In *Bill Johnson's*, the Court held that the filing and prosecution of a "well-founded lawsuit"<sup>3</sup> is not an unfair labor practice "even if it would not have been commenced but for the plaintiff's desire to retaliate against the defendant for exercising rights protected by the Act." *Id.* at 743. In relying on *Bill Johnson's*, Respondent ignores past precedent where the Board has consistently held that while filing and prosecution of a "well-found lawsuit" may be protected, threats to bring legal action against employees for engaging in protected concerted activity are not. *DHL Express, Inc.*, 355 NLRB No. 144 at p. 1, fn. 3, p. 13 (2011), citing *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977). As the judge explained in her decision (which Respondent belittled as "illogical" and defying "common sense" (R. Br. to Board, at 31)), the Board held in *BE & K Construction Co.*, 351 NLRB 451 (2007) that retaliatory but reasonably based lawsuits do not violate Section 8(a)(1), but the Board has explicitly declined to extend this finding to threats to initiate litigation, even where they are "incidental" to the actual filing of the lawsuit itself.

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<sup>3</sup> Respondent asserts that its lawsuit against Sanzone was well-founded and gives as a basis that Sanzone "recognized the blatant falsity of her comments and behavior by adopting Ms. LaFrance's retraction and through her own testimony at the hearing." (R. Br. to Board, at 32). Once again Respondent is changing the facts. Sanzone did not adopt LaFrance's retraction but instead by letter informed Respondent that the comments had been erased. (GCX5). Furthermore, LaFrance's retraction did not admit that the statements made were false. (GXC4).

(See ALJD 18, lines 4-17); see also *Postal Service*, 350 NLRB 125 at 125-126 (2007), enfd. 526 F.3d 729 (11th Cir. 2008); see also *DHL Express, Inc.*, 355 NLRB at p. 1, fn. 3. Applying the above, the judge correctly held that Respondent violated Section 8(a)(1) of the Act when, instead of filing a lawsuit, it threatened employees with legal action in order to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. (ALJD 18, lines 25-37).

Respondent also excepts to the judge's determination that it interrogated Spinella in violation of the Act. As discussed above, Respondent admitted to questioning Spinella about his participation in the Facebook conversation. Respondent argues that because the questioning was not accompanied by any explicit threats, it was a legal interrogation. (R. Br. to Board, at 34) In its brief, Respondent applies the test laid out by the judge in her decision for how the Board determines whether questioning regarding protected activity is unlawful. The Board considers: 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). (ALJD 19, lines 30-35). In defiance of the judge's findings of credibility and the established evidence, Respondent inexplicably argues that none of the factors set forth have been met. Regardless of Respondent's mischaracterizations, the evidence showed and the judge correctly found that: 1) there was a backdrop of hostility given Sanzone's discharge the previous day; 2) the nature of the conversation was not a casual talk but rather seeking specific information "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?"; 3) the questioners were two of three owners of the Company; 4) Spinella was taken out of work and specifically called to the office where they had LaFrance's Facebook account displayed on the computer; and 5) Spinella answered their questions truthfully. In considering these factors, the judge found that they established that Respondent's questioning was impermissibly coercive, and thus in violation of Section 8(a)(1) of the Act. (ALJD 19-20).

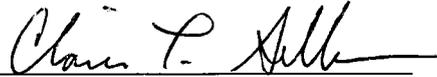
Finally, Respondent excepts to the judge's findings that it violated the Act by threatening employees with discharge. Respondent bases its objection on its claim that "it is not credible that DelBuono actually made the statement" that his "attorney had advised him to discharge every employee who participated in the Facebook discussion." (R. Br. to Board, at 36-37). Respondent's argument once again solely relies on a finding that the judge erred in her credibility determinations. Putting aside the well established rule that the Board will not set aside a judge's credibility findings unless a clear preponderance of the record evidence convinces that the judge was wrong, Respondent's argument is utterly illogical. Given that DelBuono did not deny making this statement during his testimony, Respondent has no basis to attack the judge's crediting of Spinella's testimony. As such, there obviously is no "preponderance of the evidence" to overturn the judge's credibility findings and the judge correctly ascertained that Respondent violated the Act by threatening employees with discharge for engaging in protected concerted activity. *Standard Dry Wall Products*, supra, 91 NLRB 544.

**IV. CONCLUSION**

For all of the above reasons, Counsel for the Acting General Counsel submits that all of Respondent's exceptions are without merit, and respectfully urges the Board to affirm Judge Esposito's decision in its entirety, as modified by her limited Cross Exceptions concerning the lawfulness of Respondent's Blogging/Internet policy.

Dated at Hartford, Connecticut, this 27<sup>th</sup> day of March 2012.

Respectfully submitted,



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