UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLONIAL PARKING INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	**PETITIONER COLONIAL PARKING INC.'S PETITION FOR REVIEW OF NATIONAL LABOR RELATIONS BOARD ORDER** 16-1039

Colonial Parking, Inc. ("Colonial"), pursuant to Federal Rule of Appellate Procedure 15(a) and 29 U.S.C. § 160(f), petitions the United States Court of Appeals for the District of Columbia Circuit for review of the Order of the Respondent National Labor Relations Board in NLRB Case No. 05-CA-141241, entered on January 5, 2016, and titled "Decision and Order in Colonial Parking and Unite Here Local 23." A copy of the Order is attached as Exhibit A.

Dated: February 5, 2016

Respectfully submitted,

Baker & Hostetler LLP
Attorneys for Colonial Parking, Inc.

ORIGINAL

By: _____

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLONIAL PARKING INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	**PETITIONER COLONIAL PARKING INC.'S CORPORATE DISCLOSURE STATEMENT**

Pursuant to Federal Rule of Appellate Procedure 26.1 and Circuit Rule 26.1, Petitioner, Colonial Parking, Inc. ("Colonial") hereby states that its parent entity is the Forge Company, a privately held corporation organized under the laws of the District of Columbia. No publicly traded entity owns 10% or more of Colonial's stock. Colonial is a corporation formed pursuant to the laws of the Maryland and is engaged in the business of operating parking facilities throughout the District of Columbia metropolitan area.

Dated: February 5, 2016

Respectfully submitted,

Baker & Hostetler LLP
Attorneys for Colonial Parking, Inc.

By: _____

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IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

COLONIAL PARKING, INC., Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	**PETITIONER COLONIAL PARKING, INC.'S PETITION FOR REVIEW OF NATIONAL LABOR RELATIONS BOARD ORDER**

CERTIFICATE OF SERVICE

Pursuant to Federal Rules of Appellate Procedure 15(c) and 25(b), I hereby certify that true and correct copies of the foregoing Petitioner Colonial Parking, Inc.'s Petition for Review of National Labor Relations Board Order and Petitioner Colonial Parking, Inc.'s Corporate Disclosure Statement were served on the following via U.S. Mail, return receipt requested on this 5th day of February, 2016:

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Dated: February 5, 2016

Respectfully submitted,

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Colonial Parking *and* Unite Here Local 23. Case 05–CA–141241

January 5, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 30, 2015, Administrative Law Judge Michael A. Rosas issued the attached decision. The Respondent filed exceptions, a supporting brief, and a reply brief. The General Counsel filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions[3] and to adopt the recommended Order as modified.[4]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Colonial Parking, Washington, DC, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate Elene Gebremariam for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters."

2. Substitute the following for paragraph 2(d).

"(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful warning, probation, suspensions, and discharge, and within 3 days thereafter, notify Elene Gebremariam that this has been done and that said disciplinary actions will not be used against her in any way."

3. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. January 5, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

[1] No exceptions were filed to the judge's dismissal of the following allegations: that the Respondent violated Sec. 8(a)(5) and (1) of the Act by announcing a new policy that employees' schedules are subject to change based on operational needs without affording the Union an opportunity to bargain over the change and its effects; that the Respondent violated Sec. 8(a)(3) and (1) by refusing to give Yosef Woldhanna a letter of recommendation; and that the Respondent violated Sec. 8(a)(3) and (1) by refusing to approve Elene Gebremariam's vacation request.

The judge found that the Respondent violated Sec. 8(a)(1) when its Manager Mesfin Taye created the impression that employees' protected, concerted activities were under surveillance. Pursuant to Sec. 102.46(b)(2) of the Board's Rules and Regulations, the Respondent's bare exception to this finding without supporting argument is disregarded. Even if the exception were properly before us, we would affirm the judge's finding, but in doing so we would not rely on *New Vista Nursing and Rehabilitation*, 358 NLRB No. 55 (2012), cited by the judge. See *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014).

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] We affirm the judge's conclusions that the Respondent violated Sec. 8(a)(3) and (1) by warning, placing on probation, suspending, and discharging Gebremariam because she engaged in protected, concerted activity. In so doing, we note that regardless of whether the Respondent's attendance policy allowed late arrivals, with or without prior notice, the Respondent failed to meet its burden of showing that the discipline of Gebremariam was similar to the discipline of other employees who violated the attendance policy but did not engage in protected, concerted activity. We also note that the *Wright Line* standard does not require a showing of particularized animus toward the employee's specific protected activity. See *Libertyville Toyota*, 360 NLRB No. 141, slip op. at 4 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015); *Encino Hospital Medical Center-Prime*, 360 NLRB No. 52, slip op. at 2, fn. 6 (2014). We therefore do not rely on the judge's citation to *American Gardens Management, Co.*, 338 NLRB 644 (2002).

[4] We shall modify the judge's recommended Order to conform with the judge's unfair labor practice findings and in accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the Order as modified.

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT create the impression that we are engaged in surveillance of your union or other protected concerted activities.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT threaten you with discharge or other unspecified reprisals because of your membership in or support of Unite Here Local 23.

WE WILL NOT suspend, discharge, discipline, or otherwise discriminate against you because of your membership in or support for Unite Here Local 23.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Elene Gebremariam full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elene Gebremariam whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Elene Gebremariam for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful warning, probation, suspensions, and discharge of Elene Gebremariam, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the said disciplinary actions will not be used against her in any way.

COLONIAL PARKING

The Board's decision can be found at www.nlrb.gov/case/05-CA-141241 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Timothy P. Bearese, Esq., for the General Counsel.
Peter G. Fischer and *Bryan O'Keefe, Esqs. (Baker & Hostetler, LLP)*, for the Respondent.
Samantha Schnoerr, Esq. (Unite Here), of Washington, D.C., for the Charging Party.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Washington, D.C. on July 7–10 and 13, 2015. United Here Local 23 (the Union) timely filed a charge and two amended charges and the General Counsel issued a complaint on April 21, 2015. The complaint, as amended, alleges that two managers employed by Colonial Parking at a Ritz-Carlton Hotel in Washington, D.C. (the Company), at various times between August and December 2014,[1] unlawfully interrogated employees, created the impression that employees' union activity was under surveillance, threatened employees with termination and other unspecified reprisals related to their union activities, and engaged in reprisals by disciplining, denying leave requests and employment references to employees who engaged in union activity. The Company denies the managers made any coercive statements, asserts the alleged adverse action against two employees were not motivated by discriminatory animus, but rather, valid business reasons and practices, and contends the allegations stem from the Union's attempts to exert pressure on the Company through the Board's legal processes during on-going first contract negotiations.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Company, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Company, a corporation, is engaged in providing parking valet services at hotel facilities in Washington, District of Columbia (the District) where it annually purchases and receives products, goods and materials valued in excess of $5,000 directly from points located outside the District. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the National

[1] All dates are in 2014 unless otherwise indicated.

Labor Relations Act (the Act)[2] and the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

The Company manages the parking operations of the two Ritz-Carlton hotels in Washington, D.C.—one at 22nd Street NW and another in the Georgetown section. It employs approximately 40 full-time and part-time valet attendants, lead attendants, cashiers, and maintenance workers at both facilities. Twenty-five of those employees are based at the Ritz-Carlton's 22nd Street location (the facility).

The allegations in the complaint focus on the activities of the Company's two managers at the facility—Mesfin Taye and Hana Jorji. Taye, a former parking attendant fluent in English and Amharic, has served as the Company's senior operations manager at both facilities since the Company took over the facility's parking contract from Central Parking on August 1, 2013. He worked in a similar capacity for Central Parking before the transition in August 2013.

Jorji, a former cashier, has been the facility's project manager since 2012. In that capacity, she supervises daily operations, sets employee schedules, approves leave requests, supervises employee time, attendance and performance, and issues discipline in consultation with Taye.

Taye and Jorji have a long history with unions, first as members and then as managers. Jorji, in particular, was an active supporter and shop steward with the Union and its predecessor, Local 27. As managers, their labor relations with unions prior to August 2013 have been uneventful. Taye is a member of the Company's collective-bargaining committee.[3]

Originally from Ethiopia like most of their subordinates, Taye and Jorji succeeded in having the Company retain most of them after it assumed operations in 2013. The employees who made the transition included Elene Gebremariam, Fissha Abraham, and Yosef Woldhanna, all involved in the activities of the Union's executive committee.[4]

B. The Company's Time and Attendance Rules

In August 2013, the Company provided employees with an employee handbook which includes an attendance and punctuality policy:

> To maintain a safe and productive work environment, Colonial Parking expects employees to be reliable and to be punctual in reporting for scheduled work. Absenteeism and tardiness place a burden on other employees and on Colonial. In the more instances when you cannot avoid being late to work or are unable to work as scheduled, you should notify your supervisor as soon as possible in advance of the anticipated tardiness or absence, at a minimum of one hour in advance.[5]

The Company's progressive disciplinary policy includes the following levels of discipline: oral warning, written warning, probation, suspension, and termination.[6] The policy is not, however, always implemented in a progressive manner as managers have the discretion to assess the level of discipline deemed appropriate under the circumstances.[7]

Instances of discipline for time and attendance were rare, however, as the Company merely asked that employees notify Jorji or, in her absence, Taye, in advance by cellular telephone call or text message if they were going to be late or absent. Jorji was easily accessible by telephone or text communication, and it was only those instances of lateness or absence in which employees did not call that created operational difficulties.[8]

C. The Union

Employees at both facilities were represented by the Union during Central Parking's tenure. As noted above, the Company retained most Central Parking employees when it assumed the facility's parking operations in August 2013. On February 17, the Company formally recognized the Union as their collective-bargaining representative. The recognition agreement defines the bargaining unit for purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All full-time and part-time employees employed by Colonial at the Ritz Carlton Parking operations located at 3100 South Street, N.W. and 1150 22nd Street, N.W., in Washington, District of Columbia, including Attendants, Valet Attendants, Cashiers, and Maintenance employees, but excluding managers, confidential employees, clerical employees, guards, and supervisors as defined in the National Labor Relations Act.[9]

D. Employee Scheduling Changes

During Central Parking's parking operations at the facility prior to August 2013, employee monthly schedules were posted in the valet office on a board with a note at the top stating that "no changes can be made without manager approval." Below

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[2] 29 USC §§ 151–169.

[3] The Company attempted to elicit testimony from employee Elfenesh Gedele that Taye never asked him about the Union. After the General Counsel's objection was sustained, the Company proffered additional, but similarly objectionable, testimony by 23 witnesses who, if allowed to testify, would have testified that it was not part of Taye's past practice to speak with employees about union matters, including the petition. As indicated in the record, I refused to receive such testimony, citing the inapplicability of FRE 406. I also explained the inapplicability of the past bad acts provision of FRE 404 in this instance. (Tr. 381–385.) See *United States v. Barry*, 814 F.2d 1400, 1403–1404 (9th Cir.1987). In any event, there is no evidence, prior to 2014, that Taye had any grievances or unfair labor practice charges filed against him. Nor was there any evidence that he ever expressed antiunion sentiments prior to August 2014. (Tr. 391–392.)

[4] The contentions of Taye and Jorji that they advocated for the Company's retention of most personnel are undisputed. (Tr. 621–624.)

[5] The Company-wide distribution of the employee handbook is not disputed. (R. Exh. 9; Tr. 129, 204, 337, 365, 394, 410–411, 620.)

[6] GC Exh. 3.

[7] The Company skips disciplinary levels when the nature of an infraction warrants more severe discipline. (Tr. 556–559.)

[8] Jorji provided undisputed testimony that she was easily accessible during work and nonworking hours. (Tr. 581–582, 599, 617–618, 633–635.)

[9] GC Exh. 10.

the list of employees with assigned schedules were the names of several on-call employees without assigned shifts.[10]

Upon assuming parking operations at the facility on August 1, 2013, the Company issued a policy regarding work schedules, as reflected in the employee handbook, stating in pertinent part:

> Staffing needs and operational demands may necessitate variations in starting and ending times, as well as variations in the total hours that may be scheduled each day and week." Your work schedule may include assignments on Saturdays and Sundays. At its discretion, the Company may require you to work overtime, including weekends if necessary, depending on your position, assigned location, and general requirements of the business.[11]

Upon taking over parking operations in August 2013, without notifying the Union, the Company implemented the aforementioned scheduling policy by replacing the note at the top of the posted monthly schedules with another one stating: "this schedule is subject to change based on operation[al] needs . ." Employees' schedules did not change, however, as a result of the changes to the notation at the top of the posted monthly schedules.[12]

E. Employees Unsatisfied With Collective Bargaining Engage in Protected Activity

After the Company recognized the Union as its employees' labor representative, the parties commenced bargaining. From April to August, they met for two bargaining sessions, but were unable to conclude an agreement. On August 1, several members of the Union's bargaining committee, including Woldhanna and Abraham, met with Union Representatives Sarah Jacobsen and Burt Bayou. They discussed bargaining strategy and a series of actions demonstrating unity among unit employees and their desire for a quick resolution. Toward that end, Jacobsen and Bayou recommended generating a petition to be signed by employees at both locations. The employees agreed with that approach and Jacobsen and Bayou produced a petition for these employees to circulate among coworkers at both hotel locations.[13] The "Petition for a Fair Contract" stated, in pertinent part:

> Since the company has now started bargaining with us, we would like to express our desires of what we believe we deserve. As valued workers of Colonial Parking at Ritz Hotels, we demand to have the same rights and benefits as other union parking workers in the city. .We ask that Colonial Parking not delay our bargaining and to give us a contract that is only fair to the hard work that we do to make its operations successful.[14]

Woldhanna, Gebremariam, Abraham and Ayele Dema began circulating the undated petition in August.[15] Over the course of August and September, a group of employees took the petition to coworkers and secretly got 18 of them to sign it.[16]

Jacobsen and Bayou met again with employees at an area church on September 13. Those in attendance included Woldhanna, Gebremariam, and Abraham. They discussed strategy, which included having coworkers sign the petition and deciding how and when to deliver it to Taye.[17]

F. Taye and Jorji Interrogate and Threaten Employees

Notwithstanding the secretive nature by which employees solicited petition signatures, the subsequent conduct of Taye and Jorji reveals that they learned the names of employees who circulated and/or signed the petition.

On August 13, after he began circulating the petition, Woldhanna asked Taye for a letter of recommendation in connection with an application for taxi driver's license. Taye refused and remarked: "you expect me to write you this letter while at the same time you are making papers to sign petition to join the Union . I have already reported to headquarters that you are not going to join the Union I could have written a bad letter to you. Up until now you and we were like family members, living in peace, in good terms. From now on, we are not going to continue the sentiment of family-ship." He also asked Woldhanna why he thought the petition would not hurt the Company and why he signed it.[18]

During late August, Jorji asked Tewodoros Wadimu, a valet attendant, why he signed the petition. Wadimu lied, denying

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[10] GC Exh. 9.

[11] R. Exh. 9.

[12] Several employees testified that the schedule posted during Central Parking's operations, GC Exh. 9, carried over until approximately September, 2014, when it was replaced by GC Exh. 8. (Tr. 119–120, 125, 329–334, 342–343, 346, 354–355, 361, 364.) However, Jorji identified the names of 10 employees (5 employees with scheduled shifts and 5 on-call employees) listed on GC Exh. 9 who were *not* hired by the Company after it assumed operations in August 2013. The General Counsel did not refute such evidence and, under the circumstances, I find that the posted monthly schedule listed in GC Exh. 8 was posted in August 2013, and still in place as of September 2014. (Tr. 693–697.)

[13] There was conflicting and confusing employee witness testimony as to the purpose of the petition and the dates of meetings and employees who attended. Some of this was attributable to difficulties with the interpretation of witness testimony or the Company's cross-examination, which confused bargaining sessions with other employee meetings. (Tr. 64–65, 74, 91–92, 100, 154, 322, 325–326.) I did, however, find Sarah Jacobsen generally credible and base most of the chronology regarding the meetings on her testimony. (Tr. 28–29.)

[14] GC Exh. 2.

[15] Again, there was conflicting testimony among the General Counsel's witnesses as to when this activity began, but it, the credible evidence indicates that the petition circulated among employees after mid-August. (Tr. 81, 154, 350–351.)

[16] The General Counsel's witnesses provided vague testimony as to when they signed the undated petition during August and September. (Tr. 72, 154, 160.)

[17] Jacobsen credibly recollected this date because it took place 2 days after the Ethiopian New Year. (Tr. 30.) The employee witnesses confused this date with other meetings. (Tr. 94–95, 103–104, 219–220, 322, 336, 361.)

[18] Woldhanna's detailed version of the conversation was more credible than Taye's explanation . (Tr. 73–74, 81–82, 102–103.) Taye insisted he did not feel comfortable explaining the reasons to Woldhanna, professing uncertainty about Woldhanna's qualifications for a taxi driver license. However, it also became clear that recommendation letters were a personal decision and Taye did not always agree to provide one. (405–409, 527–530, 568–570.)

that he signed the petition. Jorji responded that signing the petition was "useless" and "doesn't help the employee."[19]

During the same period of time, Jorji approached Gebremariam in the cashier's office and asked if she signed the petition. Gebremariam acknowledged signing it. Jorji responded that, by signing the petition, the employees made her a "liar" with the "office" and asked Gebremariam why she signed the petition if she previously mentioned she would not join the Union. Gebremariam denied ever telling Jorji that she would not join the Union. Jorji concluded with a cryptic remark that "whoever signed on this paper, you guys will pay for it."[20]

Jorji followed up those remarks on September 1 by reminding Gebremariam that she did employees a favor by getting them rehired, and was being made out to be a "liar" to the Company. She also mentioned how much "power" the Company had, including her ability to change schedules, knowing that most of them had second jobs. Jorji concluded her remarks by noting the Company could get the employees fired by "writing letters and letters."[21]

G. Employees Attempt to Deliver Petition to Taye

On September 26, several employees, including Abraham, Woldhanna and Dema, asked Taye to meet with them by the cashier's booth where Gebremariam was working at the time. When Taye arrived, Woldhanna attempted to hand him the petition. Although he did not read the document, Taye, indicating he knew what it was about, said there was a collective-bargaining process in place, refused to accept it and instructed any off-duty employees to leave. The employees left without delivering the petition.[22] Later that day, however, a copy of a petition containing the signatures of seven employees at the Georgetown location was faxed to the hotel and delivered to Taye. Jorgi also learned about the petition on that day.[23]

The petition, containing 25 signatures, including 18 from facility employees and 7 from Georgetown location employees, was finally delivered to the general manager of the Ritz-Carlton Hotel on November 21, 2014. It was on that day that Taye first saw all four pages of the petition containing 26 signatures.[24]

H. Elene Gebremariam

Gebremariam worked as a cashier at the facility for 9 years before her discharge in December. She previously served as a shop steward and attended meetings of the Union's executive committee. Gebremariam's relationship with Taye and Jorji was uneventful until August when, as previously explained, Jorji questioned her as to why she signed the petition.

1. Gebremariam's vacation request

There was only one cashier on duty at any given time. Gebremariam worked the weekday shifts from 7 a.m. to 3 p.m. and was followed by another employee who worked until closing time at 10:30 p.m. Two part-time employees split the weekend shifts.[25]

In the past, Gebremariam, would ask Jorji if she could take time off on a particular date before submitting a leave request form, copies of which were readily available to employees.[26] If Jorji agreed, Gebremariam would fill out a leave request form and submit it for approval. During September 2014, Gebremariam asked Jorji for time off because family would be visiting in about 2 weeks. Jorji responded that there was no one to replace her and Gebremariam did not bother to submit a written leave request form.[27] Had she submitted a form, the Company's practice was to routinely approve leave requests. In fact, between August and December, Jorji and Taye approved written requests for vacation leave submitted by Abraham, Dema, and Woldhanna.[28]

2. Elene Gebreariam's discipline for late attendance

For years, Gebremariam was assigned a fixed shift from 7 a.m. to 3 p.m. For the past several years, however, Gebremariam had a verbal agreement with Taye to arrive after 7 a.m. and stay later than 3 p.m., as needed. This resulted in Gebremariam working less than 40 hours per week, kept her within the public housing income limit, and enabled Taye to avoid paying her overtime. As a result, Gebremariam usually arrived late to work and was never disciplined prior to Septem-

[19] I based this finding on the credible testimony of Wadimu over the terse and conclusory denial of Jorji in response to leading questions. (Tr. 117–119, 132–134, 687–688.)

[20] Gebremariam's testimony as to the August conversation with Jorji was detailed, spontaneous and generally consistent. Moreover, her reference to "petition" instead of "paper" when asked to testify again about this incident was insignificant and, in all likelihood, attributable to inconsistencies in the interpretation of her testimony. (Tr. 154–157, 166–167, 215–216, 221, 224–225, 228, 230, 237–238.) As such, I credit her testimony over Jorji's terse denials in response to leading questions that any of the alleged conversations in August or September occurred. (Tr. 683–687.)

[21] I also credit Gebremariam's testimony about a second incident in which Jorji confronted her on September 1. (Tr. 165–167.), but do not credit her vague testimony describing an October encounter that was virtually identical to the August incident. (Tr. 167–169, 253–255, 301–306.)

[22] This occurrence is not disputed and the weight of the credible evidence indicates Taye flatly refused to read the document or accept it. However, it is also evident that he knew what the document was about since he referred to the bargaining process and omitted any explanation as to why he did not even ask his subordinates what it was about. (Tr. 86, 88, 324, 341–342, 352, 421, 496–497, 587.)

[23] The faxed document was the third page of the petition that employees attempted to deliver to Taye that day. It contained only the names of seven Georgetown location employees. (Tr. 420–421, 683; R. Exh. 11.)

[24] Woldhanna incorrectly testified in his Board affidavit that he helped collect 19 signatures. (Tr. 108.) It actually contained 18 signatures on the first two pages from facility employees. Page 4 was identical to page 3, except that the latter had two additional signatures. (GC Exh. 2; Tr. 43, 106, 495.)

[25] GC Exh. 8.

[26] The forms were available at both locations. (Tr. 338, 399, 401, 592–593.)

[27] I found Gebremariam's detailed version of this conversation more credible than the terse denial offered by Jorji. However, there is no proof demonstrating that someone was available to replace Gebremariam during the period requested. (Tr. 163–164, 249–252, 266, 405, 680–682.)

[28] Abraham's vacation requests were approved in August and October. (Tr. 339–340, 402, 405, 608–609; R. Exh. 7.) Dema's request was approved in October. (Tr. 385; R. Exh. 10(d).) Woldhanna's request was approved in December. (R. Exh. 10 at 1–2.)

ber.[29] This was consistent with Taye and Jorji's practice of not disciplining any employees for lateness, and there were many such instances in 2013 or 2014.[30]

Gebremariam's arrangement with Taye was upended on September 12 when she arrived 3 hours late and received a verbal warning. Earlier that morning, she called Jorji to advise that she overslept and would arrive late. Upon arriving at work, however, Gebremariam was called to a meeting with Taye and Jorji. After they issued the verbal warning, Gebremariam objected to the discipline, noting her longstanding arrangement with Taye. Taye replied that "from now on, there would not be like before, it will never be like before."[31]

About a week or two later, Jorji asked Gebremariam to cover a special hotel event on November 4. Gebremariam, still seething over Taye's cancellation of her flexible-time arrangement, refused. Taye subsequently approached Gebremariam about 2 weeks before the event and asked why she refused to come in early to cover it. After Gebremariam attributed her refusal to the September 12 discipline, Taye reinstated the previous flexible time arrangement if she agreed to cover the upcoming event.

Gebremariam's attendance practices returned to "normal" as she resumed arriving to work after 7 a.m. over the next several weeks. On October 30, however, Gebremariam got into an automobile accident and arrived late to work as usual. She called Jorji and informed her she would not arrive on time to cover the November 4 event because of her accident.[32]

On November 4, after arriving late to work, Taye and Jorji issued a notice placing Gebremariam on probation for 30 days. Taye attributed the suspension to the fact that the flexible time agreement was once again cancelled because Gebremariam failed to cover the special hotel event earlier that day. Gebremariam explained that she was late because of her accident. She disagreed with the discipline and initially refused to sign the notice, but relented after Taye assured her it was only to acknowledge receipt.[33]

Over the next several days, Gebremariam arrived to work on time.[34] During the morning of November 7, however, she got into an argument with Abiy Habtemariam, a valet attendant, who only provided a picture of a claim check presented by a customer. For security reasons, Gebremariam insisted Habtemariam get a copy of the customer's driver's license and an argument ensued. Subsequently, Gebremariam retaliated against Habtemariam by refusing to hand him a customer's car keys when it was his turn to retrieve a vehicle. Habtemariam repeatedly asked her for the keys, but she refused to hand them to him. Another valet, Ashenafi Balcha, tried to calm her down, but she was angry and continued to refuse Habtemariam's requests. Habtemariam missed two more turns in the rotation and was steaming as Gebremariam continued handing car keys to Balcha. At some point, they argued in front of a customer waiting for his vehicle. Gebremariam mentioned to Balcha that the customer was waiting, but still warned him not to give the keys to Habtemariam. An angry Habtemariam grabbed Balcha's hand and insisted he give him the key because it was his turn. Balcha tried unsuccessfully to calm Habtemariam down and assured him that he would give him the tip. Gebremariam left the cashier's booth, told them to stop arguing and implored Balcha to get the vehicle because the customer was watching the episode unfold. At some point, Gebremariam called security and then called Jorji to complain that Habtemariam was interfering with her work.[35]

After the argument, Taye and Jorji interviewed Gebremariam, Habtemariam, and Balcha. Each described his/her version of the incident. Later that day, Taye suspended Gebremariam, but did not discipline Habtemariam in any respect. Her 2-day suspension notice also alluded to Gebremariam's discipline on November 4 for lateness.[36]

Upon returning to work on November 14, Gebremariam arrived late at 7:45 a.m. and explained to Jorji that she locked herself out of her apartment by accident. Jorji said that she did not care. After learning later that day that Gebremariam arrived late, Taye told Jorji to inform Gebremariam that she was suspended pending investigation.[37]

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[29] Taye and Jorji denied Gebremariam's assertion regarding a verbal agreement in which she had flexibility in arriving to work after the start of her shift at 7 a.m. (Tr. 36, 147–152, 204–206, 210, 410, 502–504, 549, 574–578, 583–584, 635–636, 728.) However, her testimony was corroborated by Gebremariam's time clock records from August 2013 to November 2014, indicating that she rarely arrived by 7 a.m. (GC Exh. 4.)

[30] The only instance that the Company could point to was the June 3, 2015 discipline of Ermias Getachew, an overnight valet attendant, who received an oral warning after a no call/no show to work. (R. Exh. 12, 15.)

[31] I credit Gebremariam's recollection of this conversation because Taye's version—that she had never arrived 3 hours later before—was also contradicted by time records. (Tr. 158–159, 415–416, 584, 637, 641, 709; GC Exh. 3; GC Exh. 4 at 12, 53, 59.)

[32] Although Gebremariam's excuse was vague, I credit her testimony that she called Jorji earlier that day to say she would be late. (Tr. 171, 174, 218.)

[33] I credit Gebremariam's version of this conversation, as corroborated by the timing of the special hotel event on November 4. (Tr. 173–174, 672; GC Exh. 5.) Jorji acknowledged that Gebremariam had a medical appointment on that day (Tr. 672.), but still wrote her up because she failed to arrive early, by 6:30 a.m., for the special event. (Tr. 643–644.) Taye simply relied on the fact that Gebremariam arrived less than an hour late on October 30 and had been warned on September 12. (Tr. 424.)

[34] GC Exh. 4 at 89–90.

[35] Gebremariam and Habtemariam provided slightly different accounts of the incident (Tr. 175–179, 184–185, 247, 429, 476, 478, 651, 653, 655–656, 764–766–774.) However, the very credible testimony of Balcha provided the most credible account of the incident, essentially laying blame on both participants. (Tr. 476–477, 484-486.)

[36] The incident was clearly a serious one, especially with the hotel's events manager calling Taye to report a related complaint later that day. (Tr. 433, 463–464, 471, 656–657; R. Exh. 17) Neither Taye nor Jorji provided an explanation, however, as to why Habtemariam was not also disciplined to any extent for his conduct during the incident. (GC Exh. 6; Tr. 185–188, 426, 434–435, 661–664.)

[37] I did not give any weight to Gebremariam's testimony that Taye attempted to harass, sexually harass or assault her on November 14. (Tr. 198-199.) Any altercation between Gebremariam and Taye on November 14, given the former's assertion that any discipline issued her in November was due to her "union leadership," had no bearing on the labor related acrimony leading up to that point.

On November 15, Jorji called Gebremariam and informed her she was suspended.[38] On December 12, the Company notified Gebremariam that she was terminated after she declined to accept the Company's December 9, 2014 "last chance" agreement relating to the November 15 suspension.[39] The notice stated that termination was based on a "failure to comply with company policies.[40]

LEGAL ANALYSIS

I. STATEMENTS BY TAYE AND JORJI

The complaint alleges that Company Supervisors Taye and Jorji made unlawful statements to Gebremariam, Wondimu, and Woldhanna in August and September 2014, in violation of Section 8(a)(1). The Company denied that the allegations.

A. Taye's Statements Regarding the Union

On August 13, after he began circulating the petition, Woldhanna asked Taye for a letter of recommendation in connection with his application for taxi driver's license. Taye's response indicated his utter disappointment with Woldhanna's role in generating the petition and suggested that he would have written a bad recommendation letter. Describing their relationship prior to that point like close family members who enjoyed a good working relationship, Taye predicted the petition would hurt the Company and asked why Woldhanna signed it. He warned that the relationship would change. In expressing his disappointment, Taye alluded to the interest of his superiors at Company "headquarters," to whom he reported that Woldhanna would not join the Union.

Conversations about union activity between employers and employees are considered lawful when they involve open union supporters, in a casual setting, and are unaccompanied by coercive statements. *Toma Metals Inc.*, 342 NLRB 787 (2004) (lawful for a supervisor to ask an employee what is up with the rumor of the union where they had a friendly relationship); *Emery Worldwide* 309 NLRB 185, 186–187 (1992) (no violation where a low-level supervisor engaged in a casual, amicable conversation with an employee that did not involve coercive statements).

Taye's statements in response to Woldhanna's requests for a letter of recommendation violated Section 8(a)(1) in several respects. First, they reasonably conveyed the message that Woldhanna's secret union activities in generating the petition and soliciting employee support were under surveillance by the highest level manager at the facility. *Register Guard*, 344 NLRB 1142, 1144 (2005) (the Board's test for an unlawful impression of surveillance is "whether the employee would reasonably assume from the statement that their union activities had been placed under surveillance"); *New Vista Nursing and Rehabilitation*, 358 NLRB No. 55, slip op. at 15 (2012) (unlawful impression of surveillance created "when an employer reveals specific information about a union activity that is not generally known, and does not reveal its source"); *Flexsteel Industries Inc.*, 311 NLRB 257, 257 (1993) (employer created the unlawful impression of surveillance when circumstances indicated that the employer was closely monitoring the degree of an employee's union involvement).

Second, Taye's inquiry as to why Woldhanna signed the petition and did not realize that it would hurt the Company constituted unlawful interrogation. Although the record does not establish a prior history of antiunion hostility, Taye confronted Woldhanna at work in a hostile manner in an effort to intimidate him for engaging in protected activity relating to employees' efforts to attain a first collective-bargaining agreement. The remarks were a clear message that engaging in Section 7 activity was harmful to the Company. *Hoffman Fuel Co.*, 309 NLRB 327, 327 (1992) (employer's questioning coupled with a veiled threat unlawful where there was no legitimate purpose for ascertaining the employee's prospective union activities).

Lastly, the remarks also constituted an unspecified threat of future reprisals since, unlike the close and good relationship that they enjoyed in the past, Taye warned Woldhanna's terms and conditions of employment would change for the worse because of his protected activities. *Atlas Logistics Group*, 357 NLRB No. 37, slip op. at fn. 2 (2011) (employer's unspecified threats of reprisal due to employee's Section 7 were unlawful); *F. W. Woolworth Co.*, 310 NLRB 1197, 1200 (1993) (employer's statement that "if you think I'm a bitch now, wait" constituted an unlawful threat of reprisal).

B. Jorji's Statements regarding the Union

Sometime in August, Wondimu, a valet attendant, secretly signed the petition seeking a first collective-bargaining agreement which, at the time, had not yet been presented to the Company. During late August, Jorji, the second highest level supervisor at the facility, surprised Wondimu at work by asking why he signed the petition. The conversation occurred outside the presence of Wondimu's coworkers. Obviously intimidated by his supervisor, Wondimu denied signing the petition. Jorji concluded the coercive exercise by adding that signing the petition was "useless" and "doesn't help the employee." Jorji's interrogation violated Section 8(a)(1). *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217 (1985) (the Board analyzes the totality of the circumstances to determine whether an interrogation reasonably tends to restrain, coerce, or interfere with employees in the exercise of their Section 7 rights); *BJ's Wholesale Club*, 319 NLRB 483, 484 (1995) (interrogation was unlawfully coercive where a supervisor unexpectedly approached an employee who was not an open union supporter, began to directly question the employee about her stance on the union, and communicated an antiunion message).

During the same period of time, Jorji approached Gebremariam in the cashier's office and asked if she signed the petition. After Gebremariam acknowledged signing it, Jorji responded that, by signing the petition, the employees made her a "liar" with the "office." She then asked Gebremariam why she signed the petition if she previously told Jorji she would not join the Union. Gebremariam denied making such a statement. Jorji concluded the conversation with a cryptic remark that "whoever signed on this paper, you guys will pay for it." Jorji's statements during this encounter constituted an unlawful inter-

[38] The suspension was paid but a stop payment was placed on the paycheck mailed to Gebremariam. (R. Exh. 1; Tr. 190, 198, 668.)

[39] R. Exh. 2.

[40] GC Exh. 7.

rogation and unspecified threat that Gebremariam and anyone else who signed the petition would experience undesirable changes to their terms and conditions of employment. *Atlas Logistics Group*, supra at fn. 2 (employer statements making unspecified threats of reprisal for an employee's engaging in Section 7 activities violate Section 8(a)(1) of the Act); *F. W. Woolworth Co.*, 310 NLRB at 1200; *Hoffman Fuel Co.*, 309 NLRB at 327.

Jorji followed up those remarks on September 1, 2014 by reminding Gebremariam that she was responsible for getting Gebremariam and her coworkers rehired by the Company, yet they repaid her by making her look like a 'liar" with the Company. That remark gave the reasonable impression that Jorji's superiors were not pleased that employees engaged in Section 7 activity by taking a more aggressive approach toward a first contract and were inclined to punish those who persisted. Jorji described two likely avenues of reprisal based on the Company's "power" over such employees: (1) a more stringent enforcement of Company rules in order to facilitate the termination of such employees; and (2) changing employees' schedules in ways that would interfere with their ability to attend to second jobs. These statements constituted clear threats of discharge or unspecified reprisals in violation of Section 8(a)(1). *Publix Super Markets, Inc.*, 347 NLRB 1434, 1435 (2006) (supervisor's threats to discipline or discharge employees for concerted activity violated Section 8(a)(1)); *Braswell Motor Freight Lines*, 156 NLRB 671, 674–675 (1966) (supervisor's statement that "you can see the trouble signing cards has caused" was an unlawful threat of discharge in the context of a discussion about another employee's termination).

II. EMPLOYEE SCHEDULING CHANGES

The complaint alleges that the Company announced a new policy on or about October 2014 that employees schedules are subject to change based on operational needs. It is further alleged that, by announcing such a change to employees terms and conditions of employment without affording the Union an opportunity to bargain over such a change and the effects of this change, the Company violated Section 8(a)(5) and (1) of the Act.

The General Counsel does not dispute the applicability of the company rule as set forth in the employee handbook, but relies on its implementation through a posted monthly schedule. Prior to August 2013, the posted monthly schedule stated that schedules could only be changed with management approval. When the Company took over in August 2013, however, the aforementioned statement on the posted monthly schedule regarding changes was replaced with one stating that all employees' schedules are subject to change based on operational needs. The Section 8(a)(5) charge, however, is premised on the notion that the change occurred in October 2014, which did not occur. Therefore, the Company's change in its employee scheduling policy in August 2013 did not violate Section 8(a)(5) and is dismissed.

III. THE REFUSAL TO GIVE WOLDHANNA A LETTER OF RECOMMENDATION

The complaint alleges that the Company discriminated against Woldhanna in violation of Section 8(a)(3) of the Act by refusing to give him a letter of recommendation because he assisted the Union and engaged in concerted activities. The Company denies the allegations, asserting that Taye did not feel comfortable providing a recommendation for a taxi driver license application and was entitled to rely on his personal discretion.

In order to establish unlawful discrimination under Section 8(a)(3) of the Act, the General Counsel must show that an employee engaged in protected Section 7 activity, the employer had knowledge of the employee's protected activity, animus against the employee's Section 7 activity, and the employer's animus was a motivating factor in the decision to take adverse action against the employee. *Wright Line*, 251 NLRB 1083, 1089 (1980); *FES*, 331 NLRB 9 (2000) (clarifying the allocation of burdens in the *Wright Line* framework).

Taye's unlawful remarks to Woldhanna on August 13—how Woldhanna could expect him to write him a letter of recommendation while he was involved in generating a petition for a first contract—confirm Taye's knowledge that Woldhanna was engaged in protected concerted activities on behalf of the bargaining unit. They further revealed the animus that Taye harbored toward such activity and its direct connection to his decision declining to sign a letter of recommendation for Woldhanna enabling him to apply for a taxi driver's license. *Austal USA, LLC*, 356 NLRB No. 65 (2010) (employer's statements to employee that indicated animus towards the employee's protected activity established unlawful discriminatory motivation); *Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer's threatened consequences of protected activity were consistent with actions taken against employees for protected activity).

The only issue here is whether Taye's discriminatory refusal resulted in adverse action with respect to a term or condition of employment. There is Board precedent holding it unlawful to refuse an employee a reference letter because he/she engaged in protected conduct. See *Café La Salle*, 280 NLRB 379, (1986) (violation of Section 8(a)(4) for employer to refuse to give an employee a letter of recommendation for another job due to involvement in proceedings before the Board). Here, however, the General Counsel failed to meet his burden of establishing the regularity with which Taye issued reference letters since there is undisputed evidence that he also refused certain requests. See *Eugene Iovine, Inc.* 353 NLRB 400 (2008), reaffirmed 356 NLRB No. 134 (2011) (practices are terms and conditions of employment when they occur regularly and frequently such that employees could reasonably expect the practice to continue); *Sunoco, Inc.*, 349 NLRB 240, 244 (2007) ("employer's regular and longstanding practices that are neither random nor intermittent become terms and conditions of employment"). As previously explained, Taye's otherwise discriminatorily motivated statements for denying the request were coercive in several respects and violated Section 8(a)(1), there is insufficient credible evidence demonstrating that letters of reference were among the terms and conditions of employment that Company employees have come to expect on a regular basis. Thus, the refusal to grant Woldhanna a letter of recommendation did not constitute adverse action and this charge is

dismissed.[41]

IV. THE COMPANY'S TREATMENT OF GEBREMARIAM

The complaint alleges that the Company discriminated against Gebremariam in violation of Section 8(a)(3) of the Act by refusing her vacation request and then issuing a series of disciplinary actions that ultimately resulted in her discharge on December 12. The Company denies the allegations, asserting that she was discharged based on her disciplinary history and refusal to sign a "last chance" agreement to return to work.

As in the case of the Company's response to Woldhanna's request for a letter of recommendation, the General Counsel must show that an employee engaged in protected Section 7 activity, the employer had knowledge of the employee's protected activity, animus against the employee's Section 7 activity, and the employer's animus was a motivating factor in the decision to take adverse action against the employee. *Wright Line*, supra at 1089.

Gebremariam engaged in protected concerted activity by signing the petition in August advocating for a collective-bargaining agreement. Jorji's knowledge of and animus toward Gebremariam's Section 7 activities became evident toward the end of August and beginning of September when she angrily interrogated and threatened Gebremariam because she signed the petition. *Austal USA, LLC*, supra at 363. Jorji was extremely resentful of Gebremariam's activity because she had assured her superiors that Gebremariam and others would not engage in such activity and it made her look like a liar with the Company. Her remarks were significant since they threatened the eventual termination of employees through stricter enforcement of company rules and changing employees' schedules in order to create havoc with the ability of most employees to perform their second jobs. Taye subsequently reinforced those remarks by revoking his longstanding arrangement with Gebremariam permitting her to arrive late to work nearly every day.

A. Denial of Gebremariam's Vacation Request

Whether Jorji's denial of a vacation request was motivated by animus or even qualifies as adverse action, however, is not as evident. Gebremariam, as she had in the past, asked Jorji if she could take time off a few weeks later. Jorji responded negatively, indicating that she had no one to cover the cashier position for Gebremariam. Gebremariam was only one of 4 cashiers on staff, 2 of whom are full-time during weekdays and 2 of whom work part-time on weekends. The General Counsel did not establish that one of the other 3 cashiers were available to cover Gebremariam's scheduled shifts during the requested leave period. As a result, Gebremariam did not bother to submit the required leave request form even though leave was routinely granted during the same period of time to other employees engaged in protected concerted activities. As such, there is insufficient proof demonstrating that Gebremariam suffered an adverse action or that her oral request for leave was denied due to discriminatory reasons. *American Gardens Management, Co.*, 338 NLRB 644, 645 (2002) (motivational link or nexus must be shown connecting the employee's protected activity and the adverse employment action).

B. Gebremariam's Discipline

The disciplinary events that unfolded during this period, however, clearly constituted adverse action—the September 12 oral warning, the November 4 probation, the November 7 suspension, the November 15 suspension, and the December 12 discharge.

The first of these events, the September 12 warning, unfolded shortly after Jorji's interrogation and threats relating to Gebremariam's protected concerted activities in signing the petition in August. Gebremariam arrived late to work that morning, as she did routinely prior to that date without ever being disciplined. Even though Gebremariam called Jorji earlier that morning to report that she would arrive late, Jorji still issued her an oral warning to comply with the Company's time and attendance rules. Coupled with the absence of any prior history of enforcement of its time and attendance rules, the Company's decision to suddenly discipline Gebremariam for coming late to work was attributable to discriminatory motivation.

The retaliatory consequences of Jorji's threats snowballed after Gebremariam's coworkers attempted to deliver the petition to Taye on September 26 at the cashier's booth where Gebremariam was working.

Prior to November 4, Taye reinstated his agreement with Gebremariam permitting her to routinely arrive late to work. On that day, Gebremariam arrived late to work, disappointing Taye and Jorji because she failed to arrive early in order to cover a special event at the facility. Thus, after permitting Gebremariam to resume reporting late for work for at least several weeks, Taye cancelled the agreement again and placed her on a 2-day suspension. The conflicting reasons offered by Taye and Jorji for the suspension—Gebremariam's pattern of lateness and her failure to arrive early for the special event – reveal shifting defenses. See *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (2014) (finding of animus supported by persuasive evidence that employer's reasons for discharge were pretextual and included the use of shifting explanations); *NLRB v. Dorothy Shamrock Coal Co.*, 833 F.2d 1263, 1268 (7th Cir. 1987) (upholding an unlawful animus finding based upon circumstantial evidence and close timing of adverse actions to organizing activity). When coupled with Taye's inexplicable leapfrog over the next disciplinary level of a written warning to probation, the evidence strongly supports an inference of discriminatory motivation. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), rev. denied 2004 WL 210675 (D.C. Cir. 2004) (inference of unlawful motive drawn from inconsistencies between the proffered reasons for discipline employer's other actions, disparate treatment of employees with similar work records or offenses, deviations from past practice, or proximity of discipline to union activity).

[41] Had I determined that Taye's denial to issue a recommendation letter constituted adverse action, the burden would have shifted to the Company to demonstrate that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, supra at 1089. There is no doubt that the Company failed to sustain its burden, as Taye failed to provide a credible, detailed explanation for his refusal as to Woldhanna's request. *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).

The November 4 discipline subsequently mushroomed into a 2-day suspension on November 7 after Gebremariam got into a workplace dispute with Habtemariam, a valet attendant. Their altercation in front of a hotel customer was certainly inappropriate. The incident, accurately reported to Taye by a neutral and credible coworker, revealed that Gebremariam and Abbe both engaged in misconduct. However, Habtemariam, equally at fault for carrying on in front of a customer whose complaint was reported to the facility, was not even counseled.

The November 7 suspension was also unlawfully motivated for several reasons. First, it was premised in part on the previous unlawful discipline. See *Dynamics Corp.*, 296 NLRB 1252, 1253–1254 (1989), enfd. 928 F.2d 609 (2d Cir. 1991) (discipline or discharge of an employee is a violation of the Act where it is tainted by reliance on prior discipline that was unlawful under the Act). Second, the suspension was a clear exercise of disparate treatment since Taye was also informed about Habtemariam's misconduct during the incident, but did not discipline him in any manner. See *Embassy Vacation Resorts*, 340 NLRB at 848 (inference of unlawful motive drawn from "disparate treatment of certain employees compared with employees with similar work records or offenses").

After a long history of accommodating Gebremariam's routine lateness, the Company was waiting to pounce when she returned to work after the suspension on November 14. That day, however, she arrived 45 minutes late. The following day, November 15, she was suspended pending an "investigation" that resulted in her discharge on December 12. Gebremariam's November 15 suspension and December 12 discharge also emanated from the three previous unlawful disciplines. Additionally, the discipline runs counter to the Company's virtually nonexistent enforcement of its time and attendance rules.

Under the circumstances, the September 12 oral warning, November 4 probation, November 7 suspension, November 15 suspension, and the December 12 discharge were issued to Gebremariam in violation of Section 8(a)(3) and (1) of the Act.

Conclusions of Law

1. By stating on August 13, 2014 that an employee petition advocating for a first collective bargaining would hurt the Company and asking an employee why he signed it, the Company gave the impression that employees' protected concerted activities were under surveillance, and constituted coercive interrogation and an unspecified threat of future reprisals in violation of Section 8(a)(1) of the Act.

2. By questioning employees in August and September, 2014, as to why they signed a petition advocating for a first collective-bargaining agreement, referring to the petition as "useless," stating it "doesn't help the employee," threatening that employees who signed the petition that things will change for the worse and employees "will pay for it" by more stringent terms and conditions of employment, including discharge, the Company violated Section 8(a)(1) of the Act.

3. By warning, placing on probation, suspending and ultimately discharging Elene Gebremariam because she engaged in protected concerted activity by signing the petition, the Company violated Section 8(a)(3) and (1) of the Act.

4. By the aforementioned violations, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Company has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

The Company, having discriminatorily discharged an employee, must offer her reinstatement and make her whole for any loss of earnings and other benefits. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

The Company shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Company shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year, *Latino Express, Inc.*, 359 NLRB No. 44 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[42]

ORDER

The Company, Washington, D.C., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Giving employees the impression that we are watching their activities on behalf of Unite Here Local 23.

(b) Coercively interrogating employees about their support for or activities on behalf of Unite Here Local 23.

(c) Threatening employees with termination or other unspecified reprisals because of their membership in or support of Unite Here Local 23.

(d) Suspending, terminating, or otherwise disciplining employees because of their membership in or support of Unite Here Local 23.

(e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

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

(a) Within 14 days from the date of the Board's Order, offer Elene Gebremariam full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Elene Gebremariam whole for any loss of earnings and other benefits suffered as a result of the discrimination against her in the manner set forth in the remedy section of the decision.

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

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful warning, suspensions and discharge, and within 3 days thereafter notify the employee in writing that this has been done and that said disciplinary actions will not be used against her in any way.

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

(e) Within 14 days after service by the Region, post at its facility in Washington, D.C., copies of the attached notice marked "Appendix."[43] Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since August 13, 2014.

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

Dated, Washington, D.C. September 30, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT suspend, discharge, discipline or otherwise discriminate against you because of your membership in or support for Unite Here Local 23 or any other union.

WE WILL NOT threaten you with suspension, discharge or other unspecified reprisals because of your membership in or support of Unite Here Local 23.

WE WILL NOT coercively question you about your union support or activities.

WE WILL NOT give you the impression we are watching your activities on behalf of Unite Here Local 23 or any other union.

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

WE WILL, within 14 days from the date of this Order, offer Elene Gebremariam full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Elene Gebremariam whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest compounded daily.

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Elene Gebremariam for the adverse tax consequences, if any, of receiving a lump-sum backpay award covering periods longer than 1 year.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Elene Gebremariam, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

COLONIAL PARKING

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-141241 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

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