

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
REGION 2**

**PIER SIXTY, LLC**

**Respondent**

**and**

**EVELYN GONZALEZ**

**Charging Party**

**Case Nos. 02-CA-068612 and 02-CA-070797**

**and**

**HERNAN PEREZ**

**Charging Party**

**COUNSEL FOR THE ACTING GENERAL COUNSEL'S  
ANSWERING BRIEF TO RESPONDENT'S EXCEPTIONS TO THE  
ADMINISTRATIVE LAW JUDGE'S DECISION**

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## I. STATEMENT OF THE CASE

On November 9, 2011, Hernan Perez, an individual, filed an unfair labor practice charge in Case No. 02-CA-068612 alleging that Pier Sixty, LLC (herein Respondent) discharged him because of his protected, concerted and union activities. On December 15, 2011, January 20, 2012, and February 6, 2012, Evelyn Gonzalez, an employee of Respondent who is also a labor organization (herein referred to in her representational capacity as the Union or EGU), filed and amended an unfair labor practice charge in Case No. 02-CA-070797 alleging that Respondent, among other things, promulgated a rule prohibiting employees from talking during their work time in retaliation for the Union activities, and made threats of discharge, threats of closure and/or loss of business, and threats of loss of benefits.

After investigating the amended charges, the Regional Director issued a Complaint and Notice of Hearing on April 27, 2012. The Acting Regional Director issued an Amended Complaint and Notice of Hearing on August 24, 2012. In substance, the Amended Complaint alleged that Respondent threatened employees with loss of benefits, loss of business, and discharge if they chose the Evelyn Gonzalez Union as their representative; twice disparately applied its “no talk” rule to discussions regarding the Union; and discharged Hernan Perez because of his protected, concerted activities and activities on behalf of the Union (GCX 1[r]<sup>1</sup>).

A hearing before Administrative Law Judge Lauren Esposito was held on October 16, 17, 18 and 19, 2012 and November 19 and 20, 2012. On April 18, 2013, Judge Esposito issued her Decision finding, among other things, that Respondent discharged Perez because of his protected, concerted and Union activities, that Respondent disparately applied its “no talk” rule to prohibit discussions of the Union, and that Respondent engaged in independent 8(a)(1) threats.

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<sup>1</sup> References to the transcript are designated as “Tr.”. References to Counsel for the Acting General Counsel’s exhibits are designated as “GCX”. References to Respondent’s exhibits are designated as “RX”. References to the Administrative Law Judge’s Decision are designated as ALJD, followed by page number: line number.

On June 14, 2013, Respondent filed Exceptions and a Brief in Support of its Exceptions to the Administrative Law Judge's Decision ("Respondent's Brief").

Pursuant to Section 102.46(d) of the Rules and Regulations of the National Labor Relations Board ("Board's Rules and Regulations"), Counsel for the Acting General Counsel submits the instant answering brief to Respondent's Exceptions. Counsel for the Acting General Counsel submits that Respondent's Exceptions are without basis in the record, are contrary to law, and should be dismissed in their entirety.

## **II. SUMMARY OF FACTS**

### **A. Background.**

Respondent operates a catering and banquet facility in New York City, where it provides food and beverages, and the banquet space. Respondent's customers have social events such as weddings, parties, and bar and bat mitzvahs; companies having what Respondent refers to as "corporate" events; and groups sponsoring fundraising events. Respondent employs banquet servers, captains, coat check employees, chefs and cooks, kitchen workers, maintenance workers, sales and administrative staff, and managers. (Tr. 21.) In total, about 310 staff members work at the facility. (Tr. 565.) The employees involved in this matter work as banquet servers, captains, and coat check employees. At the time of the events in the fall of 2011, there were about 130 employees in these positions. (GCX 2(b).) Until the events of 2011 described below, Respondent's employees had not been represented by any union. (Tr. 29.)

Upon arrival, employees greet guests, take coats, give out place cards, and serve drinks and appetizers. The main meal is served in one of several ballrooms; the employees serve wine and drinks, bring appetizers and the main course to the guests, and remove plates when the guests are finished eating. The banquet servers clean up after the event. Several events can take place at the

same time. (Tr. 701.) Starting and ending times vary from event to event, and the number of events per week and season varies. Events may have fewer than 100 guests to 1200 guests. (Tr. 701.) Thus, different combinations of employees work each event, depending upon these variables. Rarely if ever do all banquet servers work a single event.

**B. 2011: Employees Engage In Concerted Activities.**

In early 2011<sup>2</sup>, banquet server Evelyn Gonzalez heard that other employees had spoken about representation by a union. (Tr. 29.) Gonzalez spoke to about 30 employees, including servers Lora and Hernan Perez, about their concerns. (Tr. 32.) Gonzalez was told, among other things, that the employees felt that Respondent did not treat employees with equality and dignity, disrespected employees, and that assignments to more difficult tasks such as moving heavy stacks of dishes were made in an unfair manner. (Tr. 33.) Gonzalez spoke with Banquet Director Jeffrey Stillwell in February and related the employees' complaints about equality, disrespect and dignity, but Stillwell responded that only a small group of employees were unhappy and that they should leave and find work elsewhere. (Tr. 33.)

Gonzalez continued to speak with her co-workers about their complaints. Based upon her discussions, Gonzalez compiled a two-page list of employee complaints (GCX-3) and presented it to Stillwell around March. Among other things, the list stated that managers didn't know how to "reprehend" [sic.] employees; that they made employees feel uncomfortable; that they didn't give employees enough space to do their jobs; that they took out their own job frustrations on employees; that they didn't treat employees with respect; and that they made employees feel that the employees were lower. (GCX-3.) Gonzalez told Stillwell that she had spoken to a number of employees and compiled the list based upon what they had told her. Stillwell looked at the list

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<sup>2</sup> All events herein took place in 2011 unless specified otherwise.

and said that some of the items on the list couldn't be done. Gonzalez said that she wanted Stillwell to be aware of the complaints. (Tr. 36.)

A couple of weeks later, Gonzalez was asked to meet with Human Resources Director Dawn Bergman and Stillwell. Gonzalez told the managers that there were many employees with complaints, not just a handful. Gonzalez urged Respondent to meet with the staff, but cautioned that many staff members would be reluctant to speak out because they were scared. (Tr. 38-40.)

Around April, Gonzalez heard from another employee that Event Manager Richard Martin had referred to employees as "animals". Upon learning of this, Gonzalez initiated a meeting with General Manager Douglas Giordano; Stillwell was present as well. Gonzalez said that Martin's comment had been very disrespectful and added that there was a lot of disrespect going on, that's why she had brought the list (GCX-3) to Stillwell, and that there was a "wall" between management and the service staff that was really getting out of hand. Gonzalez also told them about an incident between McSweeney and an employee named Kareem House in which McSweeney told House that he would throw House out of the building. (Tr. 41-44.)

### **C. Employees Resume Union Activities.**

Respondent did meet with the server staff, but employees resumed their union activities later that spring<sup>3</sup>. Union authorization cards were distributed to employees. Respondent became aware of the employees' activities by June, when General Manager Douglas Giordano summoned employees to meetings, said that he had heard that employees were signing union authorization cards and urged employees not to sign cards or support a union. (Tr. 49-50, 51.)<sup>4</sup>

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<sup>3</sup> Some employees told Gonzalez that there had been one or more meetings with representatives of Local 6 (an apparent reference to Local 6 of the New York Hotel-Motels Trades Council) but that Local 6 did not pursue representation because Respondent is not affiliated with a hotel. In later spring, employees' activities were with an aim of seeking representation by Local 100 of UNITE/HERE.

<sup>4</sup> The Complaint does not allege these June statements to be independent violations of the Act.

#### **D. Evelyn Gonzalez Forms the Union.**

Local 100 did not, in the end, become the employees' collective-bargaining representative. (Tr. 166.) Instead, after conducting research on the internet, Gonzalez concluded that she could serve as the employees' collective-bargaining representative. Gonzalez and Perez collected employee signatures authorizing Gonzalez to represent them. On September 22<sup>nd</sup>, Gonzalez filed a petition to represent employees in Case No. 02-RC-065080 (Tr. 54, Tr. 333, GCX 2(a)). Thereafter, an election was scheduled to be held on October 27<sup>th</sup>.<sup>5</sup>

#### **E. Respondent Threatens Employees With Loss of Benefits and Discharge.**

Within a few days of the filing of the petition, Respondent began a campaign of meetings in which it expressed its strong opposition to the Union. The meetings were held after the "family meal" and before employees started setting up for the assigned event. Each meeting was repeated so that employees who missed one meeting because they were not scheduled to work the associated event could attend an alternate meeting. Gonzalez, Perez and Lora, as well as servers Robert Ramirez and Esther Martinez, testified that each employee attended about 6 meetings. (Tr. 54, 168, 333, 421, 495.) Because of their varying work schedules, the witnesses didn't necessarily attend the same meetings. (Tr. 56, 169, 262, 334, 496.) Depending upon the number of employees working a particular event, between 20 and 60 employees attended each meeting. (Tr. 856.)

##### *1. Giordano Threatens Employees With Loss of Benefits.*

Giordano told employees that that they would lose their benefits and that if the Union asked for one thing then Respondent would take something else away. Giordano suggested that

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<sup>5</sup> The stipulated bargaining unit included all full-time, part-time and on-call servers, all full-time and part-time captains, all full-time, part-time, and on-call bartenders, and coat check employees in the banquet department of the Employer located at Chelsea Piers, New York, NY. The unit excluded all other employees, including office clerical employees, and guards, professional employees, and supervisors as defined by the Act. (GCX 2(c).)

medical benefits would be taken away if the Union sought higher wages. (Tr. 179.) Giordano also told employees that if the Union won the election then Respondent would have to “start all over” beginning with scratch (Tr. 340), that their benefits would be taken away if the Union was voted in (Tr. 426), and repeated that medical and dental benefits would be taken away if the Union won the election. (Tr. 500.)

*2. Giordano Threatens Discharge if Employees Select the Union.*

During the second or third anti-Union meeting, an employee named Yamina Collins asked what would happen to employees who did not support the Union if the Union prevailed in the upcoming election. Five employees<sup>6</sup> testified that Giordano responded that, if the Union won the election, the non-supporters would have to become Union members and would lose their jobs if they refused to join. Giordano answered Collins’ question at the meeting in front of the assembled employees. (Tr. 62, 180, 340, 428, 500.)

In addition, employees Perez, Ramirez and Martinez testified that Giordano said that employees would be discharged if they went on strike. Giordano did not describe permanent replacement of economic strikers, and used the words “fired”, “discharged” and “lose your jobs” to describe what would happen. (Tr. 183, 426-427, 500, 544.)

*3. Stillwell Threatens that Respondent Would Lose Business if Employees Select the Union.*

Several employees testified that Banquet Director Stillwell, who spoke at one of the last Employer campaign meetings held before the election, told employees that the Union would hurt Respondent’s business because the Employer would no longer be able to provide services such as placing items such as program cards on guest chairs, rolling tables, working with other

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<sup>6</sup> Gonzalez, Perez, Lora, Robert Ramirez, and Esther Martinez.

departments, and service would decline. Stillwell said that potential customers would not use Respondent's services and that business would decline. (Tr. 63, 181, 341-342, 429.) Gonzalez testified that the Union had not expressed a desire that employees stop placing items on chairs (Tr. 63-65) and there is no record evidence of any Union interest in restricting employees' job duties. Since this Union had never negotiated any collective bargaining agreements, there are no EGU contracts with restrictive work rules in existence.

*4. Chris Martino Threatens that Bargaining Will Start From Scratch.*

Ramirez testified that, after one of the last anti-union meetings, Event Manager Richard Martin initiated a discussion about the Union in a hallway outside the men's locker room. As they were talking, Banquet Administrator Chris Martino, who schedules employees, approached and asked if Ramirez had anything he wanted to ask. Ramirez asked Martino how the following month's schedule was looking. Martino replied that he wasn't too sure, but that if the Union came in then he would have to start from scratch. (Tr. 436.)

**F. Respondent Disparately Applies Its "No Talk" Rule to Discussions Regarding the Union.**

*1. Respondent Permits Employees to Discuss Subjects Unrelated to Work.*

There are extensive periods when no customers or guests are in Respondent's facility, such as when employees set up dining rooms before an event and as employees clean the facility after guests have left. In addition, there are some sections of the facility where there are no guests at any time, such as the kitchen and beverage station areas. Similarly, employees may be setting up in one room while the guests are eating the main course or watching a presentation in another room. The record demonstrates that, when guests are not present, Respondent permits employees to engage in conversations regarding subjects unrelated to work while they are working when those conversations are not excessive or unreasonable. All five employees

testified that employees as well as managers frequently engage in discussions of non-work related matters in such situations, and that managers do not object to these discussions.<sup>7</sup>

## *2. Respondent Restricts Union Supporters' Discussions*

After the petition was filed, McSweeney told Perez that he did not want to see groups of employees talking (Tr. 187) and Macias asked Perez on a daily basis whether Perez was having his "little secret meeting". (Tr. 191.) In addition, Respondent twice disparately prevented Evelyn Gonzalez from engaging in discussions with other employees.

This first incident happened around mid-October. Gonzalez, Hernandez and Lora had finished their assignments and were chatting in a non-guest kitchen area. Banquet Manager McSweeney approached and, speaking in an unusually loud tone of voice, told them to "take your meetings outside" (Tr. 68-71) or "have her meetings" outside (Tr. 354-356.) and that they

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<sup>7</sup> For instance, Gonzalez testified that employees discuss non-work related matters in the kitchen, and when setting up in the dining room and setting up buffets, and that this happens all the time. (Tr. 66.) She also testified that Event Managers Martin and Macias, and Banquet Manager Bob McSweeney have joined in these discussions with employees and did not criticize employees for talking. (Tr. 68.) Martinez testified that she talks about non-work related matters about 80% of the time when no guests are present. (Tr. 507.) Perez testified that these conversations happened every day. (Tr. 184.) Lora testified that these discussions of non-work matters happened at least once a day. (Tr. 353.) Ramirez also testified to engaging in frequent conversations while working when no guests were in the area.

Gonzalez testified that employees talk about personal matters, events in the news and the like. (Tr. 67.) Perez testified that employees discuss subjects such as nutrition, baseball and football games. (Tr. 184.) Ramirez testified that employees may discuss Mets baseball games, movies and plays, and vacations. Ramirez also testified that he has discussed non-work while Giordano was in the area, without objection from Giordano. (Tr. 438.) Lora testified that he and employee Kareem House discussed Thanksgiving plans as they set up for an event while Event Manager Paul Macias was in the area. Macias did not object and joined the discussion. (Tr. 351.) In addition, Lora testified that he overheard a discussion between Macias and another employee discussing home repairs as they worked. (Tr. 352.) Martinez testified that she has discussed vacations, dogs and cars with Event Manager Macias; dogs with Event Manager Richard Martin; and the burden of car ownership in New York City with Stillwell. These discussions took place while she was on duty and as she was doing tasks such as set up. She was never told by supervision not to discuss these non-work matters while working. (Tr. 506-510.)

Stillwell and Martin, who testified at the hearing, did not dispute that employees are permitted to engage in such conversations when no guests are present, such as during set up. Macias did not testify; no reason was given by Respondent for his failure to testify.

should “break it up”. (Tr. 188-190.) Other employees were also chatting at this time, but McSweeney did not approach them. (Tr. 188-190.)<sup>8</sup>

The second incident, which was also around mid-October, took place in the Olympic Room as about a dozen employees were setting up a dessert buffet; no guests were present. A Captain told employees to delay set-up as while another task was being done first. The employees paused and chatted in small groups until the other matter could be attended to. As Gonzalenz and a couple other employees talked, McSweeney briskly walked up to Gonzalez, ignoring the other small groups who were chatting. McSweeney addressed Gonzalez in a harsh tone of voice and told her to “break the group”. McSweeney left the area; he did not tell the other employees to break up their groups. (Tr. 71-75, 440, 503-506.)<sup>9</sup>

Respondent proffered no reason for its sudden objection to employees’ personal discussions. There was no evidence of any disruptions caused by either supporters or opponents of the Union; indeed, Stillwell testified that he had thanked employees during his pre-election campaign speech for not allowing the upcoming election to affect their work, with Respondent’s business and Respondent’s service. (Tr. 722, 729.) Despite the absence of disruption, McSweeney testified that he felt that Respondent was spending a lot of time campaigning, that he assumed that the Union supporters were campaigning, and that he was concerned that the Union campaign would interfere with work. (Tr. 799.)

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<sup>8</sup> McSweeney did not specifically recall telling the employees to take their meetings outside. (Tr. 775.)

<sup>9</sup> McSweeney testified that he did not recall instructing Gonzalez to stop talking, but said that he was always telling employees “that kind of thing.” He explained that he meant that he told servers who were conversing while “huddled” on the floor in front of guests to break it up. (Tr. 777.)

## **G. Hernan Perez Posts A Facebook Message Critical of Management and Supporting the Union.**

### *1. McSweeney Harshly Directs Employees to "Spread".*

When working events, employees are assigned a table for which the employee is responsible. If the employee assigned to a particular table is not available to assist a guest, the guest may speak to any server, who will attempt to assist the guest or locate the employee assigned to the table. Employees work in teams of around five employees and wait for a captain to signal that it is time to serve or remove courses and beverages. Employees sometimes stand near their assigned table, but sometimes stand near other employees as they monitor their assigned tables, typically while guests are dining or while presentations are taking place.<sup>10</sup>

The Andrew Glover Youth Program had an event in the Lighthouse on October 25, two days before the election. Gonzalez, Perez and Lora were among the employees working the Glover event. After the guests were served appetizers, Gonzalez, Perez, Lora, and employees Barbie Sanchez and Michelle Sanchez stood near one another on the side of the Montauk Room near table 23. They stood side by side facing the guests and stood about one foot apart from one another. Gonzalez was waiting for the captains to signal that it was time to clear the appetizers. (Tr. 82, 360.) Perez' assigned table was about three tables to their right and in the slightly lower Navesink Room, and Perez could see his table from where they were standing. (Tr. 145.)

As they were standing, McSweeney rapidly walked towards the five employees. He stood directly in front of Gonzalez and, in a harsh tone of voice, told the employees to spread,

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<sup>10</sup> All five employees testified that they have regularly stood near other employees, rather than separately near each table, while events are taking place. Esther Martinez and Robert Ramirez, who were not involved in the Glover event incident, testified that they have worked other events in that room and were able to see their assigned table from the area where Gonzalez, Perez and Lora were standing during the Glover event. Martinez and Ramirez also testified that they frequently stand near other servers as guests are dining or presentations are taking place. (Tr. 88, 289, 369, 448, 512-514).

making a spreading motion with his hands. The employees took a couple of steps away from one another. McSweeney then said, in a higher tone of voice, that he had told them to spread out. A guest at a nearby table turned and looked in the direction of McSweeney and the employees at that point. The employees then moved further away from one another. (Tr. 83-85; 204-206; 360-361.)

McSweeney left a few moments after this incident. Gonzalez, Perez and Lora spoke for a couple moments. Perez said that he was sick and tired of McSweeney's treatment, that McSweeney didn't know how to talk to employees, and that he was going to talk to McSweeney. Gonzalez told Perez that he shouldn't talk to McSweeney, as she would do that, and suggested that Perez take a break. (Tr. 86, 206.)<sup>11</sup>

Gonzalez approached McSweeney about an hour later. She told McSweeney that he needed to learn how to talk to the staff. He did not respond. (Tr. 87.)

## *2. Perez Posts His Facebook Message About McSweeney.*

### *a. Facebook and "Facebook Friends".*

Facebook is a social media website that can be accessed online by computer or Smartphone. Facebook subscribers post messages on their page; other Facebook subscribers can read the postings. "Facebook friends" can comment on other Facebook friends' postings. Facebook users typically post messages about their social activities, vacations, families, pets and the like. (Tr. 213, 519-520.)

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<sup>11</sup> Barbie Sanchez also told Gonzalez that she wanted to speak with McSweeney about the way he treated employees, but Gonzalez told Sanchez to let Gonzalez handle that. (Tr. 86.)

*b. Perez' Posting*

Immediately after Gonzalez suggested that Perez take a break, Perez told his captain that he would be taking a quick break.<sup>12</sup> He went to the restroom for a couple of minutes, then walked to the apron area just outside the Lighthouse. Employees testified that it takes a minute or two to walk between these areas of the Lighthouse.

Perez opened his Facebook app on his SmartPhone and posted the following message:

“Bob is such a NASTY MOTHER FUCKER don’t know how to talk to people!!!!!!  
Fuck his mother and his entire fucking family!!!!  
What a LOSER!!!!

“VOTE YES FOR THE UNION!!!!!!!<sup>13</sup>”

Perez then returned to work and completed his shift. Perez continued to work as scheduled until November 1.

*c. Other Employees Respond To Perez' Facebook Posting.*

Within a day of the posting, Perez saw that an employee named Crystal posted a response stating that respect was a two way street. Martinez replied that that when somebody disrespects you all the time, you lose respect for the person. Ramirez posted that he heard that “Bob” “did the nasty” with a waitress<sup>14</sup>. A former employee posted that he thought that the waitress was an employee named Sharon. Perez posted a reply that the other posters should keep their comments to themselves and shouldn’t involve other people, and Martinez posted a message that said that people should not post messages if they didn’t know what they were talking about. (Tr. 218, 456, 523.)

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<sup>12</sup> There is no set break time. If an employee needs a break after the guests have arrived, the employee tells the other employees on the team and a captain. The other team members cover the employee’s table until the employee returns. (Tr. 88, 134, 374, 453, 518.)

<sup>13</sup> GCX-5.

<sup>14</sup> Ramirez testified that “doing the nasty” meant a sexual relationship. (Tr. 457.) Martinez and Perez testified that they also understood the phrase “doing the nasty” to mean a sexual relationship.(Tr. 218, 523.) Human Resources Director Bergman testified that she too understood that phrase to mean a sexual relationship, and that she understood Ramirez’ post to be suggesting that “Bob” was having a sexual relationship with a subordinate.

No more messages were posted. Perez removed the posting a day or so after the election<sup>15</sup>. Perez removed several other Facebook messages discussing the election at the same time, and said that he removed the messages (including the October 25 message) because the election was over and the Union had won. (Tr. 219.)

In addition to the employees (and former employee) who responded to Perez' posting, the record shows that the Facebook exchange was seen by only one other employee and several managers, including Bergman and Marciano. There is no evidence that anybody else viewed Perez' posting or the responses. Nor is there any evidence that any Respondent customer or guest ever saw the posting or the response. Perez testified that he was not friends (in a traditional, non-Facebook, way) with any customer or guest. (Tr. 216.)

## **I. The Union Is Certified.**

On October 27<sup>th</sup>, 71 employees voted for the Union, while 50 voted no. On November 4, the Acting Regional Director issued a Certification of Representative certifying the Union as the employees' collective-bargaining representative. (GCX 2(c).)

## **J. Respondent Discharges Perez.**

### *1. Respondent Investigates the Facebook Posting.*

Human Resources Director Bergman was first told about the posting by another manager around 3:30 pm on October 26<sup>th</sup>. Bergman viewed the posting on a Respondent computer. She read all of the responses described above on the afternoon of October 26<sup>th</sup>. She printed out Perez' post but was unable to print the other posters' responses. She notified Marciano of the posting. (Tr. 569-70.)

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<sup>15</sup> Corporate Human Resources Director Luisa Marciano's testified that she was able to view Perez' Facebook page in November 2012, a year after Perez' posting that led to his discharge. Marciano did not, however, claim that she was able to see the October 25, 2011 exchanges on Perez' page when she access his page a year after the incident. (Tr. 823.)

Bergman asked McSweeney about the Glover event. McSweeney said that he had told the employees to disburse and that Gonzalez had later told him that he should learn how to talk to people. (Tr. 572.)

Bergman and Giordano called Perez into Respondent's office and met with Perez on the afternoon of November 1. Perez was not under oath. (Tr. 232, 648.) They confronted Perez with the printout of his Facebook posting, GCX-5. Bergman told Perez that she considered the posting to be very, very serious. Perez realized that the matter might cost him his job, and told them that the Facebook posting was not about McSweeney. (Tr. 313.) Perez said that there had been a problem with McSweeney and five employees about two weeks before the Glover event. Perez was suspended at that point. (Tr. 225, 576.)

Respondent questioned other employees about the posting, including Gonzalez. Gonzalez told the Employer that McSweeney had "screamed" that the employees should spread, that they had spread, but that McSweeney screamed again and that a guest turned around to look at them. Gonzalez said that Perez was very upset, that Perez and Barbie Sanchez wanted to talk to McSweeney about the way he spoke to the employees, but that she told them that she would take care of that. She said that she had told McSweeney that he should learn how to talk to the staff, that employees were experiencing a lot of stress and disrespect from managers, and described the "dessert buffet" incident in the Olympic Room. (Tr. 93-95.)<sup>16</sup>

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<sup>16</sup> Stillwell sent Bergman a written report concerning his interview with Gonzalez that Bergman read before she decided what action to take against Perez. Thus, Berman knew that Gonzalez had told Stillwell and Giordano that Gonzalez had said that not everybody was able to deal with McSweeney and that Gonzalez thought that McSweeney's action was directed more at her than the other employees, that Gonzalez told them about other incidents in which McSweeney had acted inappropriately towards servers, including the Olympic Room dessert buffet setup incident. (Tr. 637-640.)

## 2. Respondent Terminates Perez.

Bergman, who made the decision to terminate Perez, stated that her decision was based solely on the Facebook posting and that prior personnel actions were not a factor in the decision. (Tr. 630, 657-659.)<sup>17</sup>

Bergman had concluded that Ramirez' comment about "Bob" "doing the nasty" with a waitress was a reference to McSweeney and that she thought Ramirez meant that McSweeney had a sexual relationship with the waitress. No action was taken against Ramirez concerning his accusation that McSweeney had a sexual relationship with a subordinate. (Tr. 654.)

Perez filed a claim for unemployment benefits and Respondent challenged Perez' right to receive benefits. Perez testified at a hearing before an Administrative Law Judge of the state agency responsible for unemployment benefits. Under oath, Perez stated that his October 25<sup>th</sup> Facebook posting was about McSweeney. (Tr. 648.) Respondent's only asserted reason for terminating Perez was his violation of a Respondent policy prohibiting harassment.<sup>18</sup>(Tr. 630.)

### **K. Respondent's Condonation of Other Workplace Profanity and Insulting Personal Attacks.**

The record shows extensive profanity and personal attacks by Executive Chef Phil DeMaiolo<sup>19</sup>, Stewarding Supervisor Felix Acosta, Bob McSweeney, Richard Martin and Paul

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<sup>17</sup> Bergman also stated that Respondent had concluded before making the decision that the posting was about McSweeney. She acknowledged that cursing takes place at Respondent's workplace. (Tr. 586.)

<sup>18</sup> That Respondent policy states: "Pier Sixty also prohibits harassment of any Associate by any manager, supervisor, Associate, client, guest or visitor including, but not limited to, harassment on the basis of age, race, religion, color, national origin, citizenship, disability, marital status, familial status, sexual orientation, alienage, liability for services in the U.S. Armed Forces, or any other classification protected by Federal, State or Local laws. While it is not easy to define exactly what harassment is, examples of prohibited conduct include unwelcome slurs, threats, derogatory comments or gestures, joking, teasing, or other similar verbal, written or physical conduct directed towards an individual because of one of these protected classifications. Violations of this policy will not be permitted and may result in discipline up to and including discharge. In addition, Pier Sixty will not permit any form of retaliation against individuals who report unwelcome conduct to management or who cooperate in the investigation of such reports in accordance with this policy." (GCX 9.)

<sup>19</sup> DeMaiolo oversees the culinary, pastry and stewarding departments, is a member of Respondent's Steering Committee, directly oversees about 40 employees and indirectly oversees an additional 35 employees. He has

Macias. As discussed in more detail below, these managers have frequently used invectives such as “fucking stupid”, “fucking idiot” and the like. There is no record evidence establishing that Respondent has ever taken disciplinary action against the staff using this language.<sup>20</sup>

The record contains abundant evidence establishing that DeMaiolo frequently curses at employees using variations of “fuck”, without any repercussions.<sup>21</sup> The record also contains significant evidence that Acosta, Macias, Martin, Giordano and McSweeney have cursed at employees, using “fuck” and variations, again without any repercussions.<sup>22</sup>

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authority to effectively recommend that employees be hired, fired, suspended, promoted, grant raises, appraise employees, and resolve some grievances. (Tr. 620-622.)

<sup>20</sup> Lora testified that he hears DeMaiolo use “fuck” and its derivatives at work on almost a daily basis. (Tr. 368.) Martinez testified that she has heard DeMaiolo curse, using “fuck” and its derivatives 50% to 60% of the time she encounters him. (Tr. 529.) Ramirez testified that he has heard DeMaiolo curse around 20 to 30 days of each month, and that he uses words such as “fuck”, “shit”, “motherfucker” and “what the fuck”. (Tr. 441.) The employees testified that the cursing often takes place in the kitchen, and that a dozen or more kitchen and serving staff employees (including managers) are in the area when he does so. Perez testified that he often heard DeMaiolo yell “move!”, “fuck!”, “shit!” and “this is stupid” at servers. (Tr. 235-236.)

<sup>21</sup> For instance, Gonzalez, Lora and Martinez testified to DeMaiolo’s reaction when a machine broke down in 2011 or early 2012. Gonzalez heard DeMaiolo shout “What the fuck?”, “Who the fuck?” and “Fucking stupid” at employees; Lora heard him call employees “fucking idiots”; and he confronted Martinez by saying “Why the fuck aren’t you using [the broken machine]? Did you even fucking ask?”. (Tr. 99, 368, 410, 532.) Martinez complained to a captain about DeMaiolo and the captain relayed the complaint to Event Manager Paul Macias, but there is no record evidence of any action being taken against DeMaiolo. (Tr. 533-535.) Similarly, Gonzalez testified to a late 2010 incident in which DeMaiolo shouted that employees should “move the fucking line.” (Tr. 101.)

Martinez also described an incident in late 2011 in the kitchen; about 30-40 servers were in the area, waiting to pick up plates. DeMaiolo shouted “what the fuck; ask what the fuck you’re picking up; you shouldn’t just fucking pick it up” at Martinez. McSweeney was in the area at the time. (Tr. 530-531.)

<sup>22</sup> Perez testified that Felix Acosta has said “what the fuck is this? Why are you fucking guys slow?” to kitchen employees. (Tr. 237.) Ramirez has heard Acosta say similar things two or three times a week. (Tr. 445.) Martinez has heard Acosta say “fucking shit”, “fucking stupid” and “asshole” in English and Spanish, as well as “nasty ass” in Spanish. Martinez has heard Acosta say these things on more than half of her shifts, and has said it to managers as well as employees. (Tr. 536-538.)

Martinez has heard Macias say things like “what the fuck” and says he says such things around 20% to 30% of the events that she works; Martin say things like “fuck” and “asshole” on about 40% of her shifts; and Martinez has heard McSweeney use the words “fuck” and “shit” on about 10% to 20% of her shifts. (Tr. 538-539.)

Perez heard McSweeney, about 3-4 years ago, tell an employee named Dean to “stop fucking around”. (Tr. 240-242.) Around the first half of 2011, McSweeney shouted in a loud voice “what the fuck?” at Martinez. (Tr. 528.)

Around early 2012, Ramirez entered the men’s locker room and saw Giordano and a chef named Francisco talking there. Giordano called Francisco a “fucking little Mexican”, “motherfucker” and that Francisco should “eat shit”. Francisco responded that he wasn’t scared of Giordano, “fuck you”, “get out of my face” and the like. The discussion continued while Ramirez changed and was continuing when he left the locker room. (Tr. 443-444.)

### III. ARGUMENT

#### A. The Administrative Law Judge's Credibility Resolutions Should Be Upheld, as Respondent Failed to Establish That There is a Clear Preponderance of Evidence That the ALJ's Resolutions Were Erroneous.

Respondent has failed to demonstrate by a clear preponderance of evidence that the ALJ's credibility resolutions were erroneous. Accordingly, the Board should not do so. *Standard Dry Wall Products*, 91 NLBB 544 (1950), *enfd.* 188 F.2d 361 (3d Cir 1951).

The ALJ's determinations were proper and well supported and the ALJ set forth the reasons upon which her credibility finding is based. Thus, the Acting General Counsel's witnesses testified about a half dozen or so "captive audience" speeches at which they had taken no notes. Because some employees attended different meetings, the ALJ properly considered that some of the Acting General Counsel's witnesses may not have been present when Respondent made certain 8(a)(1) threats. (Tr. 55, 558.) (ALJD 18:41-43.) Similarly, the ALJ properly considered that Respondent's witnesses may not have been present at meetings described by the Acting General Counsel's witnesses because of the staggered meeting schedule. ALJD 18:38-41. The ALJ also noted that in some instances Respondent's witnesses stated that they did not recall statements being made during captive audience speeches or that their denials that the violative statements were made were generalized. ALJD 18:21-27. In other instances, at least some of Respondent's witnesses did not deny that its agents made the statements attributed to them by Acting General Counsel's witnesses.<sup>23</sup>

Respondent in its Exceptions asserts that the Acting General Counsel's witnesses did not provide a complete and exhaustive description of managers' statements on direct examination

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<sup>23</sup> Banquet Administrator Chris Martino, for instance, was at most meetings (Tr. 743) but did not dispute that Giordano and Stillwell made the statements described by Acting General Counsel's witnesses.

and that the witnesses on cross examination made admissions that showed that Respondent's statements were lawful. But as noted by the ALJ at ALJD 19:1-4, the witnesses testified concerning many meetings and the ALJ concluded that their failure to provide an extensive context was not fundamentally detrimental to their overall credibility.<sup>24</sup>

Further, Respondent's assertion that its witnesses' recollections were complete and comprehensive is not supported by the record. Martino, Martin and McSweeney were at most of these meetings (Tr. 170-171, 424, 497, 743) but did not dispute that Giordano and Stillwell made the statements described by Acting General Counsel's witnesses. Bergman, who was at many of the meetings, admitted that the meetings were "all running together" in her head. (Tr. 594, 598, 676.) Corporate Director of Human Resources Luisa Marciano admitted that she didn't remember all of the employees' questions (Tr. 832) and her testimony was to a large extent simply her prepared notes of her speech (RX 9).

Finally, Respondent's apparent assertion that some employees' testimony concerning Respondent's statements in the captive audience meetings should not be credited because they falsely told Respondent that Perez' Facebook posting was not about McSweeney is also without merit. When credibility findings are not based on demeanor, "an administrative law judge properly may base credibility determinations on the weight of the respective evidence, established or admitted facts, inherent probabilities, 'and reasonable inferences which may be drawn from the record as a whole.'" *Daikichi Corp.*, 335 NLRB 622, 623 (2001) (quoting *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)). Moreover, "nothing is more common in all kinds of judicial decisions than to believe some and not all, of a witness'

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<sup>24</sup> Further, in those instances where cross examination disclosed testimony that rendered Respondent's statements lawful in context, the Judge found no violation, and the Acting General Counsel does not except to those findings.

testimony.” *State Plaza, Inc.* 347 NLRB 755, 755 n.2 (2006) (quoting *NLRB v. Universal Camera Corp.*, 179 F.2d 749, 754 (2d Cir. 1950)). The ALJ may also believe some testimony of a discredited witnesses, especially when the testimony is: “(1) implicitly credited by the judge, (2) is consistent with the testimony of credited witnesses or with documentary evidence, (3) is an admission against interest, or (4) is relied on by the party against whom we are resolving a particular issue.”) *Upper Great Lakes Pilots, Inc.*, 311 NLRB 131, 131 n.2 (1993). Furthermore, “[w]here there are two materially conflicting versions of the same incident, an ALJ’s credibility determinations are entitled to deference.” *NLRB v. Advance Transp. Co.*, 979 F.2d 569, 573 (7th Cir. 1992) (citing *NLRB v. Augusta Bakery Corp.*, 957 F.2d 1467, 1477 (7th Cir. 1992)).

It should be emphasized that the employees in the instant case were not under oath when they were interviewed concerning the Facebook posting. They were under oath when they testified before the ALJ, and they readily acknowledged in that sworn testimony that Perez’ Facebook posting was about Bob McSweeney. They thus never testified falsely under oath, and the ALJ therefore appropriately credited the employees’ testimony concerning Respondent’s statements during the captive audience meetings.

For the above reasons, Respondent has failed to establish any basis for disturbing the ALJ’s credibility determinations.

**B. The ALJ Correctly Concluded That Respondent Violated Section 8(a)(1) of the Act In Its Pre-Election Speeches and Discussion.**

*1. Loss of Benefits*

The evidence establishes that Giordano stressed the benefits that employees enjoyed and warned them that they could lose the benefits if they selected representation the Union. Ramirez and Martinez testified that Giordano explicitly told employees that they would lose benefits, and which benefits they would lose, if they selected the Union.<sup>25</sup> Such threats are violative of Section 8(a)(1) of the Act. *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617 (2007); *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), *enfd.*, 679 F.2d 900 (9th Cir. 1982). For the foregoing reasons, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act.

*2. Threats Of Discharge.*

Giordano, answering Yamina Collins' question in front of dozens of employees, said that employees would have to join the Union or face termination. Collins question and Giordano's answer were discussed at an open Employer campaign meeting and dozens of employees heard Giordano's response. The employees testified consistently that Giordano said this would happen when employees voted for the Union, and that he did not explain that this would only happen if the parties negotiated a contract that included a union security clause.<sup>26</sup> Giordano thus threatened

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<sup>25</sup> As noted above, because the Employer's speeches were repeated and employees attended different speeches depending upon their work schedule, the fact that other employees such as Gonzalez did not hear these threats does not render Ramirez' and Martinez' testimony as missing corroboration. Rather, the testimony suggests that the other employees were not at the meetings, attended by Ramirez and Martinez, in which these threats were made.

<sup>26</sup> Marciano's claim that she interrupted Giordano before he could answer Collins' question is contradicted by the employees who recalled Giordano making the statement. Gonzalez testified that Marciano started speaking as Giordano completed his answer, but that Giordano had already answered the question. Gonzalez testified that she did not hear Marciano explain that employees could be discharged only if there is a contract with a union security clause. Bergman does not corroborate Marciano, as she testified that she did not recall the answer to Collins'

that the Employer would discriminate against employees who did not support the Union by discharging them. Employer statements that employees must be a Union member to obtain or retain a position are unlawful threats and violate Section 8(a)(1) of the Act. *United States Postal Service*, 345 NLRB 1203 (2005), 1216-1217. See also, *Overnite Transportation Co.*, 334 NLRB 1074, 1112 (2001); *SMI of Westchester, Inc.*, 271 NLRB 1508, 1524 (1984); *United Stanford Employees, Local 680 (Leland Stanford Junior University)*, 232 NLRB 326 (1977), enf'd., 601 F.2d 980 (9th Cir. 1979); *NLRB v. Reed*, 206 F.2d 184 (9 Cir. 1953).

In addition, Giordano told employees that they would be discharged if they went on strike to support the Union's negotiating claims. Perez, Ramirez and Martinez all testified to hearing Giordano use words such as that they would lose their job, would be fired, or would be discharged.

By telling employees that they are discharged carries with the implication that their employment relationship is completely severed, a more severe consequence than being permanently replaced, Respondent violated Section 8(a)(1) of the Act. Severing employment signifies that the employee would have no job protection if the employee goes on strike, since discharged employees have no *Laidlaw* right to reinstatement. *Laidlaw Corp.*, 171 NLRB 1366 (1968) (1968), enf'd. 414 F.2d 99 (7th Cir. 1969). See, *Gelita USA, Inc.*, 352 NLRB 406 (2008) (2-member Board); affirmed 356 NLRB No. 70 (2011). See also *Connecticut Humane Society*, 358 NLRB No. 31, at p. 34.

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question. (Tr. 597.) Respondent has failed to establish that a clear preponderance of evidence contradicts the ALJ's credibility resolutions.

For the foregoing reasons, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act, and the Board should find that Respondent's exceptions are without merit.

### *3. Start From Scratch.*

When Martino told Ramirez, in response to Ramirez' question about the upcoming schedule, that he wasn't sure but if the Union came in he'd have to start from scratch, he was effectively warning Ramirez that Respondent would change the upcoming schedule or the scheduling system itself if the Union won the election. Ramirez was clearly asking what his anticipated schedule would be, but Martino brought up the Union instead. Martino's response suggested that a Union victory would result in continuation of the scheduling process being changed; further, Martino said nothing that would suggest that the current process would be maintained while the Union and Respondent negotiated how a new system would work.<sup>27</sup>

It is well established that "bargaining from ground zero" or "bargaining from scratch" statements by employer representatives violate Section 8(a)(1) of the Act if, in context, they reasonably could be understood by employees as a threat of loss of existing benefits and leave employees with the impression that what they may ultimately receive depends upon what the union can induce the employer to restore. *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980); *enfd* 679 F.2d 900 (9<sup>th</sup> Cir. 1982). In context, Martino's statement was a threat that the scheduling system would be changed, possibly to employees' detriment, if the Union won the

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<sup>27</sup> The Judge correctly credited Ramirez' testimony that Martino, responding Ramirez' question about the upcoming schedule, replied that he wasn't sure but that he'd have to start from scratch if the Union came in should be credited. Ramirez' testimony was specific as to when the conversation occurred (the same day that Betts and Kirsch spoke) and was detailed that as to the circumstances that led to his being in the upstairs hallway outside the locker room. In contrast, Martino testified that he "didn't recall" talking with Ramirez in the hallway, but admitted that he has multiple daily conversations with employees about schedules, including some in upstairs hallway conversations. (Tr. 735, 736.) He also said that he had discussed the Union with some employees but couldn't recall which employees. (Tr. 742.)

election. *Noah's Bay Area Bagels*, 331 NLRB 188 (2000); *Taylor-Dunn Mfg. Co.*, supra. *BP Amoco Chemical-Chocolate Bayou, Id.*, 351 NLRB 614, 617-618 (2007). For the foregoing reasons, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act, and the Board should find that Respondent's exceptions are without merit.

#### *4. Threat of Loss of Business*

Employees consistently testified that Stillwell emphasized that, if employees selected the Union as their representative, the Employer have inferior service and that Respondent would not be able to provide the same level of service, and that Respondent would lose customers as a result. Stillwell said these things even though the Union had not suggested any interest in imposing work rules that would limit Respondent's ability to provide its current level of service to its customers. Thus, Stillwell was suggesting that Respondent would lose customers through a chain of causation brought about through forces beyond Respondent's control. Without more specific, objective data, the statement could be taken to suggest that, for reasons that are partly within its control and known only to it, Respondent might discharge employees should they choose a union. *Harrison Steel Castings Co.*, 293 NLRB 1158, 1159 (1989), enf'd 728 F.3d 821 (7<sup>th</sup> Cir. 1984), vacated and remanded 735 F.3d 1049 (7<sup>th</sup> Cir. 1984); *Crown Cork & Seal Company, Inc.*, 255 NLRB 14 (1981). For the foregoing reasons, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act, and the Board should find that Respondent's exceptions are without merit.

**B. The ALJ Correctly Found That Respondent Violated Section 8(a)(1) of the Act By Discriminatorily Applying Its “No Talk” Rule to Discussions of the Union.**

*1. Employee Conversations About Subjects Unrelated To Work Were Permitted.*

The ALJ’s conclusion (ALJD 26:26-45) that employees frequently discussed matters unrelated to work when there were no guests in the area is supported by an abundance of record evidence. These non-work related conversations took place frequently in the presence of managers who did not object to these conversations (and in fact frequently participated in and at times initiated these conversations). Respondent’s witnesses did not dispute this.<sup>28</sup>

*2. Respondent’s Instructions Were a Directive That Employees Not Discuss The Union*

The ALJ’s conclusion that Respondent disparately enforced the “no talk” rule against Union-related discussions (ALJD 27:37-42) is fully supported by the evidence. It is clear from the evidence that, once the petition was filed, Respondent was on “high alert” for employees having discussions about the Union. This is when McSweeney told Perez not to talk to other employees and Macias asked every day if Perez was having his “secret little meeting”, a clear reference to the employees’ Union activities. McSweeney, for his part, testified that he assumed that employees were campaigning and that he was concerned that it would interfere with work. There was in fact no objective basis for that fear: employees and managers alike proudly agreed in their testimony that Respondent provided the best service in the city, and Stillwell went so far as to thank employees for not letting the Union campaign interfere with that service and not letting the business suffer. Indeed, there was no record evidence of the Union campaign causing any diminution of service or other harmful effect on Respondent’s business.

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<sup>28</sup> Indeed, Respondent recognized that employees were permitted to talk if there were no guests in the area if the discussion was not excessive. Perez was criticized in his 2010 appraisal and issued a warning in 2011 not because he was talking during duty time, but because he was talking *excessively* or for *more than a reasonable amount* of time. [Emphasis added.] Gonzalez has never been criticized for talking excessively.

Notwithstanding the absence of disruption, Respondent restricted employees from talking, even though no customers or guests were present, when it thought they were talking about the Union. The first time, in a non-guest area, during downtime when other groups of employees were also chatting, McSweeney told Gonzalez, Hernandez and Lora in a loud voice to take their “meetings outside”. McSweeney was clearly referring to the Union, and Gonzalez felt compelled to explain that they were talking about another non-work subject that, unlike discussions about the Union, she knew would be permitted because it was not about the Union.<sup>29</sup>

There were also no guests present in the second, “dessert buffet”, incident of Respondent’s disparate application of the “no talk” rule. McSweeney ignored the dozen or so employees who were talking in small groups, briskly walked directly to Gonzalez, stood at arm’s length, and harshly told Gonzalez to “break the group”. None of the other employees, who were talking in their own small groups, were told that they should stop talking. There were no customers or guests in the area, and employees chatted because they were waiting briefly for some items to be brought to the room before they could resume buffet setup. Given McSweeney’s testimony of his concern that the Union campaign would disrupt Respondent’s business, the evidence establishes that McSweeney was singling out Gonzalez because he thought she was discussing the Union with other employees – a topic that, in his view, was forbidden.

### *3. Respondent’s Disparate Prohibition on Union Discussions Violated Section 8(a)(1) of the Act.*

The ALJ’s conclusion (ALJD 27:38-42) that Respondent unlawfully and disparately enforced the rule against Union supporters is supported by an abundance of record evidence and

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<sup>29</sup> McSweeney’s testimony that he did not specifically recall the incident is barely a denial, particularly given that Gonzalez, Perez and Lora all consistently testified that McSweeney did engage in this conduct.

correctly applies Board precedent. It is well settled that “an employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with the employees’ work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work. . . .” *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), citing *Jensen Enterprises*, 339 NLRB 877, 878 (2003).

In this regard, Respondent’s hyperbolic claim in its brief that the ALJ determined that enforcement of normal rules against Union adherents was de facto unlawful is contradicted by the evidence; the ALJ did no such thing. There is abundant evidence that Respondent’s employees were free to discuss subjects unrelated to work when no guests are in the area and the employees’ discussions of non-work subjects are not excessive.<sup>30</sup> There is also abundant record evidence that Respondent treated the Union supporters differently when it believed them to be chatting about Union matters. Similarly, Respondent’s claim that the ALJ failed to consider prior discipline is against Perez is not correct: the ALJ considered and correctly distinguished prior actions at ALJD 26:36-39. Rather, the evidence is clear that McSweeney in each of these incidents singled out Gonzalez, the Union President, because he intended to stop employee discussion of the Union in circumstances where other discussions were permitted.

For the foregoing reasons, the ALJ correctly concluded that Respondent violated Section 8(a)(1) of the Act, and the Board should find that Respondent’s exceptions without merit.

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<sup>30</sup> There is no record evidence that suggests that the employees’ conversations about Gonzalez’ Puerto Rico trip were excessive or unreasonably lengthy; indeed, McSweeney did not even remember the incident. Nor is there evidence that Gonzalez and the other employees, while waiting for missing items to arrive in the Olympic Room before they could resume setting up the dessert buffet, were engaging in excessive or unreasonably lengthy discussions – again, McSweeney did not remember the incident.

**C. The Judge Correctly Concluded That Respondent Discriminatorily Discharged Hernan Perez Because He Assisted The Union and Engaged in Protected, Concerted Activities.<sup>31</sup>**

*1. Hernan Perez' Facebook Posting Was In Furtherance of Nine Months of Employees' Protected, Concerted Activities.*

Contrary to Respondent's assertion in its brief, the record evidence fully supports the ALJ's conclusion, at ALJD 28:48 to 29:15, that Hernan Perez' October 25<sup>th</sup> Facebook posting was part of a sequence of months of efforts by Perez<sup>32</sup>, Gonzalez, and other employees to concertedly ameliorate what they saw as rude and demeaning treatment by Respondent's managers. Earlier in the year, Gonzalez had spoken to around 30 other employees about their complaints; she told Stillwell that the employees' concerns included *equality, dignity and disrespect*. When Stillwell dismissed the concerns, Gonzalez continued to press the issue: she compiled the list of employee complaints (GCX 3) that she presented to Stillwell. The list included the very issues about managers' treatment of employees that led to Perez' October 25 Facebook posting that stated, among other things, that McSweeney didn't know how to talk to people.<sup>33</sup> Gonzalez continued to speak up on behalf of employees, objecting in the spring of 2011 to a manager referring to employees as animals and citing McSweeney's treatment of employee Kareem House as another example of managerial "disrespect" of employees.

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<sup>31</sup> The Board should not give any consideration to the decisions of the Acting General Counsel's Division of Advice not to issue complaints in other cases not involving Respondent, cited by Respondent in its Brief at pages 14-16. Those Division of Advice cases involved significantly different facts than the instant case; moreover, *they are not Board decisions*, as the cases were never before the Board in any way, and they are not binding authority in any matter before the Board. Rather, they were decisions of the Acting General Counsel not to prosecute those matters before the Board in matters involving much different facts.

<sup>32</sup> Though Perez told Respondent during its investigation that his posting referred to somebody other than McSweeney, he should not be discredited. Respondent's questioning put him in the position of having to discuss his protected activity in a context where he believed his job was in danger. He was not under oath; when under oath, he testified that the posting was in fact about McSweeney. See, *Fresenius USA Manufacturing*, 358 NLRB No. 138 (2012), fn. 6; *Earle Industries*, 315 NLRB 310, 315 (1994).

<sup>33</sup> The employees' complaints included that managers didn't know how to reprehend [sic.] employees; that they made employees feel uncomfortable; that they didn't give employees enough space to do their jobs; that they took out their own job frustrations on employees; that they didn't treat employees with respect; and that they made employees feel that the employees were lower. (GCX 3.)

Respondent's proclivity to treat employees, in their eyes, with disrespect was further manifested when McSweeney disparately enforced the "no talk" rule shortly before the October 25<sup>th</sup> incident at the Glover event that led to Perez' Facebook posting.<sup>34</sup>

These concerted complaints were protected: it is well established that employee complaints about the manner in which supervision treats employees is a term and condition of employment. For instance, an employee walkout in response supervisory treatment perceived by employees as rude, overbearing, condescending and demeaning – the same complaints that Respondent's employees made in 2011 – was protected. *Arrow Electric Co.*, 323 NLRB 968, 970 (1997); enf'd 155 F.3d 762 (6<sup>th</sup> Cir. 1988). The complaints need not be "earth shattering" to be protected so long as they arise from their conditions of employment. *Fair Mercantile Co.*, 271 NLRB 1159, 1162 (1984); enf'd 767 F.2d 930 (8<sup>th</sup> Cir. 1985).

In addition, Perez was an active participant in the employees' union organizing. Perez' pro-Union sympathies were apparent in his pointing out, in front of dozens of employees and managers, to Human Resources Consultant Marciano that employees without union representation were considered employees at will and that their benefits could be unilaterally changed. Managers further demonstrated their awareness of his sympathies by referring to his "secret little meetings" after the petition was filed. Indeed, Respondent acknowledged that it was aware of Perez' pro-union sympathies by consulting with counsel and delaying its investigation of his Facebook posting until after the election.

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<sup>34</sup> Respondent's claim that the incidents did not result in any complaint of rude or belligerent behavior is contradicted by the record. Gonzalez challenged McSweeney both times (asking whether he was "harassing" her during the "dessert buffet" incident, Tr. 75) and complained about the incident when interviewed by Stillwell and Giordano. (Tr. 71, 95, 639-640.)

The employees were doing nothing out of the ordinary when they stood side-by-side and silently monitored the dinner during the Glover event on October 25, as they done so many other times without complaint. From their perspective, McSweeney's "spread" instruction and loud, harsh tone of voice – so loud that a dinner guest turned to see what was going on – was totally unexpected and inappropriate. From their perspective, it was yet another incident of managers treating employees with disrespect less than two days before the election. Thus, the ALJ's conclusion, at ALJD 30:4-5, that the resulting Facebook posting was protected, concerted activity is fully supported by the record and Board precedent.

*2. Perez' Facebook Posting was the Res Gestae of McSweeney's "Spread" Command.*

The employees were upset by the manner in which McSweeney had just spoken to them and Gonzalez spoke to the other employees to make sure they were all right within moments of the incident. Indeed, Gonzalez told other employees that she would confront McSweeney about the way he had spoken to them, and she did so later that evening.

Perez posted the Facebook posting within a few minutes of the incident. At Gonzalez' suggestion, Perez quickly took a break after making sure that his guests were attended to. He first went to the restroom for a few moments, then went to the break area, and posted the Facebook message. The uncontroverted testimony of Perez, Lora, Ramirez and Martinez was that it takes just a couple of minutes to walk through Respondent's facility. Thus, the entire process took but a few minutes.

Respondent's claim, at page 12 of its brief, that Perez did not post the Facebook message until 45 minutes after the incident is contradicted by its own evidence.<sup>35</sup> Bergman testified that Perez' Facebook posting was made within 15 minutes of the incident. (Tr. 643.) Moreover, on December 8, during the Regional Office's investigation of the charge, Respondent's counsel submitted a position statement to the Regional Office that admitted that the Facebook posting had been made "only moments" after the incident and that the Facebook posting "was perfectly in sync" with McSweeney's directive to the five employees. (Tr. 667.)

Given Perez' uncontroverted testimony that he made the Facebook posting a few minutes after the incident, Bergman's testimony that the posting was made within 15 minutes of the incident, and Respondent's admissions during the investigation, the evidence clearly establishes that Perez made the posting within a few moments of the incident, and was part of Perez' reaction to what had just happened when McSweeney harshly directed the employees to spread.

*3. The Facebook Posting Was Protected Union Activity As Well as Concerted Activity.*

The Facebook posting on its face concluded "Vote YES for the UNION!!!!!!!!!" It cannot be disputed that the post expressed Perez' support for the Union, and the ALJ's conclusion at ALJD 30:5-7 that the Facebook posting constituted Union activity is fully supported by the record.

*4. Respondent Knew That the Facebook Posting Was Protected and Concerted Activity.*

Respondent knew that Perez' Facebook posting was in furtherance of employees' concerted complaints about working conditions at the time of its decision to terminate Perez. By

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<sup>35</sup> Its claim is based solely on the printout of the Facebook posting, which indicated that the posting had been made 20 hours before it was printed out, but did not indicate the minute of the posting. Thus, the printout could have been made up to 20 hours and 59 minutes after the incident, but would indicate only the number of hours, not minutes.

their actions during Respondent's investigation, Bergman and McSweeney acknowledged that the employees' responses showed that they regarded the incident as more than a minor matter: McSweeney readily recalled the incident when asked about it by Bergman five days later. Further, Bergman knew that Gonzalez had told McSweeney that he should learn how to communicate better with people. Bergman knew that several employees had been involved in the incident, that Gonzalez had told Stillwell and Giordano that not everybody was able to deal with McSweeney, and that Gonzalez thought that McSweeney's action was directed more at Gonzalez than the other employees. Indeed, Bergman knew that Gonzalez had told Stillwell and Giordano about other incidents in which McSweeney had acted inappropriately towards other servers, including herself during the disparate "dessert buffet" application of the "to talk" rule. Bergman knew that employee Endy Lora had told her that employees were "still fed up".<sup>36</sup>

5. *The Facebook Posting Did Not Lose the Protection of the Act.*

The Judge correctly found that Perez' Facebook posting was protected because it was posted in the course of protected, concerted activity and was not so flagrant, violent or extreme as to remove Perez unfit from further service. ALJD 30:12-14, 35:23-26.

An employee engaging in impulsive conduct during the course of protected, concerted activity is granted "some latitude" or "leeway" before the employee's impulsive conduct will be deemed unprotected. *Webster Men's Wear*, 222 NLRB 1262, 1267 (1976), quoting *NLRB v. Illinois Tool Works*, 153 F.2d 811 (7<sup>th</sup> Cir. 1946). National labor policy favors "freewheeling," "uninhibited," "robust," and "wideopen debate in labor disputes." *Letter Carriers v. Austin*, 418 U.S. 264, 272, 273 (1974).

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<sup>36</sup> Bergman initially testified that her handwritten notes of the Lora interview stated "tensions" with a few employees but later claimed that she couldn't read her own writing and wasn't sure she wrote "tensions". She did not, however, dispute that Lora had referred to other employees or that he had said they were still fed up. (Tr. 655-656.)

The Board, with court approval, has set a high standard to justify removing labor-related speech from the Act’s protections. The “test by which the Board examines speech in the context of protected activity . . . appropriately recogniz[es] that the economic power of the employer and the employee are not equal, that tempers may run high in this emotional field, that the language of the shop is not the language of ‘polite society,’ and that tolerance of some deviation from that which might be the most desirable behavior is required.” *Dreis & Krump Mfg.*, 221 NLRB 309 (1975), at 315; *enfd.*, *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976). Thus, “offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act’s protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service.” *Id.*, 221 NLRB, at 315.

Under either an *Atlantic Steel*<sup>37</sup> or totality of circumstances analysis, Perez’ posting was protected notwithstanding the use of profanity in the posting. The Board has consistently applied the four-part *Atlantic Steel* analysis to impulsive conduct that arises in the course of a grievance discussion.<sup>38</sup>

*a. The Posting Was Protected Under an Atlantic Steel Analysis*

The Judge correctly found that Perez’ Facebook posting did not lose the protection of the Act under the four-part *Atlantic Steel* analysis, as application of all of the four *Atlantic Steel* factors does not weigh against continued protection of the Act.

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<sup>37</sup> *Atlantic Steel Co.*, 245 NLRB 814, 816-817 (1979).

<sup>38</sup> While the Board has often applied the *Atlantic Steel* analysis to impulsive conduct arising in the course of non-grievance concerted activity, it recently acknowledged in *Fresenius USA Mfg.*, 358 NLRB No. 138 (Sept. 19, 2012), Slip Op. at 4-5, fn. 8 that there have been some inconsistencies in the Board’s approach as to whether the *Atlantic Steel* or “totality of circumstances” analysis were applied in such situations, and applied both analyses in concluding that the employee in *Fresenius* did not lose the Act’s protection. Because the only reason for discharging Perez was the Facebook posting, a *Wright Line* (251 NLRB 1083 (1980) analysis is inapplicable here. *Fresenius*, supra., Slip Op. at 4, fn.7; *Tampa Tribune*, 351 NLRB 1324 (2007), fn. 14; *Hahner, Foreman & Harness, Inc.*, 343 NLRB 1423, 1425 (2004) at fn. 8.

*i. Location of the Comments*

The Judge's conclusion, at ALJD 30:31-32, that the place of the discussion militates in favor of finding that Perez did not lose the protection of the Act is supported by the facts and by Board precedent. Instead of engaging in a confrontation with McSweeney at work, Perez placed his posting on Facebook, an internet website, using his personal Smartphone to transmit the posting from a break area at Respondent's facility during an approved break, which was non-work time. The Board has recognized that break areas are appropriate places to discuss union and work-related matters. *Fresenius*, supra, Slip. Op. at 5; *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007).

As found by the Judge, there is no evidence that the posting caused any work disruption. Indeed, there is no evidence that any other non-managerial employee viewed or responded to Perez' posting at work or while on duty. ALJD 30:31-35. Nor does the record show so much as discussion of the posting among any non-managerial employees while at Respondent's facility<sup>39</sup>. Respondent's contention that the Facebook posting lost the protection of the Act by holding McSweeney out to ridicule was properly rejected by the Judge for the reasons stated at ALJD 31:1-15: in evaluating this factor, the Board is concerned with the immediate, contemporaneous disruption of workplace discipline, managerial authority and customer service caused by the employee outburst in question. There was no evidence of such an immediate disruption, or indeed of any disruption, caused by the posting. Nor was McSweeney a "high level executive" as claimed by Respondent at page 25 of its brief. As an Assistant Director of Banquets, McSweeney was responsible for running individual events. (Tr. 750.) There is no record

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<sup>39</sup> Bergman's, McSweeney's and Marciano's testimony about their viewing the Facebook posting concerned their investigation of the Facebook posting and decision. There was no record evidence establishing that the posting or the limited discussion it engendered caused any workplace disruption.

evidence of any supervisors who were of a lower tier in Respondent's organization, as captains are in the stipulated bargaining unit (GCX 2(c)). Thus, McSweeney was the direct supervisor of the dozens of unit employees working each event when McSweeney was Banquet Manager<sup>40</sup>

Respondent's delay in taking immediate action when it became aware of the Facebook posting further demonstrates that the outburst did not disrupt discipline in the workplace. If the Facebook posting really had disrupted discipline, Respondent could have removed the source of the supposed disruption – Perez – as early as the afternoon of October 26, when it learned of the posting. Instead, it permitted him to work for the next several days. There is no evidence of any negative effect from Perez' continued presence in the workplace.

Nor did the Facebook posting interfere with or disrupt Respondent's business relationship with any customer or potential customer. There is no record evidence establishing that any of Respondent's customers or guests saw the Facebook posting or were even aware of it, let alone that it caused any disruption.

Thus, the Judge's conclusion that Perez' posting from a break area, during non-work break time, causing no workplace disruption, out of view of customers, and not intended to be viewed by managers, weighs in favor of continued protection of the Act is fully supported by the facts and Board precedent.

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<sup>40</sup> Perez thought he had set his Facebook page to block non-Facebook friends from viewing it, though it apparently was set so that non-friends could view it; thus, any non-Facebook friend viewers were the digital equivalent of somebody accidentally overhearing a conversation. Such conversations, when not intended to be heard by others, do not lose their protection when a supervisor or manager overhears one employee curse while engaging in protected concerted activities with another non-supervisory employee. "It would seem to be of the essence of protected union activity for employees in the course of such activity to comment to one another on the character or capacity of their employer. The protected character of the utterance would not seem to depend upon whether the comment was overheard by the employer." *Thor Power Tool Company*, 148 NLRB 1379, 1388 (1964).

*ii. Subject Matter of the Posting*

The Judge correctly concluded, at ALJD 31:23-24, that the subject matter of the posting strongly supports a conclusion that Perez did not lose the protection of the Act. The posting stated that McSweeney did not know how to talk to people, expressed his displeasure with McSweeney's treatment of the employees, and expressed his support for the Union. The issue of the employees' alleged mistreatment by managers had been an ongoing concern of employees that had been concertedly raised with management since early 2011. Respondent knew that such treatment encouraged support for the Union.<sup>41</sup> Perez' posting concerning McSweeney's perceived abusive manner was directly connected to the employees' continuing concern about managers' treatment of employees that the Employer itself recognized as an issue in the upcoming election. Perez' posting also urged readers to vote for the Union in the impending election, which was less than two days away.

Thus, Perez' posting expressed his support for the union, urged other employees to vote for the union in the impending election, and was an extension of the employees' continuing complaints about the way their managers dealt with them in their day-to-day work activities. Perez' posting went to the core of Section 7 rights protected by the Act, and the posting's subject strongly weighs in favor of continued protection. *Fresenius*, supra, Slip Op. at 6; *Starbucks Coffee Co.*, 354 NLRB No. 99 (2009), slip op. at 56 (2 member panel); affirmed 355 NLRB No. 135 (2010) (3 member panel); remanded, *NLRB v. Starbucks Corp.*, 679 F.3d 70 (2d Cir. 2012).

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<sup>41</sup> A manual prepared for the Employer's October 3<sup>rd</sup> campaign training of its supervisors and managers specifically recognized that lack of continuing courtesy, respect and fair consideration from managers, lack of supervisory sensitivity, lack of ability to listen and understand employees, and lack of dignity and respect, were all conditions that would promote union support in the upcoming election. (RX-6, pp. 11-12.)

*iii. Nature of the Outburst.*

The Judge's conclusion, at 31:45-57, that the nature of the outburst did not remove Perez' comments from the Act's protection given the overall evidence is supported by the facts and by Board precedent.

Perez' use of profanity was clearly impulsive, as his Facebook posting followed McSweeney's directive by but a few minutes. There is no evidence that his conduct or the substance of his posting was premeditated; indeed, Perez posted the comments only after Gonzalez suggested that he take a short break to blow off steam after the perceived mistreatment of the employees. Such impulsive conduct is a factor weighing in favor of continued protection. *Fresenius*, supra, Slip Op. at 5, citing *Kiewit Power Constructor Co.*, 355 NLRB 708, 710 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011) (observing that the employee's conduct consisted of a brief, verbal outburst in finding factor weighed in favor of protection).

Of particular note is that Perez' words were not more opprobrious or egregious than words commonly used in Respondent's workplace. Given the abundant record evidence that managers have used the word "fuck" and its derivatives without restraint, frequently hurling that word at employees in full earshot of other employees and managers, it is clear that such words were fully tolerated by Respondent. They were not regarded as offensive by this Respondent – at least, not until Perez used them in complaining about McSweeney's treatment of employees – and their use by managers in Respondent's workplace was widespread. Indeed, McSweeney himself was among the managers who said "fuck" in the workplace. Moreover, there is no record evidence that any of these managers received the slightest admonishment for their liberal use of "fuck" and its derivatives at work. By frequently condoning such vulgarities, Respondent had made clear that it did not consider these words to be problematic in any way. *Fresenius*, supra,

Slip Op. at 6; *Traverse City Osteopathic Hospital*, 260 NLRB 1061 (1982); *enfd.* 711 F.2d 1059 (6<sup>th</sup> Cir. 1983).<sup>42</sup>

Further, the vulgarities were *about* McSweeney rather than directed *at* McSweeney, mitigating the negative effect of the language. Perez did not curse at McSweeney in a face-to-face confrontation; instead, he referred to McSweeney in the third person in a posting that was not intended to be seen by McSweeney. There were no threats; there was no defiance of any Respondent directive or order<sup>43</sup>; there was no physical intimidation in this on-line posting. *Tampa Tribune*, 351 NLRB 1324, 1326 (2007); *enf. den. Media General Operations, Inc. v. NLRB*, 560 F.3d 181 (4<sup>th</sup> Cir. 2009).

Respondent's assertion that Perez' words were more egregious because he mentioned McSweeney's mother and family is of little moment. Respondent in its exceptions seeks to distinguish Perez' posting with a manager saying "shit" or "fuck" when dropping a plate. But there is no record evidence that managers used those words in connection with something accidental like dropping a plate. Instead, the managers used those words as hurtful attacks against employees' intelligence – "you're fucking stupid!", "what the fuck are you doing?", "motherfucker", "goddamit", "fucking little Mexican", "nasty ass", "are you blind?", "are you retarded?" – as they spewed abuse upon employees.<sup>44</sup>

Perez' words were clearly a hyperbolic reaction to the manner in which McSweeney spoke to the employees. The comments in context were clearly Perez' expression of that

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<sup>42</sup> Respondent's assertion at page 22 of its brief that the ALJ, at ALJD 32:20 and 32:24, recognized that managers language was not personally directed at employees is not supported by the Judge's decision: she did not reach such a conclusion. Indeed, the Judge found that the managers' statements were "not dissimilar" from Perez'. (ALJD 32:37 to 33:2.)

<sup>43</sup> McSweeney admits that the employees, including Perez, moved as directed when told by McSweeney to "spread".

<sup>44</sup> Respondent's suggestion, at page 25 of its brief, that the exchange between McSweeney and Francisco was a joking exchange is without merit. The record does not contain the slightest suggestion that this exchange was a joke.

reaction, but cannot be seen as personal attacks on McSweeney's mother or family. Rather, it was a more vulgar version of the expressions "a pox on your house" or "to hell with you and your family". All are expressions that are commonly understood to be figures of speech expressing anger at the recipient rather than as a literal wish that the recipient's family members contract a disease. Perez' posting was his way of expressing anger with McSweeney and cannot seriously be considered a wish of harm to McSweeney's family.

It is well settled that the use of similar words, including "fuck" and its derivatives, is not so egregious as to remove the speaker or writer from the protection of the Act. For instance, the Board found that loudly calling a supervisor a racist "bastard red-neck son-of-a-bitch" was not so outrageous as to lose the protection of the Act. *Media General Operations*, 341 NLRB 124, 126 (2004); *review granted, enf. denied*, 394 F.3d 207 (4<sup>th</sup> Cir. 2005). Nor did calling a co-worker a "brown-nosing suck-ass" lose the Act's protection. *Traverse City Osteopathic Hospital*, *supra*, at 1061-1062. Calling a supervisor a "stupid fucking moron" was found to weigh only moderately against the Act's protection<sup>45</sup>. *The Tampa Tribune*, *supra*, at 1326. Calling a supervisor a "devil" who would be punished by Jesus Christ did not weigh against the Act's protection. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 670 (2007). Nor did calling a supervisor an "egotistical fucker" weigh against protection of the Act. *Alcoa, Inc.*, 352 NLRB 1222, 1226 (2008). Similarly, calling a supervisor a "fucking asshole" did not rise to the level of egregiousness to lose the Act's protection. *Burle Industries*, 300 NLRB 498 (1990); *enf. granted* 932 F.2d 958 (3d Cir. 1991). Calling a supervisor a "fucking liar" was also deemed protected. *Union Carbide Corporation*, 331 NLRB 356 (2000).<sup>46</sup> In *Plaza Auto Center, Inc.*, 355 NLRB No. 85 (2010),

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<sup>45</sup> Perez did not call McSweeney "stupid" or a "moron".

<sup>46</sup>In a case involving termination for alleged strike misconduct, a striking employee's asked a striker replacement how the replacement would like it if someone came to his house and "fucked his wife" and told the replacement that

review granted in part, enforcement granted in part, *Plaza Auto Center, Inc. v. N.L.R.B.*, 664 F.3d 286 (9<sup>th</sup> Cir. 2011), an employee told the owner that the owner was, among other things, a “fucking mother fucking”, a “fucking crook”, an “asshole” and “stupid”. Noting that the employee’s profane language was not outside the range of conduct at the Employer’s facility, the Board, in applying *Atlantic Steel* factor 3, favored the Act’s protection. *Id.*, slip op. at 3.

Perez’ Facebook posting in the instant case was a significantly milder personal attack on McSweeney than the attacks found protected in the Board decisions cited above. Perez called McSweeney a “loser” who didn’t “know how to talk to people” but did not call McSweeney a crook, a liar, egotistical, a bastard, a son-of-a-bitch, a redneck, a brown-noser, stupid, a devil, or an asshole – all of which were greater insults than “loser” and all of which have been found by the Board to be protected<sup>47</sup>.

Respondent’s claims that the Facebook posting were not protected are without merit. Respondent’s only basis in the record for terminating Perez – and the only reason given to the Unemployment Board – was that Perez had violated Respondent’s policy prohibiting “Other Forms of Harassment.” That policy prohibits harassment of Associates for reasons protected by federal, state or local law<sup>48</sup>. Yet Respondent has not claimed that Perez’ Facebook posting was posted because of McSweeney’s race, sex, age, religion or other similar reasons protected by anti-discrimination laws. Thus, the Judge properly found at ALJD 39:42-49, fn. 43, that the

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the striker would “fuck” the replacement’s wife like the replacement had “fucked” the striker. The Board found that the statement was not serious enough misconduct to justify the employee’s termination. *Oak Harbor Freight Lines*, 358 NLRB No. 41 (2012), slip op. at 17. While a different standard applies to strike misconduct cases, the striker’s statement in the *Oak Harbor* case was far more specific and personal than Perez’ figure of speech in the instant case.

<sup>47</sup> His view that McSweeney did not know how to talk to people, which was shared by the other employees, was an assertion arising out of the way in which McSweeney spoke to the employees in directing them to “spread”, and was not name-calling.

<sup>48</sup> Sexual harassment is prohibited by a separate policy. Bergman testified that Perez was not accused of sexual harassment. (Tr. 657.)

posting did not violate the Employer's anti-harassment policy, which was the only Employer policy cited in support of its discharge action.

Respondent's attempts in its brief to exaggerate the bases for its decision to terminate should be rejected as it is flatly contradicted by record evidence, including the testimony of its chief witness who made the decision to discharge Perez. It now claims in the brief that Perez was discharged because he "lied" and that his prior disciplinary record was of "some significance". This claim is contradicted by Bergman's testimony. Bergman testified that the only reason for the decision to terminate Perez was violation of the harassment policy (Tr. 569, 658) and stated that prior discipline in Perez' file had nothing to do with Respondent's decision to terminate him. (Tr. 586.) Similarly, the only reason Respondent gave to the unemployment office was his purported violation of the harassment policy. (Tr. 630.)

Similarly, Respondent's hyperbolic assertion that Perez put the posting out to "800,000,000 people" is contradicted by the evidence. The record in fact shows just over a half dozen people responding to or discussing the posting, and the last on-line Facebook response had already been made before Bergman first saw the posting less than a day after Perez had posted it. Thus, the matter had already blown over less than a day after it was posted.<sup>49</sup>

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<sup>49</sup> Respondent's assertion that the posting was potentially defamatory was properly rejected by the Judge (ALJD 33:38-42 (fn. 43)). Perez' comments were not false and did not disparage Respondent's product in any way. In contrast, the Employer took no action with respect to Ramirez' on-line Facebook comment that McSweeney was "doing the nasty" with a waitress, which Respondent and employees alike understood to mean that McSweeney was engaging in an inappropriate sexual relationship with his subordinate. If the assertion was untrue, the claim would have harmed McSweeney's reputation by making a false statement to a third person. Bergman's suggestion that her hands were tied because she had denied Ramirez' request for a Union representative similarly falls flat: Bergman knew that Ramirez had posted the "doing the nasty" remark before she interviewed him. Given that knowledge, and the serious consequences of the allegations, its decision to deny Ramirez' request demonstrates its lack of concern about possible defamation of McSweeney.

In sum, Perez' impulsive outburst used the same type of vulgar language used frequently by managers with impunity, was less personal in its attacks on McSweeney than attacks by managers about employees, was more restrained than language that the Board has found to retain the protection of the Act, and caused no disruption to workplace discipline. Accordingly, the nature of the Facebook posting weighs in favor of continued protection of the Act.

*iv. Provocation by Respondent*

While Respondent does not appear to except to the Judge's conclusion, at ALJD 33:3-5, that this factor weighs slightly against finding that Perez' activity was protected, it incorrectly claims in its brief that the ALJ did not cite any authority for her "watered down view" and also states that the ALJ "wrongfully suggests" that incidents from a month earlier may have justified the outburst. (Respondent Brief, at 26.) The ALJ did in fact cite the Board's finding in *Tampa Tribune*, supra, 351 NLRB at 1326, a case where the Board found that the employee's outburst weighed slightly against finding continued protection because the employee was responding to employer conduct that was not itself an independent violation of the Act.<sup>50</sup> The ALJ concluded that the disparate applications of the no talk rule during the month before the incident, as well as the employees' ongoing perception of previous incidents of disrespectful and demeaning conduct, and finally the incident during the Glover event, contributed to Perez' Facebook posting. (ALJD 34:15-27.) The Judge's conclusion is fully supported by the record, her factual findings and Board precedent, and Respondent's exceptions should be denied.

*b. The Posting Was Protected Under The Totality of Circumstances Analysis.*

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<sup>50</sup> Counsel for the Acting General Counsel took the position in its brief to the ALJ that the factor did not weigh against a finding of continued protection in factor iv but does not except to the ALJ's conclusion that the outburst weighed slightly against continued protection.

The Judge correctly concluded that Perez' Facebook posting was protected if the totality of circumstances test is to be applied (ALJD 35:23-26 and 36:31-34.) The "test by which the Board examines speech in the context of protected activity . . . appropriately recogniz[es] that the economic power of the employer and the employee are not equal, that tempers may run high in this emotional field, that the language of the shop is not the language of 'polite society,' and that tolerance of some deviation from that which might be the most desirable behavior is required." *Dreis & Krump Mfg.*, 221 NLRB 309 (1975), at 315; enf'd, *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320 (7th Cir. 1976). The Board in *Dreis & Krump* summarized prior precedent as holding that "offensive, vulgar, defamatory or opprobrious remarks uttered during the course of protected activities will not remove activities from the Act's protection unless they are so flagrant, violent, or extreme as to render the individual unfit for further service." Id.

In assessing the totality of circumstances surrounding an employee outburst, the Board has considered whether the outburst was obscene, was offensive, was impulsive, took place in the context of anti-union hostility, or constituted harassment. It has also considered whether the Employer permitted other exercises of Section 7 rights and whether the employee had other means to pursue Section 7 rights such as newsletters. It considers the severity of the employer's action – whether the employee was merely admonished, or more severely disciplined. *Honda of America Mfg.*, 334 NLRB 746 (2001). It also considers whether employees had ever been put on notice that continued use of offensive language would result in discipline, *American Hospital Association*, 230 NLRB 54 (1977), and whether the employee's action interfered with production, challenged any supervisor's or manager's authority, undermined the employer's ability to maintain order and discipline, could reasonably be perceived as a threat of physical harm, and the employer's treatment of similar activity. *Fresenius USA*, supra.

In the instant case, application of the totality of the circumstances tests warrants a conclusion that Perez did not lose the protection of Act, and the Judge correctly found that an assessment of all circumstances surrounding Perez' Facebook posting compels that conclusion.

*i. Use of Obscenities and Degree of Offensiveness.*

The obscenities in the Facebook posting do not warrant Perez losing the protection of the Act. The Facebook posting contained language that was in common use at Respondent's facility, not considered offensive by Respondent, and was nothing out of the ordinary. The obscenities were the same words that were frequently used in the workplace by managers. Thus, Perez' obscenities were nothing out of the ordinary – rather, at Respondent's facility, it was the language of the shop.

The posting was less of a personal attack on McSweeney than the comments routinely made by managers about employees being “fucking stupid”, “blind” and “retarded”. Perez' posting did not involve a loud workplace confrontation in front of other employees and was *about* McSweeney rather than directed *at* McSweeney. The references to McSweeney's family were clearly figures of speech that expressed Perez' displeasure at McSweeney rather than an expression of animosity towards McSweeney's family members.

Given the frequent use of these words by Respondent's managers, it is clear that these words were not considered offensive in this Respondent's workplace.

*ii. Impulsiveness of Comments*

The comments, posted immediately after the incident, were spontaneous, rather than a matter given lengthy preparation like a newsletter article, and militates towards finding that they did not lose the protection of the Act.

### *iii. Antiunion Hostility*

The posting's context, made at the culmination of an intense campaign of opposition to the Union and independent violations of Section 8(a)(1) of the Act, warrants a finding of continued protection of the Act. The posting was made two days before the election in the midst of Respondent's anti-Union campaign and at the same time that the Respondent threatened loss of benefits and discharges, and disparately enforced the "no talk" rule against Union supporters, including Gonzalez and Perez. These circumstances support a finding of continued protection.

### *iv. Harassment*

There was no harassment in the posting. The comments were posted online; there was no physical menacing or hint of threat. The substance of the comments was that McSweeney didn't know how to talk to people and that he was a "loser". The use of nearly identical vulgarities was commonplace and had not been considered harassment by Respondent until Perez' postin. These circumstances support a finding of continued protection.

Respondent's claim that the Facebook posting was harassment and violated its anti-harassment policy is not supported by the evidence. Perez' message did not violate that policy. Respondent's anti-harassment policy on its face prohibits harassment directed towards an individual "*because of one of these protected classifications*", and lists 13 protected classifications. All of these listed classifications are human characteristics such as race, sex, religion, age, and disability that are protected by anti-discrimination laws. Perez made the Facebook posting because of the way that McSweeney spoke to the employees, not because of McSweeney's race, sex, religion, or any other discriminatory factor protected by Respondent's anti-harassment policy. *Nor-Cal Beverage Co.*, 330 NLRB 610 (2000), at fn. 6.

Further, Perez' Facebook posting did not constitute harassment within the meaning of the anti-harassment policy. By its repeated toleration of cursing, including "fuck" and its derivatives, and epithets far more severe than "loser" at employees, Respondent has made clear that it does not consider these actions to be harassment. There is no evidence of Respondent ever invoking the harassment policy as a basis for discipline of any conduct, let alone for discipline for conduct that was not based on classifications protected by anti-discrimination statutes. The fact that Perez' posting mentioned McSweeney's mother and family is a distinction without a difference. All of the uses of "fuck" and its derivatives, whether by Perez or others, are clearly figures of speech expressing the speaker's displeasure at the other person rather than something to be taken literally. As discussed above, Perez' use of the expression was akin to the expression "a pox on you and your family" or "to hell with you and your family" rather than any malice towards McSweeney's family.

Further, because Perez was discharged for his Facebook posting, the only issue is whether the posting lost the Act's protection, and Respondent cannot rely upon its anti-harassment policy to justify the discharge. "[A]n employer's punishment of an employee's exercise of [a Section 7] right can[not] be justified by an assertion that language used by the employee in the course of exercising that right, although nonthreatening, was viewed as 'harassment' . . . . The point is that the Act prohibits an employer from punishing an employee's expression of . . . prounion . . . views unless they are manifested in a manner that exceeds the protection of the Act." *Nor-Cal Beverage Co.*, supra, at fn. 5.

*v. Notice That Respondent Considered Conduct Objectionable.*

Perez would have no reason to think his posting would be objectionable to Respondent. Like the other employees, he had seen and heard managers use nearly identical obscenities with

impunity, and had seen and heard managers call employees names such as “stupid”, “blind”, and “retarded” with impunity. Thus, he would have no reason to think that his use of obscenities or the mild “loser” would be viewed by Respondent as problematic in any way. Thus, consideration of notice results in a finding of continued protection.

*vi. Severity of Respondent’s Action.*

Not only was Perez never put on notice that the language in the Facebook posting could result in discipline, he was summarily discharged without lesser action such as record of discussion, counseling, warning or even suspension. Instead of allowing a 13-year employee to remain on the job, Respondent chose to discharge Perez – the “capital punishment of the shop”, and the ultimate punishment possible. In contrast, Respondent permitted managers who engaged in extensive cursing, as well as repeated insulting statements to employees, to remain on the job without so much as a slap on the wrist. Perez’ discharge was wildly disproportionate to its treatment of others.

*vii. Other Means of Engaging in Section 7 Rights.*

Gonzalez she and other employees reasonably came to the conclusion that her discussions with managers about employee complaints ultimately did not lead to any management action to address the concerns. In any event, because Perez was discharged, he was never afforded an opportunity to pursue other means of engaging in Section 7 rights.

*viii. Interference with Production.*

The Facebook posting did not interfere with production. Respondent did not proffer any evidence showing any interference with production or interference with Respondent’s services.

At the time of the posting, Respondent had about 130 bargaining unit employees and over 300 staff members in all. There is no evidence that any of the handful of employees who

commented on Perez' posting did so while they were on duty or that it impacted their work in any way. Nor is there any evidence showing any bargaining unit employees engaging in any workplace discussion about Perez' posting. There is no evidence of any other impact on any bargaining unit employees.

Beside the handful of employees who responded on-line to Perez' Facebook posting, an employee named Sean Tremblay, the two managers who told Bergman and McSweeney of the posting, and the managers involved in the investigation of the matter, there is no evidence that any other employee or manager saw the Facebook posting.

Until Perez was summoned to Respondent's office to be questioned about the posting, he worked as scheduled for six more days. Again, there is no evidence that his presence disrupted Respondent's operations in any way.

*ix. Challenge to Supervisory or Managerial Authority; Undermining of Management's Ability to Maintain Order and Discipline*

Perez did not challenge Respondent's authority to direct the workforce. When directed by McSweeney to spread, Perez and the other employees complied. After taking a break and making the Facebook posting, Perez returned to work. He completed his shift on October 25<sup>th</sup> and worked when scheduled to do so for the next six days, without any incident, until November 1. Nor is there any evidence suggesting that any other employee considered the Facebook posting to be a call to defy managerial directives, or that Respondent had any difficulty in maintaining order and discipline after the posting.

Perez' Facebook post clearly expressed his unhappiness with the way McSweeney treated Perez and other employees. It did not, however, urge his readers to defy any manager's or supervisor's directive<sup>51</sup>.

*x. Threat of Physical Harm*

Nothing in the posting suggested any threat of physical harm. There was no physical or other confrontation with McSweeney nor any suggestion in the posting that Perez contemplated any confrontation in any manner. Bergman in her testimony never suggested that the posting was in any way a threat of physical harm.

*xi. Respondent's Treatment of Similar Activity*

Respondent routinely tolerated the kind of language used in Perez' Facebook posting. Respondent's managers, including its higher-level managers, frequently cursed at employees, using among other words "fuck" and its derivatives, and frequently called employees epithets such as "stupid", "retarded" and "blind" (in a pejorative manner). They did so in front of other managers and in front of many employees. There is no evidence that Respondent took any action to stop this conduct, thereby demonstrating that Respondent permitted obscenities in the workplace as well as epithets that were much meaner and more hateful than Perez' words.

*xiii. Conclusion: The Posting Was Protected Under A Totality of The Circumstances.*

The ALJ correctly conclude that consideration of all of the circumstances associated with Perez' Facebook posting compels a conclusion that it did not lose the protection of the Act and that the posting was not so flagrant, violent, or extreme as to render Perez unfit for further

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<sup>51</sup> Even if it had, Perez' posting would not have been rendered unprotected, as employees do not lose the protection of the Act even if they act with a disrespectful, rude, and defiant demeanor. *Severance Tool Industries*, 301NLRB 1166 (1991), at 1170.

service. *Dreis & Krump Mfg.*, supra; *Nor-Cal Beverage Co.*, supra, and the Board should deny Respondent's exceptions.<sup>52</sup>

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<sup>52</sup> In a footnote to its Exceptions to the Administrative Law Judge's decision, Respondent argues, presumably based on *Noel Canning v. NLRB*, 705 F.3d 490 (D.C. Cir. 2013), cert. granted, 81 U.S.L.W. 3629 (U.S. June 24, 2013) (No. 12-1281), that the Amended Complaint is "barred" and "should be dismissed because the Board lacks a quorum." Specifically, Respondent claims that neither the Board, nor its agents or delegees on the Board's behalf, may act. As discussed below, Respondent's claims are incorrect.

### **1. Regardless of the Issue of the Board's Composition, the Acting General Counsel and the Regional Director Have Independent Authority To Act**

Regardless of any issue concerning the composition of the Board, the Acting General Counsel's authority to issue and prosecute the complaint is derived from his independent authority to issue and prosecute complaints. *Bloomingtondale's, Inc.*, 359 NLRB No. 113, slip op. at 1 (Apr. 30, 2013), ("[u]nder the NLRA, the General Counsel is an independent officer appointed by the President and confirmed by the Senate, and staff engaged in the investigation and prosecution of unfair labor practices are directly accountable to the General Counsel" (citing 29 U.S.C. § 153(d); *NLRB v. United Food & Commercial Workers Union, Local 23*, 484 U.S. 112, 127-28 (1987); *NLRB v. FLRA*, 613 F.3d 275, 278 (D.C. Cir. 2010)). Thus, "[t]he authority of the General Counsel to investigate unfair labor practice charges and prosecute complaints derives not from any 'power delegated' by the Board, but rather directly from the language of the NLRA." *Id.* Accordingly, contrary to Respondent, the Acting General Counsel's authority to issue and prosecute the complaint, and, in turn, the Regional Director's authority to do so, are unaffected by any issue concerning the composition of the Board. (The General Counsel has delegated the authority to the Regional Directors for issuing complaints. See *United Elec. Contractors Ass'n v. Ordman*, 258 F.Supp. 758, 760 (D.C.N.Y. 1965), *aff'd*. 366 F.3d 776 (2d Cir. 1966).)

### **2. The Board and Its Appointees, Agents, and Delegees Are Charged To Fulfill Their Responsibilities Under the Act While The Validity of the Recess Appointments Remains in Litigation**

It is correct that *Noel Canning* held that Members Griffin and Block, current Board Members serving alongside Chairman Pearce, were not validly appointed because they were appointed during an intrasession recess. However, the Supreme Court has granted the Board's petition for certiorari of *Noel Canning*. Furthermore, in *Belgrove Post Acute Care Center*, 359 NLRB No. 77, slip op. at 1, n.1 (Mar. 13, 2013), the Board took note that in *Noel Canning*, the D.C. Circuit Court itself recognized that its conclusions concerning the Presidential appointments had been rejected by the other circuit courts to address the issues. Compare *Noel Canning*, 705 F.3d at 505, 509-10 with *Evans v. Stephens*, 387 F.3d 1220, 1226 (11th Cir. 2004) (en banc); *United States v. Woodley*, 751 F.2d 1008, 1012-13 (9th Cir. 1985) (en banc); *United States v. Allocco*, 305 F.2d 704, 709-15 (2d Cir. 1962). Thus, in *Belgrove*, the Board concluded that because the "question [of the validity of the recess appointments] remains in litigation," until such time as it is ultimately resolved, "the Board is charged to fulfill its responsibilities under the Act."<sup>52</sup> *Belgrove*, 359 NLRB No. 77, slip op. at 1, n.1. (The Third Circuit's decision in *NLRB v. New Vista Nursing & Rehabilitation*, \_\_\_ F.3d \_\_\_, 2013 WL 2099742 (3d Cir. May 16, 2013), should not change this result. As noted above, there still remains a split in the circuits regarding the validity of intrasession recess appointments.) Accordingly, Respondent's argument is without merit and should be rejected.

Moreover, any assertion that delegees may not exercise delegated authority fails to account for the Supreme Court's decision in *New Process Steel, LP v. NLRB*, 130 S.Ct. 2635 (2010). In *New Process*, the Supreme Court, refusing to rely on language in the D.C. Circuit's *Laurel Baye* decision (*Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469, 475 (D.C. Cir. 2009)), stated that its "conclusion that the delegee group ceases to exist once there are no longer three Board members to constitute the group does not cast doubt on the prior delegations of authority to nongroup members, such as the regional directors or the general counsel." 130 S.Ct. at 2643 n.4. Indeed, since *New Process*, three Courts of Appeal have held that valid prior delegations of Board authority survive a loss of Board quorum. See *Frankl v. HTH Corp.*, 650 F.3d 1334, 1354 (9th Cir. 2011), cert. denied 132 S.Ct. 1821

#### IV. REMEDY AND CONCLUSION

It is respectfully urged that the Board affirm the Administrative Law Judge's rulings, findings and conclusions and adopt the recommended Order.

Dated at New York, New York this 15<sup>th</sup> day of July, 2013.



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(2012); *Overstreet v. El Paso Disposal, LP*, 625 F.3d 844, 853 (5th Cir. 2010); *Osthus v. Whitesell Corp.*, 639 F.3d 841, 844 (8th Cir. 2011).

UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD

PIER SIXTY, LLC

Respondent

AND

HERNAN PEREZ

Charging Party

Case No. 02-CA-068612

AND

EVELYN GONZALEZ

Charging Party

Case No. 02-CA-070797

Date of Electronic Transmission: July 15, 2013

**AFFIDAVIT OF SERVICE OF: COUNSEL FOR THE ACTING GENERAL COUNSEL'S ANSWERING BRIEF TO THE RESPONDENT'S EXCEPTIONS TO THE ADMINISTRATIVE LAW JUDGE'S DECISION**

I, the undersigned employee of the National Labor Relations Board, state under oath that on the date indicated above I served the above-entitled document(s) by e-Filing and electronic mail (e-mail) as indicated below, upon the following persons, addressed to them at the following addresses:

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July 15, 2013

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Print Name

Agent

Title



Signature