

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

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KATHY DREW KING, Regional Director of
Region 29 of the National Labor Relations Board,
for and on behalf of the NATIONAL LABOR
RELATIONS BOARD

Petitioner

v.

MERIDIAN IMAGING GROUP, LLC d/b/a
QUEENS MEDICAL IMAGING/NYU

Respondent

U.S. DISTRICT COURT
EASTERN DISTRICT
OF NEW YORK

-CV-

CV 16

5853

MATSUMOTO, J.
REYES, M.J.

MEMORANDUM OF POINTS AND AUTHORITIES
IN SUPPORT OF PETITION FOR PRELIMINARY INJUNCTION
UNDER SECTION 10(j) OF THE NATIONAL LABOR RELATIONS ACT

I. STATEMENT OF THE CASE

This proceeding is before the Court on a petition filed by the Regional Director of Region 29 of the National Labor Relations Board, herein called the Board, pursuant to Section 10(j) of the National Labor Relations Act, as amended (61 Stat. 149, 73 Stat. 544, 29 U.S.C. Sec. 160(j)), herein called the Act. Section 10(j) of the Act provides that, upon issuance of an administrative complaint charging that a person has engaged in or is engaging in an unfair labor practice, the Board may petition the District Court “for appropriate temporary relief or a restraining order.” *See* 29 U.S.C. § 160(j) (1998).

Petitioner, Kathy Drew King, Regional Director of Region 29 of the Board, brings this petition against Meridian Imaging Group, LLC d/b/a Queens Medical Imaging/NYU, herein called Respondent, for a preliminary injunction pending the final disposition of the

matters involved herein. The case is currently pending a hearing before an administrative law judge of the Board, based on a Consolidated Complaint and Notice of Hearing that alleges, *inter alia*, that Respondent has engaged in, and is engaging in, unfair labor practices within the meaning of Sections 8(a)(1), (3) and (5) of the Act.¹

II. SUMMARY OF THE DISPUTE

Respondent operates medical imaging facilities affiliated with New York University Langone Medical Center, including facilities located in Forest Hills, New York and Garden City, New York. Respondent provides services such as MRI, X-ray, Ultrasound and CT scan to the general public.

On May 20, 2016, following a May 6, 2016 representation election conducted by the Board, 1199SEIU United Healthcare Workers East, herein called the Union, was certified by the Board as the exclusive collective-bargaining representative of a unit of Respondent's employees, herein called the Unit. Unit employees voted overwhelmingly in favor of the Union during the May 6, 2016 Board election, with 42 of the employees who cast ballots voting for Union representation and only 5 votes cast against the Union.² (Exh. Q.)

Since the Union's resounding victory in the May 6, 2016 election, however, Respondent has embarked on an unlawful campaign to flout the Union's role as the

¹ Section 8(a)(1) of the Act prohibits an employer from interfering with, restraining or coercing employees in the exercise of rights guaranteed under Section 7 of the Act, including the right to engage in concerted activities for the purpose of collective bargaining or mutual aid or protection. Section 8(a)(3) of the Act makes it unlawful for an employer to discriminate against its employees because of their support for a labor organization. Section 8(a)(5) of the Act imposes an obligation on an employer to bargain in good faith with the collective-bargaining representative of its employees regarding the employees' terms and conditions of employment.

² Factual assertions herein are supported by Petitioner's exhibits filed concurrently with this Petition. Citations to Petitioner's exhibits will appear in parentheses and denote the letter ascribed to the exhibit, and if applicable, the page number, line number and paragraph being cited, *e.g.*, "(Exh. A, pg. 1, ll. 2-4, ¶3.)"

collective-bargaining representative of the Unit and undermine the Union's once-strong support among Unit employees. As explained more fully below, Respondent committed various unfair labor practices, including discharging two outspoken employee advocates for the Union in retaliation for their union or other protected concerted activities, withholding wage increases and work opportunities from Unit employees because they selected the Union as their bargaining representative and unilaterally changing employees' work schedules without notifying or bargaining with the Union. This unlawful conduct has severely eroded employee support for the Union during the critical period before an initial collective-bargaining contract has been negotiated, when the newly-certified Union is in a particularly vulnerable position.

Immediate action to return the unlawfully discharged employees to the workplace and to reassure employees of their rights is necessary to restore the status quo that existed before Respondent's unfair labor practices and thus prevent irreparable harm to employee rights, and to reverse the chilling effect of Respondent's illegal conduct on employees' exercise of their statutory rights. Petitioner therefore seeks a temporary injunction that will prevent Respondent from accomplishing its unlawful objective of undermining the Union and frustrating the Union's ability to negotiate a collective-bargaining agreement with Respondent, and will further allow Unit employees to exercise their rights under the Act to join or assist the Union, free from the threat of unlawful retaliation by Respondent.

III. PROCEDURAL HISTORY

On June 22, 2016, the Union filed an unfair labor practice charge in Case No. 29-CA-178852 alleging, among other things, that Respondent discharged employee Anthony Randazzo because of his support for and activities on behalf of the Union, that

Respondent unlawfully made unilateral changes to employees' work schedules without notifying or bargaining with the Union, and that Respondent was withholding wage increases from Unit employees because they had selected the Union as their bargaining representative. On July 19, 2016, the Union filed a charge in Case No. 29-CA-180440 alleging that Respondent discharged employee Sandra Kucuk in retaliation for her union activities.

On September 9, 2016, the Union filed an amended charge in both Case Nos. 29-CA-178852 and 29-CA-180440. The First Amended Charge in Case No. 29-CA-178852, in addition to the allegations made in the initial charge, further alleges that Respondent, by its Chief Executive Officer Alan Winakor, unlawfully told Unit employees that Respondent would not give them wage increases nor would Respondent allow them to work in other Respondent facilities, as they had done before the Union, because the employees had selected the Union as their bargaining representative.³ On September 9, 2016, the Union additionally filed an unfair labor practice charge in Case 29-CA-183910, alleging that Respondent has unlawfully maintained an overly broad workplace rule that restricts employees' rights guaranteed under Section 7 of the Act.

On September 15, 2016, the Regional Director of Region 29 of the Board issued an Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Case Nos. 29-CA-178852 and 29-CA-180440. (Exh. B(1).) On October 14, 2016 the Regional Director issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing, herein called the Complaint, consolidating Case Nos. 29-CA-178852 and 29-CA-180440 with Case No. 29-CA-183910. (Exh. B(2).) The Complaint

³ The First Amended Charge in Case No. 29-CA-180440 did not materially change the allegations asserted in the initial charge.

alleges, among other things, that Respondent discharged its employee Anthony Randazzo because Randazzo engaged in protected concerted activity and supported the Union, and further discharged Randazzo pursuant to an overly broad workplace rule that restricts employee exercise of their rights under the Act; that Respondent discharged employee Sandra Kucuk because of her union activities; Respondent, by CEO Winakor, during an address to Unit employees, refused to consider Unit employees for wage raises and refused to allow Unit employees to work at other Respondent facilities because employees selected the Union as their bargaining representative; and that Respondent made unlawful unilateral changes to Unit employees' work schedules without notifying or bargaining with the Union, thereby reducing the weekly hours of employee Ivisdenia Cassius-Linval. (Exh. B(2).) On September 28, 2016, Respondent filed with the Board an Answer to the initial Consolidated Complaint, denying that it has violated the Act. (Exh. C.) The unfair labor practice hearing in this matter is scheduled to commence before an administrative law judge of the Board on November 15, 2016.

IV. STATEMENT OF FACTS

A. Union Successfully Organized Respondent's Employees, despite Respondent's Opposition

On April 15, 2016, the Union filed with Region 29 of the Board a petition for representation election among Respondent's non-supervisory employees at its Forest Hills, New York facility. As noted above, the Union prevailed in the ensuing May 6, 2016 election, with an overwhelming majority of employees voting in favor of Union representation. (Exh. Q.) The Board then certified the Union as the exclusive collective-bargaining representative of the Unit on May 20, 2016. (Exh. R.) The Unit comprises approximately 56 regular full-time, part-time and per diem nurses, technologists,

schedulers, receptionists, coordinators, maintenance clerks, medical records clerks, and liaisons, employed by Respondent at the its facility located at 69-15 Austin Street, Forest Hills, New York. (Exh. Q; Exh. R.) The Unit includes both professional and non-professional employees, as defined by the Act. *See* 29 U.S.C. § 152(12) (1998).

Respondent's opposition to the Union has been evident from the start of the Union's organizing campaign. Former employee and alleged discriminatee Anthony Randazzo testified in a Board affidavit that during the week leading up to the May 6, 2016 election, Respondent hired a special consultant to persuade employees not to support the Union. In one of the meetings between employees and the special consultant before the election, Anthony Randazzo testified that Respondent's Chief Executive Officer, or CEO, Alan Winakor told employees that he believes the Union could do nothing to benefit the employees. (Exh. D, pg. 3-4 ¶¶6-7.) While there has been no allegation that Respondent's conduct during the run-up to the election violated the Act, Respondent nonetheless clearly exhibited animus against the Union during the pre-election period. Despite Respondent's anti-Union sentiments, employees still turned out in overwhelming numbers to vote in favor of the Union, despite Respondent's anti-Union sentiments. Thus, employees were not dissuaded from supporting the Union before Respondent committed the unfair labor practices at issue in this Petition, as described fully below.

B. Following Its Victory in the Representation Election, the Union Identified Its Leading Employee Supporters to Respondent

During the week following the May 6, 2016 election, before the Union was certified as the bargaining representative of the Unit, Union Organizer Beriza Luciano contacted Respondent CEO Winakor to introduce herself and notify Winakor of the

employees who would be assisting the Union in collective-bargaining negotiations with Respondent. (Exh. F, pg. 2-3, ¶ 5.) Luciano testified in a Board affidavit that during this phone conversation with Winakor, she advised him that five employees – Sandra Kucuk, Anthony Randazzo, Carmine Randazzo, Maria Lizardo and Edwin Martinez – comprised the Union bargaining committee and that these employees would serve as stewards for other employees in the Unit, as well as points of contact between Respondent and the Union. (*Id.*) Employees had previously selected Anthony and Carmine Randazzo, Kucuk and Martinez as members of the bargaining committee during a Union meeting among employees on about May 1. (Exh. F, pg. 2, ¶ 3; Exh. D, pg. 5, ¶10.) Luciano later decided to add employee Maria Lizardo to the committee. (Exh. F, pg. 2, ¶ 3.)

Luciano further testified that, during her phone conversation with Winakor in about the week following the May 6 election, she also raised certain complaints she had received from Unit employees about Respondent preventing them from working at Respondent’s Garden City, New York facility, as the Forest Hills-based Unit employees had done previously. (Exh. F, pg. 2, ¶ 5.) Several employees had complained to Luciano that since the Union won the election, Respondent had stopped offering them shifts working at the Garden City facility, and in order to make up the lost hours, these employees had to volunteer to work on Saturdays at the Forest Hills facility. (*Id.*) According to her testimony, when Luciano asked Winakor why Unit employees were being prohibited from working in Garden City, Winakor replied “I don’t want these workers to go over and infect the other offices.” (*Id.*)

On May 26, 2016, Luciano e-mailed Winakor, confirming in writing the identities of the five employees on the Union bargaining committee, specifically naming Anthony

Randazzo, Carmine Randazzo, Kucuk, Lizardo and Martinez. (Exh. F, pg. 3, ¶ 6-7) In her e-mail, Luciano also reminded Winakor to refrain from making changes to employees' terms and conditions of employment without first notifying and bargaining with the Union. (*Id.*)

C. Respondent Changed an Employee's Work Schedule without Bargaining with the Union

Employee Ivisdenia Cassius-Linval works as a front desk clerk at Respondent's Forest Hills facility. (Exh. I, pg. 1, ¶ 1.) She has been employed by Respondent since about July 2010. (*Id.*) Cassius-Linval testified in a Board affidavit that on about January 8, 2016, she converted from full-time to a part-time employee so that she could attend nursing school on certain days during regular work hours. (Exh. I, pg. 2, ¶ 3.) She requested at that time that Respondent change her scheduled shift to Thursdays and Fridays, from 8:30 a.m. to 4:30 p.m., and Office Administrator Kathy Maybaum authorized the change. (*Id.*) Cassius-Linval worked the Thursday and Friday schedule from about January 8 to May 9, 2016. (Exh. I, p. 2, ¶ 4.)

In late April or early May 2016, Cassius-Linval requested another shift schedule change to accommodate her school schedule, which was entering a new semester. (Exh. I, pg. 2-3, ¶ 4.) Cassius-Linval testified that she submitted her request to Office Administrator Maybaum and Director of Operations Yessenia Negron, and Respondent in turn granted the request and changed Cassius-Linval's work schedule to Tuesdays and Wednesdays, from 4:00 p.m. to 8:00 p.m., and Thursdays, from 12:00 p.m. to 8:00 p.m. (*Id.*) Cassius-Linval began working this new schedule on about May 9, 2016 – more than 10 days before the Union was certified as the bargaining representative of the Unit. (Exh. I, pg. 3, ¶ 5)

On about June 7, however, as Cassius-Linval testified, Respondent's new Office Administrator Dawn Shea, at the Forest Hills facility, told Cassius-Linval that her work hours had to "go back to whatever it was before the Union" was certified. (*Id.*) Cassius-Linval replied that her prior schedule had required her to work Thursdays starting at 8:30 a.m., but she was currently unavailable to work on Thursday mornings because she had class from 9:00 a.m. to 12:00 p.m. (*Id.*) In response, Shea simply told Cassius-Linval "Oh well, I can't do anything about it." (*Id.*)

After this conversation on about June 7, Cassius-Linval testified that Respondent changed her work hours back to Thursdays and Fridays, from 8:30 a.m. to 4:30 p.m. (Exh. I, pg. 3, ¶ 6) The revised hours conflicted with Cassius-Linval's class schedule, and as a result of this conflict, Cassius-Linval has not been able to work her designated hours on Thursdays and instead now works fewer hours per week, as can only regularly work Fridays, from 8:30 a.m. to 4:30 p.m. She occasionally picks up additional shifts from other employees on an as-needed basis. (*Id.*) There is no evidence that Respondent notified the Union before changing Cassius-Linval's schedule or provided the Union an opportunity to bargain over the change.

D. Respondent's CEO Made Coercive Statements Undermining the Union to Employees during a Staff Meeting

On June 17, 2016, Respondent convened two separate meetings, which it styled as "town hall" meetings to mark the one-year anniversary of a June 2015 merger that created Respondent's current business structure. (Exh. D, pg. 6, ¶ 12; Exh. G, pg. 6, ¶ 11; Exh. H, pg. 2, ¶ 2; Exh. K(1).) All Unit employees were required to attend one of the two meetings, which were held consecutively in an empty storage area at the Forest hills facility, at 12:00 p.m. and 1:00 p.m., respectively. (Exh. D, pg. 6, ¶ 12; Exh. H, pg. 2, ¶ 2.)

Employee Anthony Randazzo attended the 12:00 p.m. meeting on June 17. (Exh. D, pg. 6, ¶ 12) Randazzo was then employed as a Maintenance worker at the Forest Hills facility and had worked in that position since May 2011. (Exh. D, pg. 1, ¶ 1.) Another Maintenance employee named Carmine Randazzo, Anthony's brother, also attended the 12 o'clock meeting. (Exh. G, pg. 6, ¶ 11.) Employee Berkis Borden, a Scheduler at the Forest Hills facility, attended the same meeting. (Exh. H, pg. 1-2, ¶ 1-2.) Borden testified that she made an audio recording of what occurred during the meeting using her cell phone, which she provided to the Board. (Exh. H, pg. 2, ¶ 2.) In connection with this Petition, Petitioner attaches a true and correct copy of a transcript of the proceedings during the June 17 "town hall" meeting, which was provided to the Board by the Union. (Exh. K(1).) The transcript was transcribed from the aforementioned audio recording that employee Borden testified she made using her cell phone at the meeting. The transcript was prepared by an individual who is not affiliated with any party to this case. (Exh. K(1), pg. 55.)

Winakor began the 12:00 p.m. meeting by announcing the one-year anniversary of the merger of Meridian Imaging Group and reviewing the financial and operational history and current status of the company. (Exh. K(1), pg. 2-19.) In the course of describing certain investments in new equipment that the company had made over the preceding year, Winakor used the phrase "shitty ultrasound equipment" to describe what Respondent had previously used. (Exh. K(1), pg. 14, l. 4.) Later during the meeting, Winakor used the phrase "Shit happens," clearly illustrating his tolerance for the use of such language in the workplace. (Exh. K(1), pg. 33, l. 6.)

Winakor also addressed the employees' choice to be represented by the Union during his speech to employees. Winakor told employees that "one of the consequences of . . . this group voting to be 1199 is the fact that you didn't feel the love or attention from the corporate office." (Exh. K(1), pg. 18, ll. 9-12.) Winakor then compared employees' selection of the Union as their bargaining representative to a scenario in which Winakor's children call child services against him after the children received disciplined. (Exh. K(1), pg. 19-20, ll. 17-9.) According to Winakor, "To a certain extent, we now have child services in between us, or 1199. . . There is now an intermediary between us, and that affects certain things." (*Id.*)

Winakor told employees at the meeting that regardless of what the Union had promised them before the election, any improvements to employees' pay and benefits would have to be negotiated with Respondent. (Exh. K(1), pg. 22, ll. 8-22.) Then he warned employees, "those negotiations can take a week, or a month, or a year. Or if you look at what happened locally out in Long Island, the negotiations between 1199 and Mercy Medical Center took five years." (*Id.*; Exh. G, pg. 6, ¶ 11.) Winakor invited the employees to compare their situation to that of employees in Respondent's other facilities. He said, "You have to ask yourself if the deal here is that much better than any of the other locations," before threatening, "I wonder what's going to happen at any of the other locations?" (Exh. K(1), pg. 22-23, ll. 24-3.)

Winakor next told employees that while negotiations were ongoing, no matter how long that would be, Unit employees' terms and conditions of employment would remain at "status quo, meaning that the Union has made sure that nothing changes." (Exh. K(1), pg. 23, ll. 3-9.) Winakor then described the consequences of what he said was the

Union's insistence that "nothing changes." The CEO stated, "So, if I wanted to give people raises now, I can't." (*Id.*; Exh. G, pg. 6, ¶ 11.)

Winakor then fielded questions from the employees. The first person to raise a question asked why Respondent was now prohibiting Unit employees from working at Respondent's other facilities, whereas Respondent had previously been permitted employees to work at different offices. (Exh. K(1), pg. 23-24, ll. 24-23.) Winakor responded:

"To a certain extent, I kind of isolated everybody here. So people who used to rotate one place don't, and people who used to rotate in don't because I'm not sure what's going to happen as far as the end result of what happens here with 1199. I'm not that anxious, from my perspective, to have it spread to five different offices because this is difficult enough, and let's see how this goes. But certainly I don't want to bring more people in to make it more complicated, and I don't want to [take] more people out so it's complicated someplace else."
(*Id.*)

Winakor also blamed the Union for Respondent's decision not to allow Unit employees to work at other facilities. He said, "If you are an 1199 employee, 1199 won't let you go to another place that's part of the same organization that's not unionized." Yet in his next sentence, Winakor clarified his real concern, stating, "Or worse, you go over there and tell everybody how great the Union is, and now I have to deal with another unionized office." (Exh. K(1), pg. 25, ll. 3-8.)

Winakor then indirectly referred back to his earlier advice that employees should compare their situation to that of Respondent's employees in other, non-unionized offices. He brought up the subject of employee pay and stated:

"Oh by the way, I gave raises to . . . about 90 percent of the other offices, okay. People who didn't get raises was [sic] anybody who was hired by January 1, 2015 because they didn't suffer through the 8

or 10 years of no raises. . . Now, some people here got raises before the whole Union thing started on May 1st. Once the thing started on May 1st, we're frozen. So even if I wanted to give you a raise, I can't. And I won't be able to until we final [sic] and finish the negotiations between here and 1199. So we're in suspended animation." (Exh. K(1), pg. 26-27, ll. 23-14.)

Before concluding his discussion of why Unit employees were not getting pay raises, Winakor made it clear that it was because of the employees' decision to be represented by the Union. Winakor stated, "The decision I made, just like the decisions everybody else made, we all have to suffer or deal with the consequences of our decisions." (Exh. K(1), pg. 27, ll. 18-21.)

E. Respondent's CEO and Employee Anthony Randazzo Engaged in a Heated Verbal Exchange During the Staff Meeting

In the course of addressing employee questions during the June 17 "town hall" meeting, Winakor addressed the subject of "Add-Ons," which is the term used in the workplace to describe Respondent's practice of keeping employees on duty after the end of their scheduled shifts in order to accommodate late-arriving patients. (Exh. K(1), pg. 30-32, ll. 16-21.) Winakor explained that it was necessary for Respondent to serve patients, even if they happened to come in late. Carmine Randazzo spoke up after Winakor made his point and said that "Add-Ons" often cause employees to have to work one or two hours beyond their scheduled end time. (*Id.*) Winakor's reply to Randazzo's statement was, "Well, first of all, I hate to say this, but that's not your per se department and that's not what you're licensed or trained to do, no offense." (*Id.*)

Later during the same discussion regarding "Add-Ons," Anthony Randazzo brought up the issue of paying overtime to employees who work past their scheduled shifts. (Exh. K(1), pg. 36-38, ll. 10-8.) Respondent's practice was to only pay premium

overtime wages if an employee worked more than 40 hours per week, regardless of whether the employee worked more than eight hours in one day or worked beyond his/her scheduled shift. (*Id.*) Randazzo protested Respondent's practice, stating that employees who work an eight-hour shift should get overtime pay for having to work beyond the eight hours. (*Id.*) Winakor advised Randazzo that applicable regulations did not require overtime pay for employees who work more than eight hours in a day. (*Id.*) While Winakor was explaining his understanding of the law, Randazzo interjected and reiterated his opinion that overtime should accrue whenever employees work past their shifts. (*Id.*) Winakor replied, "You let me know when I can speak," to which Randazzo stated, "You can, it's your office." (*Id.*) Winakor then explained that the overtime regulations only require premium pay for work beyond 40 hours in a week. (*Id.*) Randazzo said, "Nobody wants to stay past their shift" and asked other employees in the room whether any of them wanted to work past their shifts. (*Id.*)

As Randazzo was soliciting his co-workers to get involved in the discussion, Winakor again brought up the fact that Randazzo was a Maintenance worker who was not licensed to take care of patients. (Exh. K(1), pg. 38-39, ll. 13-12.) Winakor told Randazzo and his brother Carmine, "You guys, the two of you who clean the office, you are cleaners of the office. You don't take care of patients. . . You're not licensed. You didn't go to school." (*Id.*) Winakor promised not to ask the Maintenance employees to stay past the end of their shifts. (*Id.*) Anthony Randazzo then asked about the front desk employees, who are also not licensed medical practitioners, yet nonetheless are required to stay past their shifts when the Employer takes "Add-Ons." (*Id.*) Carmine Randazzo added that front desk workers are required to stay late on a regular basis, adding, "This is

why we're in the position we're in." Winakor asked what position Carmine was referring to, and he responded "That's 1199. That's the position." (*Id.*)

The audio recording establishes that Winakor grew increasingly aggravated as he spoke with Anthony and Carmine Randazzo, and he began to raise his voice. (Exh. K(2) at 51:00-51:50; Exh. K(1), pg. 39-40, ll. 16-19.) Clearly frustrated, Winakor said to the Randazzo brothers, "Why don't you do this. Tell me what hours you'd like the office open to. You decide!" (*Id.*) Carmine Randazzo replied that Winakor was the boss and he had to decide what the office hours would be. (*Id.*) Winakor then asked whether Respondent should "throw out" a patient if he/she shows up near closing time. (*Id.*) Carmine replied, "Never. Never. Never," but added that there are many times when employees are required to stay late into the evening. (*Id.*) Winakor responded by exclaiming in a loud voice, "But that's the mission we're in!" (*Id.*) At that point, Carmine Randazzo stated, "Come on with this bullshit. Stop." (*Id.*)

Addressing the other employees in the room, Winakor then asked, "Does anybody other than the janitorial crew have anything to say?" (Exh. K(1), pg. 41, ll. 1-11.) Anthony Randazzo responded that the issues being raised at the staff meeting should instead be discussed at the bargaining table with the Union. Winakor replied, "We're not negotiating. . . And if you want to discuss and negotiate janitorial services, I'm happy to do so." (*Id.*)

Anthony Randazzo, himself becoming frustrated at that point, stated, "Alan, listen. Stop it with this janitorial bullshit, okay. Stop it. . . You're being a wise guy." (Exh. K(1), pg. 41-42, ll. 12-12.) Winakor then said, "Just out of curiosity, what's your job description, Anthony?" (*Id.*) Randazzo replied, "Yeah, janitorial, okay. I'm probably

more of a professional in my life than you've ever been. So just stop it. . . I don't know who you think you're talking to. This is the second time. Second time! You're a professional? Far from a professional." (*Id.*) As Randazzo addressed Winakor and said that he was "far from a professional," Office Administrator Nana Abrokwa approached Randazzo and asked him to step out of the room. (*Id.*; Exh. G, pg. 7-8, ¶ 12.) As Abrokwa was doing so, Winakor stated, "No, Nana, let him stay. I don't have a problem with it." (*Id.*) Nonetheless, Randazzo left the room at that moment, repeating the words "Far from a professional." (*Id.*)

About 35 seconds later, Anthony Randazzo is heard on the audio recording re-entering the meeting room saying, "I have every right to be in this room. Nobody puts me down. Who do you think you're talking to, Alan? I'm a professional." (Exh. K(1), pg. 42-44, ll. 25-14.) Winakor then started accusing Randazzo of cursing at him. Randazzo denied having cursed at Winakor, and Winakor stated, "You just told me to go fuck myself." (*Id.*) Randazzo denied ever saying that. At that point, Randazzo started to raise his voice and became more confrontational towards Winakor. (*Id.*) He told Winakor, "You want to battle with janitorial services, you bring it to us privately, okay. . . because you're the one with the big mouth that keeps bringing it up. (*Id.*) Do I need a license to be a janitor? Is there something funny? I don't think it's funny!" (*Id.*) Winakor started to respond saying, "My point was..." but Randazzo interrupted in a loud voice and said, "What point?!" (*Id.*) At that moment, Carmine Randazzo is heard trying to calm Anthony. (*Id.*) Winakor went on to explain that his "point was that people who go to school and got licenses for being technologists . . . have a different expectation of what the job description is than you do." (*Id.*) Winakor went on to address several other

employee questions. Anthony Randazzo did not speak again for the rest of the meeting, which lasted about another ten minutes. (Exh. K(1), pg. 44-54.) At no time did Winakor ask Anthony Randazzo to leave the meeting.

F. Respondent Terminated Randazzo's Employment

Respondent discharged Anthony Randazzo almost immediately after the June 17 “town hall” meeting. In a letter dated June 17, Director of Human Resources Cheryl Kurman wrote to Randazzo that his employment was being terminated, effective immediately, because of Randazzo’s “insubordinate behavior at this afternoon’s Town Hall meeting, hosted by Alan Winakor. . .” (Exh. D, pg. 8 ¶ 16; Exh. L(1).)

By letter from Human Resources Director Kurman dated June 20, Respondent revised its termination notice to Randazzo. (Exh. L(2).) The June 20 letter provides further detail regarding Respondent’s basis for the discharge, stating that the “insubordinate behavior” Randazzo exhibited at the town hall meeting, including “disorderly conduct and directing profanities at the meeting host and CEO Alan Winakor.” Kurman then cited provisions of Respondent’s Employee Handbook, which she claimed Randazzo violated. (*Id.*) Namely, Respondent cited its policy prohibiting “Fighting, horseplay, practical jokes, or other disorderly conduct that could endanger or disturb any employee, contractor, customer, or vendor of or visitor of your company.” In addition, Respondent cited its policy against “Inappropriately threatening, intimidating, bullying, or coercing any employee . . . in any manner, in any manner, including by use of abusive or vulgar language.” (*Id.*) Randazzo received this letter on about June 24. He has not worked for Respondent since June 17, and Respondent has not offered to reinstate him. (Exh. C, ¶ 9.)

Employees Anthony Randazzo and Berkis Bordon mutually testified their

respective Board affidavits that employees commonly used vulgar language in the workplace, including words like “bullshit” and “fuck.” (Exh. D, pg. 8, ¶ 15; Exh. H, pg. 3, ¶ 6.) Bordon testified that supervisors and managers frequently heard employees using such language and tolerated it, only advising people not to use that kind of language in the presence of patients. (Exh. H, pg. 3, ¶ 6.) CEO Winakor himself is recorded using the word “shit” multiple times during the course of the June 17 “town hall” meeting. (Exh. K(1), pg. 14, ll. 1-4; pg. 33, ll. 1-6.) There is no evidence that Respondent has disciplined, let alone terminated, any employee for using foul language in the workplace, except for its discharge of Anthony Randazzo.

G. Respondent Discharged Open Union Supporter Sandra Kucuk

Sandra Kucuk, as noted above, was one of five employees, including Anthony Randazzo, identified to the Employer by the Union as members of the Union bargaining committee. (Exh. H, pg. 3, ¶ 6-7.) Kucuk had worked as an MRI Technologist at Respondent’s Forest Hills facility since about February 2008. (Exh. E, pg. 1, ¶ 1.) In addition to being named as one of the Union bargaining committee members, Kucuk was also one of two employees who initially contacted the Union to begin the organizing drive. (Exh. E, pg. 2-3, ¶ 5.)

Kucuk underwent surgery in about February 2016, and the effects of that operation prevented her from working for an extended period of time. (Exh. E, pg. 2, ¶ 4.) Kucuk began an unpaid medical leave under the Family and Medical Leave Act (FMLA) starting on February 12, 2016 and expiring on May 5, 2016. (Exh. E, pg. 4-5, ¶ 10) In April 2016, however, Kucuk’s doctor recommended that she not return to work on May 6, as originally planned. (*Id.*) Kucuk told Human Resources representative Marilyn

McCarthy that her doctor said that she was not ready to return to work on May 6, and McCarthy offered to extend Kucuk's leave as a "Personal Leave of Absence" from May 6 to June 16, 2016. (*Id.*)

On May 26, Kucuk emailed McCarthy and attached a letter from her doctor stating that Kucuk was able to return to work on June 17, but on a part-time basis and with certain physical restrictions (i.e., no bending or lifting items more than five pounds). (Exh. E, pg. 5, ¶ 11.) McCarthy replied on about May 27, asking Kucuk how long she would need to be on part-time modified duty per the doctor's recommendation. (*Id.*) Kucuk in turn forwarded McCarthy on about May 31 an updated letter from Kucuk's doctor stating his recommendation that Kucuk work part-time for a period of two months. (*Id.*)

On June 1, Human Resources Director Cheryl Kurman, for the first time, became involved in evaluating Kucuk's leave requests and her planned return to work. (Exh. E, pg. 5, ¶ 12) Kurman emailed Kucuk on June 1 and stated that if Kucuk could not produce documentation from her physician clearing her to return to work on June 17, "without limitations that prevent you from performing the necessary requirement for your position," then Kucuk would be terminated. (Exh. M.)

On June 6, Kurman confirmed via email that Respondent would allow Kucuk to return to work if her doctor cleared her return without restrictions. (Exh. N.) In previous email correspondence between them, Kucuk had stated that she believed her need to work part-time would last only two weeks. (*Id.*) Kurman on June 6 replied, "If you are able to return with no restrictions but for PT hours, I would think we could allow you to return PT for the two weeks you mention but, again, it's not our place to advise your MD what

restrictions he would recommend for your wellbeing.” (*Id.*)

In accordance with Kurman’s June 6 e-mail, Kucuk obtained a revised letter from her doctor stating that Kucuk could return to work on June 17, without physical restrictions but on a part-time basis for a period of two weeks. (Exh. E, pg. 5, ¶ 12.) Kucuk forwarded the revised doctor’s letter to Kurman. (*Id.*) Thus, Kucuk provided the medical clearance that Kurman had said was necessary for Respondent to bring Kucuk back to work.

On June 8, however, Kurman emailed Kucuk, reversing Respondent’s earlier approval of Kucuk returning to work, stating instead, “I am sending this email to let you know that I was premature in sending the email approving your return. The information you have provided to us must be reviewed by our executive team as well as by our attorneys.” (Exh. O.) Kurman advised Kucuk that she would get back to her “as soon as a determination is made.” (*Id.*)

On June 16, CEO Winakor became directly involved in Kucuk’s situation. He emailed Kucuk stating that Respondent was concerned that the first doctor’s note Kucuk provided identified significant work restrictions, but the revised letter from the doctor stated that Kucuk could return with no restrictions. (*Id.*) Winakor noted that these “divergent instructions came with no additional evaluation. . .” (*Id.*) Thus, Winakor wrote that Respondent would not allow Kucuk to return to work until after her next medical evaluation, which Winakor hoped would be done “in short order.” (*Id.*) Winakor extended Kucuk’s leave of absence until her next physical exam by her doctor. (*Id.*; Exh. E, pg. 5-6, ¶ 13.)

Kucuk replied to Winakor’s email on June 16 and stated that her next doctor’s

appointment was on July 12. (*Id.*) Winakor replied minutes later, encouraging Kucuk to get an appointment for an earlier date but stating that Respondent “will wait until your July 12th appointment” if necessary. (*Id.*) Later on June 16, Kucuk advised HR Director Kurman via email that Kucuk was able to re-schedule her doctor’s appointment to July 7. (*Id.*)

On about July 7, Kucuk forwarded a letter from the doctor stating that Kucuk was cleared to return to work on July 20, full-time and with no restrictions. (Exh. E, pg. 6, ¶ 14.) Kurman responded to Kucuk on July 12. In an email, Kurman wrote, “This email is to advise you that, as you have exhausted both your FMLA and extended LOA, your employment . . . is being terminated as of today.” (Exh. E, pg. 6, ¶ 15; Exh. P.)

Kucuk has not been reinstated to work for Respondent since her July 12 discharge. Respondent asserts in its Answer to the administrative Complaint in this matter, that “it has offered to reinstate Kucuk to a vacant position with a higher annual salary than the position from which she was discharged.” (Exh. C, ¶ 10.) The evidence, however, establishes that during a bargaining session between Respondent and the Union in about September 2016, Respondent offered to return Kucuk to work, but only in a supervisory position outside of the bargaining unit represented by the Union. (Exh. J, pg. 4-5, ll. 20-3.) Kucuk rejected Respondent’s offer because it would not return her to a position that is substantially similar to the one from which she was discharged. (*Id.*)

H. Respondent’s Conduct Has Chilled Employees’ Section 7 Activity and Splintered Employee Support for the Union

Respondent’s conduct in discharging two of the five members of the Union bargaining committee because of their protected activity, in preventing Unit employees from working at other facilities because they chose to be represented by the Union, in

denying Unit employees pay raises granted to workers at other facilities because they chose Union representation, and in unilaterally changing employees' work schedules without bargaining with the Union, as described above, has caused the Unit's once overwhelming support for the Union to quickly unravel.

At the time of the May 6 representation election, and before Respondent engaged in its campaign of unfair labor practices to undermine the Union, the Union's support among the Unit was rock solid. As noted above, out of 56 eligible voters, 47 employees voted in the May 6, 2016 representation election, and 42 employees voted for the Union, with only five employees voting against the Union. (Exh. Q.) Employee attendance at Union meetings in the period leading up to the election was also very high. At least 25 employees – or nearly half the Unit – regularly came to Union meetings during the initial organizing campaign. (Exh. F, pg. 1, ¶ 2; Exh. J, pg. 4, ll. 8-9.)

1. Employees Have Disengaged from the Union Because They Fear Their Rights Are Not Being Protected

Employees' engagement with the Union and their willingness to participate in Section 7 protected activity has been significantly chilled in the wake of Respondent's various and wide-ranging unfair labor practices. Union Organizer Beriza Luciano testified in a Board affidavit that many workers have told her that they are afraid to openly support the Union for fear of being terminated like Randazzo and Kucuk were. (Exh. F, pg. 4, ¶ 8.) For example, Luciano testified that employees have reported that their co-workers have said things like "what have we gotten ourselves into" and "maybe we should just leave the Union alone." (*Id.*) Accordingly, the Union has had difficulty getting employees to assist the Union in pursuing unfair labor practice charges against the Employer in this case. Luciano testified that employee Ivisdenia Cassius-Linval told her

that she did not want to speak to the Board because she was scared Respondent would find out and terminate her. (Exh. F, pg. 5, ¶ 10.) Employee Carmine Randazzo likewise testified that he solicited his co-workers to cooperate in the Board investigation, but about six employees who he asked to speak to the Board declined to get involved because they said they were afraid of retaliation from Respondent. (Exh. G, pg. 9, ¶ 14)

Indeed, the evidence shows that a palpable fear of anti-Union retaliation has permeated the Forest Hills facility as a result of Respondent's conduct, and the continuing passage of time without a remedy is convincing Unit employees that Respondent is free to violate them with impunity. Carmine Randazzo testified that multiple employees have told him that they feel they are being harassed by Respondent because employees voted in the Union, and they believe that neither the Union nor the government can protect them. (Exh. G, pg. 8, ¶ 13) As a result, employees who once openly discussed Union-related matters during breaks and in the lunch room at Respondent's facility now feel compelled to only speak about such issues in whispers. (Exh. J, pg. 6, ll. 1-5) In addition, at least four Unit employees have left the workplace and decided to work elsewhere, in large part because of the coercive, retaliatory atmosphere Respondent has created since the Union's certification. (Exh. J, pg. 7, ll. 3-8.)

Carmine Randazzo further testified that he has advised a number of his co-workers that Respondent discharged Anthony Randazzo for his supposed violation of a rule prohibiting "disorderly conduct" – a rule of which employees were not previously aware. (Exh. J, pg. 5, ll. 4-22.) Carmine testified that employees have told him that the lengths to which Respondent has gone to support its termination of Anthony Randazzo shows them that Respondent will "do whatever it takes" to keep outspoken Union

advocates like Anthony Randazzo out of the workplace and rid itself of the Union. (*Id.*)

Employees are also extremely discouraged by what they perceive as Respondent's unfettered ability to control their terms and conditions of employment, without regard to the Union or collective bargaining. Carmine Randazzo testified that employees have complained to him that the Employer's unilateral changes in working conditions demonstrates that CEO Winakor "can do whatever he wants with the employees, and the Union is powerless to stop him." (Exh. J, pg. 6, ll. 13-20.) In addition, Randazzo testified that Unit employees, aware of Respondent's grant of wage increases to workers in non-unionized facilities, have expressed to Randazzo their sentiment that the Unit may have been better off if they had never selected the Union as their bargaining representative in the first place. (Exh. J, pg. 6-7, ll. 21-2.)

Unsurprisingly, employee attendance at Union meetings has declined markedly. Only four current employees came to the most recent Union meeting on October 2, including the person at whose house the meeting was held. (Exh. J, pg. 3-4, ll. 15-12) Carmine Randazzo testified that, in the weeks leading up to the meeting date, he and the Union had strongly encouraged employees to attend, attempting to impress upon them the importance of the unit getting together to develop strategies for bargaining with Respondent. (*Id.*) However, when he spoke with co-workers about the Union meeting, many of them told Randazzo that they no longer believed the Union could do anything to stop Respondent from doing what it wants, and they feared that Respondent would retaliate against them if it found out that they had gone to the meeting. (*Id.*) According to Randazzo, employee attendance at the October 2 Union meeting was "by far the lowest turnout" the Union has had to date. (*Id.*)

2. Once-Strong Union Supporters Have Withdrawn from the Union and the Collective-Bargaining Process

Even employees who once strongly supported the Union and took an active role in the organizing campaign have expressed reservations about continuing to back the Union. Union agent Luciano testified in a Board affidavit that employee Maria Lizardo, who was named to the Union bargaining committee, told Luciano on about July 22 that she no longer believed organizing behind the Union was a good idea. (Exh. F, pg. 5, ¶ 11.) Lizardo has since withdrawn from the Union bargaining committee and has not attended any of the bargaining sessions between Respondent and the Union. (Exh. J, pg. 2, ll. 1-11.) Employee Carmine Randazzo testified that Lizardo explained to him that she does not want to take a lead role in the Union because she is afraid that Respondent will retaliate against her. (*Id.*)

Employee Edwin Martinez, another employee selected to be on the Union bargaining committee, has similarly refused to assist the Union in response to Respondent's unlawful conduct. Despite previously indicating his willingness to get involved, Martinez ultimately declined to give testimony to the Board in support of the underlying unfair labor practice charges in the instant case. (Exh. F, pg. 4, ¶ 9; Exh. J, pg. 2, ll. 12-22.) Union Organizer Luciano and employee Carmine Randazzo testified in their respective Board affidavits that Martinez declined to meet with a Board agent because he said he was afraid of retaliation from Respondent. (*Id.*) Luciano testified that when she tried to reassure Martinez of his rights under the Act, Martinez countered that Respondent CEO Winakor "is going to do what he's going to do; he proved that by firing Anthony [Randazzo]." (Exh. F, pg. 4, ¶ 9.) Luciano testified that Martinez further told her, "I don't know if the Union was a good idea. I'm not even sure if I want to be on the

negotiating committee anymore.” (*Id.*)

Carmine Randazzo testified that Edwin Martinez similarly told him that he was nervous about getting involved with the Union because of the adverse actions Respondent had been taking against vocal Union supporters. (Exh. J, pg. 2, ll. 12-22.) Randazzo testified that Martinez particularly cited Respondent’s discharges of Anthony Randazzo and Sandra Kucuk and told Carmine Randazzo that it did not appear that those discharged Union adherents would be getting their jobs back any time soon, and Martinez said he could not risk losing his job in the same manner. (*Id.*)

Like Maria Lizardo, Edwin Martinez has since withdrawn from the Union bargaining committee. After attending the first negotiation session in about July 2016, Martinez has ceased his participation in bargaining and has avoided coming to Union meetings. (Exh. J, pg. 3, ll. 1-5.) Carmine Randazzo testified that Martinez has also stopped speaking with Randazzo about issues in the workplace and what the Union could do to improve working conditions, topics which Martinez had regularly brought up with Randazzo in the past. (*Id.*)

With Union bargaining committee members Anthony Randazzo and Sandra Kucuk having been discharged by Respondent, and with employees Lizardo and Martinez refusing to participate in negotiations, Carmine Randazzo is now the only current employee willing to assist the Union in bargaining an initial contract with Respondent. (Exh. J, pg. 3, ll. 6-10.) No other employees are willing to join the Union bargaining committee. (*Id.*) Carmine Randazzo testified that he’s asked a number of his co-workers to attend negotiation sessions on behalf of the Union, but every person has declined the offer, stating either that they are too busy or that they do not want to be singled out by

Respondent for taking a leadership role with the Union. (*Id.*)

The lack of employee participation in bargaining has severely hampered the Union's ability to effectively negotiate a collective-bargaining agreement with Respondent. (Exh. J, pg. 3, ll. 10-14.) Employees and the Union had originally selected bargaining committee members from diverse job classifications so that the interests of the entire Unit would be represented at the bargaining table. Now, with minimal employee engagement in the bargaining process, the Union has found it difficult to understand the needs and wishes of the Unit and to bargain in furtherance of those interests.

V. ARGUMENT

A PRELIMINARY INJUNCTION SHOULD ISSUE TO RESTRAIN RESPONDENT AS THERE IS REASONABLE CAUSE TO BELIEVE THAT RESPONDENT COMMITTED UNFAIR LABOR PRACTICES AND INJUNCTIVE RELIEF IS JUST AND PROPER

Section 10(j) of the Act,⁴ authorizes United States district courts to grant temporary injunctions pending the Board's resolution of unfair labor practice proceedings. Congress recognized that the Board's administrative proceedings often are protracted. In many instances, absent interim relief, a respondent could accomplish its unlawful objective before being placed under any legal restraint, and it could thereby render a final Board order ineffectual. *See Kreisberg v. HealthBridge Management, LLC*, 732 F.3d 131, 143 (2d Cir. 2013), *cert. denied* 135 S.Ct. 869 (2014); *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d 1047, 1055 (2d Cir. 1980); *Seeler v. The Trading Port, Inc.*, 517 F.2d 33,

⁴ Section 10(j) (29 U.S.C. Section 160(j)) provides:

The Board shall have power, upon issuance of a complaint as provided in subsection (b) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred or wherein such person resides or transacts business, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

38 (2d Cir. 1975) (citing S. Rep. No. 105, 80th Cong., 1st Sess., at pp. 8, 27 (1947)), reprinted at I *Legislative History of the Labor Management Relations Act of 1947* 414, 433 (Government Printing Office 1985). Thus, Section 10(j) was intended to prevent the potential frustration or nullification of the Board's remedial authority caused by the passage of time inherent in Board administrative litigation. *See, e.g., Seeler v. The Trading Port, Inc.*, 517 F.2d at 37-38.

To resolve a 10(j) petition, a district court in the Second Circuit considers only two issues: whether there is “reasonable cause to believe” that a respondent has violated the Act and whether temporary injunctive relief is “just and proper.” *See, e.g., Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d 462, 468-469 (2d Cir. 2014); *HealthBridge Management, LLC*, 732 F.3d at 141-142; *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d 360, 365 (2d Cir. 2001); *Silverman v. J.R.L. Food Corp. d/b/a Key Food*, 196 F.3d 334, 335 (2d Cir. 1999); *see also Mattina v. Kingsbridge Heights Rehabilitation and Care Center*, 329 Fed.Appx. 319, 321 (2d Cir. 2009).

A. The "Reasonable Cause" Standard

In determining whether there is reasonable cause to believe that the Act has been violated, the Regional Director's determinations should receive “significant deference” (*Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d at 469), and the district court may not decide the merits of the case. *See Kaynard v. Mego Corp.*, 633 F.2d 1026, 1032-1033 (2d Cir. 1980). Rather, the court's role is limited to determining whether there is “reasonable cause to believe that a Board decision finding an unfair labor practice will be enforced by a Court of Appeals.” *Id.* at 1033, quoting *McLeod v. Business Machine and Office Appliance Mechanics Conference Board*, 300 F.2d 237, 242 n. 17 (2d Cir. 1962). The district court should not resolve contested factual issues; the

Regional Director's version of the facts "should be given the benefit of the doubt" (*Seeler v. The Trading Port, Inc.*, 517 F.2d at 37) and, together with the inferences therefrom, "should be sustained if within the range of rationality." *Mego Corp.*, 633 F.2d at 1031. The district court also should not attempt to resolve issues of credibility of witnesses. *Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1051-1052, n. 5; *see also NLRB v. Electro-Voice, Inc.*, 83 F.3d 1559, 1570, 1571 (7th Cir. 1996), cert. denied 519 U.S. 1055 (1997); *Fuchs v. Jet Spray Corp.*, 560 F.Supp. 1147, 1150-51 n. 2 (D.Mass. 1983), *affd. per curiam* 725 F.2d 664 (1st Cir. 1983).

Similarly, on questions of law, the District Court "should be hospitable to the views of the [Regional Director], however novel." *Mego Corp.*, 633 F.2d at 1031 (quoting *Danielson v. Joint Board of Coat, Suit and Allied Garment Workers' Union, I.L.G.W.U.*), 494 F.2d 1230, 1245 (2d Cir. 1974)). Thus, the Regional Director's legal position should be sustained "unless the [District] Court is convinced that it is wrong." *Palby Lingerie, Inc.*, 625 F.2d at 1051. *Accord: Silverman v. Major League Baseball Player Relations Comm., Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995) ("appropriate deference must be shown to the judgment of the NLRB, and a District Court should decline to grant relief only if convinced that the NLRB's legal or factual theories are fatally flawed"); *Inn Credible Caterers, Ltd.*, 247 F.3d at 365.

1. The Reasonable Cause Standard is Met

Substantial, if not overwhelming, evidence in this case compels the conclusion that Respondent violated Sections 8(a)(1), (3) and (5) of the Act as alleged in the Complaint. Indeed, much of the evidence establishing reasonable cause to conclude that Respondent violated the Act is beyond dispute, as it is found in the audio recording of the June 17 staff meeting described above.

a. Respondent CEO Winakor Made Unlawful Coercive Statements to Employees

CEO Winakor's comments to employees during the June 17, 2016 "town hall" staff meeting represent clear coercive statements that restrain and coerce employees in the exercise of their Section 7 rights, in violation of the Act. The Board has repeatedly held that falsely blaming employees' chosen bargaining representative for the employer's decision not to provide employees with benefits that they would otherwise receive constitutes coercive conduct in violation of the Act. *Kentucky Fried Chicken*, 341 NLRB 69, 69-70 (2004); *Grouse Mountain Lodge*, 333 NLRB 1322, 1324 (2001); *RTP Corp.*, 334 NLRB 466, 467 (2001); *Hillhaven Rehabilitation*, 325 NLRB 202, 220 (1997); *Atlantic Forest Products*, 282 NLRB 855, 858 (1987) (citing *Uarco Inc.*, 169 NLRB 1153 (1968)). Yet that is precisely what CEO Winakor did at the June 17 meeting.

First, Winakor blamed the Union for Respondent's refusal to grant employees wage increases, claiming "the Union has made sure that nothing changes. . . So, if I wanted to give people raises now, I can't." (Exh. K(1), p. 23, ll. 3-9.) The statement is false, as there is no evidence or even an assertion by Respondent that it ever sought to bargain with the Union about raising Unit employees' pay. Falsely blaming the Union for Respondent's refusal to grant wage increases in this manner necessarily tends to interfere with employees' exercise of Section 7 rights under the Act and constitutes a violation of Section 8(a)(1) of the Act. *RTP Corp.*, 334 NLRB at 467 (affirming that where an employer engages in such conduct, "It is not surprising that employees would become alienated from a union which they believed had prevented a wage increase").

Not only did CEO Winakor falsely blame the Union for Respondent's refusal to grant employees' raises, but he exacerbated the coercive effect of his statements by

telling the employees that “90 percent” of their counterparts in other Respondent facilities had just gotten raises. (Exh. K(1), pg. 26-27, ll. 23-14.) Winakor then reinforced his coercive message by directly linking the employees’ pay stagnation to their selection of the Union, reminding them that “some people here got raises before the whole Union thing started on May 1st. Once the thing started on May 1st, we’re frozen. So even if I wanted to give you a raise, I can’t.” (*Id.*) The Board has long held that an employer violates Section 8(a)(1) of the Act when it advises employees that it will withhold wage increases because of union activities. *Invista*, 346 NLRB 1269, 1270 (2006); *Centre Engineering, Inc.*, 253 NLRB 419, 421 (1980); *Earthgrains Baking Cos.*, 339 NLRB 24, 28 (2003), *enfd.* 116 Fed. Appx. 161 (9th Cir. 2004). This is exactly what the audio recording establishes that CEO Winakor did at the June 17 staff meeting.

Similarly, Winakor also wrongfully blamed the Union for Respondent’s refusal to allow employees to work at Respondent facilities other than their usual Forest Hills office. Winakor expressly told his staff that he would no longer permit Unit employees to work at other facilities because he feared that they would encourage workers in the non-unionized facilities to support the Union, or in other words “infect the other offices,” as Winakor had earlier phrased it to Union Organizer Luciano. (Exh. K(1), pg. 23-25, ll. 23-8; Exh. F, pg. 2, ¶ 5.) Employees had previously been able to take shifts at other facilities in order to work additional hours at times that fit their schedules, and thus the ability to work between different offices was a benefit that employees had long enjoyed. The Board holds that employer threats to withhold such benefits from employees because of their union activity also violates Section 8(a)(1). *See Invista*, 346 NLRB at 1270; *Centre Engineering, Inc.*, 253 NLRB at 421; *Earthgrains Baking Cos.*, 339 NLRB at 28.

Accordingly, there is certainly reasonable cause to conclude that Winakor's statements regarding withholding employee wage increases and preventing employees from working in other facilities violate the Act.

b. Respondent Withheld Wage Increases and Denied Employees Work Opportunities Because They Supported the Union

The evidence further establishes that Respondent not only threatened employees with the withholding of wages and benefits but actually denied those raises and benefits as well. Respondent has continued to withhold wage increases from the Unit and has persisted in preventing Unit employees from working at other facilities. (Exh. J, pg. 6-7, ll. 13-1.) Winakor's comments clearly establish that Respondent withheld these benefits from employees because they selected the Union as their bargaining representative. (Exh. K(1), pg. 23-25, ll. 23-8.) Such discriminatory withholding of benefits violates Section 8(a)(3) of the Act, and there is thus ample basis to find reasonable cause that a violation has occurred. *See, N.L.R.B. v. Great Dane Trailers, Inc.*, 388 U.S. 26 (1967) (employers violates Section 8(a)(3) by withholding wages or benefits to employees because of their union activity); *see also, KAG-West, LLC*, 362 NLRB No. 121, slip op. at 2 (June 16, 2015) (finding employer had anti-union motive for denying represented employees wage increases based, in part, on managers' statements blaming union for withholding wage raises); *Arc Bridges, Inc.*, 362 NLRB No. 56, slip op. at 2-3 (Mar. 31, 2015); *Dish Network Service, LLC*, 358 NLRB 398, 403 (2012); *Kurdziel Iron of Wauseon*, 327 NLRB 155, 155 (1998), *enfd.*, 208 F.3d 214 (6th Cir. 2000) (unpublished decision); *South Shore Hospital*, 245 NLRB 848, 860-62 (1979), *enfd.*, 630 F.2d 40 (1st Cir. 1980).

c. Respondent Discharged Employee Anthony Randazzo Because He Engaged In Protected Concerted Activity and Union Activity

The evidence in this case also firmly establishes that Respondent discharged Anthony Randazzo in retaliation for his union and protected concerted activities, in violation of the Act. Respondent admits that it fired Randazzo because of his “insubordinate behavior” towards CEO Winakor at the June 17 “town hall” meeting. (Exh. L(1).) Thus, in order to determine whether Respondent could lawfully discharge Randazzo under the Act for his conduct during the June 17 meeting, it is necessary to evaluate whether Randazzo was engaged in protected concerted activity during the interaction that led to his discharge, and if so, whether his conduct was so egregious that he lost the protection of the Act. It is also necessary to consider Respondent’s knowledge of Randazzo’s union activity at the time of his discharge and Respondent’s anti-Union animus in order to determine whether Respondent terminated Randazzo because of his union activity.

i. *Randazzo Was Engaged in Protected Concerted Activity*

Section 7 of the Act grants employees the right to engage in “concerted activities for the purpose of . . . mutual aid or protection. . .” In order for activity to be considered “concerted” under the Act, it must be engaged in with, or on the authority of, other employees, and not merely on behalf of the acting employee himself. *Myers Industries*, 268 NLRB 493, 497 (1984). This includes circumstances in which an employee seeks “to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management.” *Myers Industries*, 281 NLRB 882, 887 (1986).

In the present case, Anthony Randazzo was certainly engaged in concerted activity protected under the Act when, during a question-and-answer session at a staff meeting hosted by Respondent's CEO, he questioned the appropriateness of the company's overtime policies. Randazzo advocated for all Unit employees – not just himself – to be paid premium wages for work beyond eight hours in a day and invited his co-workers to get involved in the discussion. (Exh K(1), pg. 36-38, ll. 10-8.) The entire interaction between Randazzo and CEO Winakor that led to Randazzo's discharge occurred in the context of this discussion about employees' terms and conditions of employment. In raising this common concern about wages and hours to the CEO during a staff meeting, Randazzo was engaged in quintessential protected concerted activity, which the Board and the courts would certainly recognize as such. *See e.g., NLRB v. Caval Tool Div.*, 262 F.3d 184, 190 (2d Cir. 2001) (employee's conduct is *per se* concerted as long as the employee raises issues to the employer that are of common concern among employees).

ii. *Randazzo's Conduct During the Meeting Did Not Remove Him from the Protection of the Act*

As Randazzo was engaged in concerted activity typically protected under the Act, it is then necessary to determine whether the manner in which he engaged in this activity somehow removed him from the protection of the Act. The Board applies a four-factor test to evaluate whether an employee's conduct during an interaction with management, which would otherwise be protected, was so egregious as to eliminate the Act's protection. *Atlantic Steel*, 245 NLRB 814, 816 (1979).

Under *Atlantic Steel*, the Board considers: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4)

whether the outburst was, in any way, provoked by the employer's unfair labor practices. In this case, analysis of all four factors supports the conclusion that Randazzo did not lose the protection of the Act. *Id.*

The place of the discussion between Randazzo and Winakor was a mandatory meeting convened by Respondent to address employee's terms and conditions of employment. It was a staff-only meeting, and no patients or clients were present. These factors strongly support finding that Randazzo's conduct was protected under the *Atlantic Steel* analysis. *See Datwyler Rubber & Plastic*, 350 NLRB 669, 670 (2007) (employee protected where outburst occurred during a staff meeting, where employees were free to raise workplace issues and in a location would not disrupt the employer's work process).

The subject matter of the discussion was related to scheduling and overtime pay, which are core terms and conditions of employment under the Act. *See, e.g., Advoserv of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 36 (Mar. 11, 2016) (where subject matter of discussion concerned complaints about proposed shift changes, the second *Atlantic Steel* factor strongly militated in favor of employee retaining the protection of the Act). In addition, Randazzo spoke as a Union shop steward and bargaining committee member, exercising his right his Section 7 right to represent his co-workers. *See, e.g., Public Service Company of New Mexico*, 364 NLRB No. 86, slip op. at 7-8 (Aug. 22, 2016) (subject matter of discussion weighed in favor of protection where employee was performing representational duties at a meeting by asking questions and commenting on a new system that the employer was implementing). The subject matter of the discussion therefore also supports a finding that Randazzo was engaged in protected activity throughout his conversation with Winakor.

As to the third *Atlantic Steel* factor, the evidence establishes that while Randazzo did use an expletive in the course of his interaction with Winakor, he did not direct any curse words or threats at Winakor, nor did he call Winakor any names. Contrary to Respondent's assertions, the audio recording shows that Randazzo at no point told Winakor "Go fuck yourself." Instead, the only arguably intemperate remarks Randazzo made throughout the interaction was when he said that Winakor's statements were "bullshit." Yet the standard for determining whether an employee's conduct is removed from the protection of the Act is whether the conduct is "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Merry Healthcare Centers*, 350 NLRB 203, 204-205 (2007). Board precedents firmly establish that Randazzo's use of the word "bullshit" does not meet this standard. *See e.g., Roemer Industries, Inc.*, 362 NLRB No. 96, slip op. at 9 (May 28, 2015) (noting that an employee's outburst was impulsive and not premeditated, which weighs in favor of continued protection); *Kiewit Power Constructor*, 355 NLRB 708, 710 (2010), *enfd.*, 652 F.2d 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); *Plaza Auto Center, Inc.*, 360 NLRB No. 117 (2014) (employee did not lose protection despite calling company owner a "fucking crook," an "asshole," and "stupid"); *Tampa Tribune*, 351 NLRB 1324, 1326 (2007) (employee protected despite calling company vice president a "stupid fucking moron"); *Wal-Mart Stores, Inc.*, 341 NLRB 796, 807-808 (2004) (employee retained the protection of Act notwithstanding his use of profanity, where the profanity was used to describe the employer's policy and its effects rather than to describe a member of management). Here, because Randazzo neither threatened violence against

Winakor nor directed any vulgarities at Winakor, and because his use of profanity was limited to describing Winakor's remarks, the Board will certainly find that the nature of Randazzo's outburst favors protection under the Act.

Finally, the evidence establishes that it was Winakor's patronizing and coercive statements that provoked Randazzo to react. The interaction between Winakor and Randazzo came just after Winakor's address to employees during which he compared employees' selection of the Union to petulant children calling child services, unlawfully blamed the Union for Respondent's refusal to grant wage increases or allow Unit employees to work at other Respondent facilities, and stated that those benefits were being withheld because of the presence of the Union. Randazzo was disturbed by these unlawful statements, as were other employees. (Exh. K(1), pg. 42, ll. 3-11.) In addition, Randazzo became more animated after Winakor repeatedly taunted and belittled him for being a janitor who merely "cleans the office" and because Randazzo was "not licensed" and "did not go to school." (Exh. K(1), pg. 38-42, ll. 7-5.) These comments plainly implied that Winakor believed Randazzo was unqualified to speak on behalf of his co-workers simply because of the position Randazzo held in the company. Although not alleged as a separate unfair labor practice, Winakor's taunts suggested that Randazzo did not have a right to engage in the protected activity of speaking on behalf of his co-workers, thereby interfering with Randazzo's Section 7 rights under the Act. This is what provoked Randazzo's adverse reaction. *See, Care Initiatives, Inc.*, 321 NLRB 144, 152 (1996) ("an employer may not rely on employee conduct that it has unlawfully provoked as a basis for disciplining an employee").

That Randazzo's outburst occurred directly after Winakor's comments about his status as a custodian, moreover, does not undermine the conclusion that Randazzo was in some way provoked by Respondent's unfair labor practices earlier in the meeting. *See, Staffing Network Holdings, LLC*, 362 NLRB No. 12, slip op. at 1, n. 1 (Feb. 4, 2015) (fourth factor of *Atlantic Steel* test weighed in favor of protection where employer unlawfully threatened employee, even though employee was also upset about the discharge of a co-worker, which was not unlawful). The unfair labor practices set the tone for the discussion about the Union and contributed to Randazzo's frustrated outburst. Accordingly, the fourth factor of the *Atlantic Steel* test also weighs in favor of finding that Randazzo's conduct retained protection of the Act. In any event, Randazzo's outburst would retain the protection of the Act even if the fourth factor weighed against it, as the Board requires a balancing of the four *Atlantic Steel* factors. *See e.g., Advoserv of New Jersey, Inc.*, 363 NLRB No. 143, slip op. at 36-37; *Long Ridge of Stamford*, 362 NLRB No. 33 (Mar. 24, 2015), enfd. sub nom. *Healthbridge Management, LLC v. N.L.R.B.*, No. 15-1110 (D.C. Cir. Sep. 30, 2016) (unpublished); *Alcoa, Inc.*, 352 NLRB 1222, 1226 (2008).

In sum, there is no basis to conclude that Randazzo lost the protection of the Act during his discussion with CEO Winakor at the June 17 meeting. Moreover, the evidence establishes that Respondent routinely tolerated employees' use of the same kind of language that Randazzo used during the June 17 meeting (Exh. D, pg. 8, ¶ 15; Exh. H, pg. 3, ¶ 6), and Winakor himself used expletives similar to those uttered by Randazzo while Winakor was addressing employees during the meeting. (Exh. K(1), pg. 14, ll. 1-4; pg. 33, ll. 1-6.) Thus, Respondent's claim that it discharged Randazzo because he used

“abusive or vulgar language” (Exh. L(1)) is clearly pretext used to conceal its unlawful motive. Instead, the evidence establishes that Respondent terminated Randazzo because of his protected concerted activity during the staff meeting in violation of Section 8(a)(1) of the Act.

Furthermore, Respondent knew that Randazzo was an employee-leader for the Union, as he was one of five individuals identified to CEO Winakor by the Union as a member of the Union bargaining committee. (Exh. F, pg. 2-3, ¶ 5-7.) That knowledge, coupled with Respondent’s virulent anti-Union animus shown by Winakor’s unlawful statements, establishes further reasonable cause to conclude that Respondent’s discharge of Randazzo also violated Sections 8(a)(1) and (3) of the Act. *See, Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004) (violation of Section 8(a)(3) is established where employee engaged in protected union activity, employer had knowledge of the protected activity, bore anti-union animus and would not have discharged the employee absent his protected activity).

d. Respondent Discharged Anthony Randazzo Pursuant to an Overly Broad and Ambiguous Policy that Restrains Employees’ Section 7 Rights

In addition to unlawfully retaliating against Anthony Randazzo for engaging in union and protected concerted activity, Respondent’s discharge of Randazzo also violated the Act because Respondent terminated him pursuant to its unlawfully broad and ambiguous policy against “disorderly conduct” in the workplace. In its revised termination letter to Randazzo dated June 20, 2016, Respondent cited policies in its Employee Handbook that prohibit “Fighting, horseplay, practical jokes, or other disorderly conduct that could endanger or disturb any employee . . .” and

“Inappropriately threatening, intimidating, bullying, or coercing any employee . . . in any manner, including by use of abusive or vulgar language.” (Exh. L(2).)

There is reasonable cause to believe that these policies are overly broad, ambiguous and would be reasonably interpreted to restrict employees’ right to engage in union and other protected concerted activity. The Board evaluates whether an employer’s maintenance of certain work rules violates Section 8(a)(1) of the Act by considering “whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.” *Lafayette Park Hotel*, 343 NLRB 646, 646-47 (1998). If the rule does not explicitly restrict activity protected by Section 7, the violation is dependent upon whether (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. *Id.* Applying this standard, the Board has held that a work rule can be reasonably interpreted to restrict Section 7 activity where the rule is “vague and ambiguous and so overly broad as to fail to define permissible conduct thereby fortifying [the employer] with power to define its terms and inhibit employees” in exercising their rights under the Act. *Advance Transp. Co.*, 310 NLRB 920, 925, (1993) (finding unlawful a rule prohibiting “harassment, intimidation, distraction or disruption of another employee”).

In the present case, the Employee Handbook rules that Respondent cited in support of its discharge of Randazzo do not explicitly restrict Section 7 activity but are nonetheless overly broad and ambiguous such that they are reasonably interpreted as a prohibition against union and other protected concerted activity. *See, Id.* The rules’ use of vague terms like “disorderly conduct that could endanger or disturb any employee”

and “inappropriately . . . intimidating . . . or coercing any employee” are reasonably construed to preclude protected conduct such as advocating for employee rights and benefits to the company CEO or soliciting employees to join or support a union. *See, Ryder Truck Rental*, 341 NLRB 761 (2004), *enfd.* 401 F.3d 815 (7th Cir. 2005) (“the Act allows employees to engage in persistent union solicitation even when it annoys or disturbs” other employees). That Respondent invoked these policies in order to discipline Randazzo for his protected conduct at the June 17 staff meeting reinforces the conclusion that the rules impermissibly interfere with employee rights. *Advance Transp. Co.*, 310 NLRB at 925 (finding unlawful ambiguous rules that enable an employer to define their terms); *see also, Boulder City Hospital, Inc.*, 355 NLRB 1247, 1248 (2010) (an employer's invocation of a facially neutral “harassment policy” during a union campaign unlawfully restricts employees’ Section 7 rights). Respondent’s Employee Handbook rules cited in support of Randazzo’s termination therefore violate Section 8(a)(1) of the Act and Respondent discharged Randazzo pursuant to this unlawful policy, also in violation of Section 8(a)(1) of the Act.

e. Respondent Discharged Employee Sandra Kucuk Because of Her Union Activities

Respondent asserts that it discharged Sandra Kucuk because she exhausted her FMLA leave and an extended personal leave after she underwent a debilitating medical procedure. (Exh. P.) However, the evidence establishes that Respondent, before it moved to terminate Kucuk, knew that she was deeply involved with the Union as a member of the Union bargaining committee and harbored animus against the Union. (Exh. F, pg. 2-3, ¶ 5-7.) Respondent’s decision to terminate Kucuk employment must then be analyzed under the Board’s *Wright Line* standard. *Wright Line*, 251 NLRB 1083; *Dish Network*,

LLC 363 NLRB No. 141, slip op. at 2 (Mar. 3, 2016) (Board applies *Wright Line* in “mixed-motive” or “dual-motive” discharge cases).

Under *Wright Line*, the Board General Counsel establishes a *prima facie* case of unlawful discrimination by showing: 1) that the employee was engaged in protected activity, 2) that the employer had knowledge of that activity; and 3) that the employer harbored animus towards the employee’s protected activity. *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562, 563 (2004). Once it is thus established that protected conduct was a motivating factor in the employer’s adverse employment action, the burden of persuasion shifts to the employer to prove that it would have taken the same adverse employment action, even in the absence of the employee’s protected activity. *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985).

Applying these principles to the present case, the evidence clearly establishes a *prima facie* case of anti-Union discrimination against Kucuk. Kucuk engaged in extensive union activity, as she was one of the employees who initiated the Union organizing campaign. (Exh. E, pg. 2-3, ¶ 5.) Although Kucuk was out on leave throughout the Union campaign, and her activities may not have been obvious to Respondent, Respondent was explicitly and unambiguously notified of Kucuk’s lead role in the Union when Union Organizer Beriza Luciano told CEO Winakor that Kucuk was one of five employees on the Union bargaining committee. (Exh. F, pg. 3, ¶ 6-7.) Luciano’s May 26, 2016 email to Winakor naming Kucuk as a member of the bargaining committee firmly establishes Respondent’s knowledge of Kucuk’s union activity. Respondent’s animus against such protected union activity is manifest in Winakor’s

statements during the June 17 staff meeting, which related the clear message that Respondent resented employees for supporting the Union and intended to punish them for it. Thus, each element of a *prima facie* case under *Wright Line* is established here.

Respondent then bears the burden to establish that it would have discharged Kucuk for failing to return to work following her extended leave of absence, even in the absence of her union activity. The record, however, does not establish Respondent's defense. Respondent readily granted Kucuk a discretionary extension of her FMLA leave in April 2016, before her involvement in the Union campaign had been announced to CEO Winakor. (Exh. E, pg. 4-5, ¶ 10.) When Kucuk on May 26 contacted Human Resources Representative Marilyn McCarthy to inform her that Kucuk's doctor recommended that she return to work part-time at the end of her extended leave, but with physical restrictions, McCarthy expressed no problems with the request for accommodation. (Exh. E, pg. 5, ¶ 11.) This evidence strongly suggests that Respondent was willing to accommodate Kucuk's medical needs in returning to work before it became aware of the extent of her union activity.

The following week, however, after Winakor had an opportunity to review the email from Luciano identifying Kucuk as a member of the bargaining committee, Kucuk's return to work drew the attention of more senior management. Only then did Respondent, by HR Director Kurman, inform Kucuk that the work restrictions recommended by Kucuk's doctor were unacceptable to Respondent and that Kucuk would be discharged if she could not return without restrictions by the end of her extended leave period. (Exh. E, pg. 5, ¶ 12; Exh. M.) Kurman later told Kucuk that if she

was able to get medical clearance to return to work without restrictions, even on a part-time basis, that would be acceptable to Respondent. (Exh. N.)

Kucuk, in turn, complied with Respondent's request and provided a new letter from her doctor stating that she was cleared to return to work part-time without restrictions at the end of her extended leave period. (Exh. E, pg. 5, ¶ 12.) Yet despite receiving from Kucuk the medical clearance that Kurman had requested, Respondent nevertheless continued to refuse to allow Kucuk to come back to work. At this point, CEO Winakor himself got involved in the matter and told Kucuk that Respondent would extend her leave until after Kucuk's next doctor's visit, which was then scheduled for July 12. (Exh. E, pg. 5-6, ¶ 13.)

Per Winakor's request, Kucuk moved her doctor's appointment up to an earlier date of July 7, and after that visit, she provided Respondent with another updated recommendation from the doctor stating that Kucuk was cleared to work full-time with no restrictions – as Respondent desired – starting July 20. (Exh. E, pg. 6, ¶ 14.) However, Respondent still refused to allow Kucuk to return to work and instead summarily terminated her. In explaining its basis for the discharge, Respondent failed to explain why Kucuk's return to work on July 20 was unacceptable (Exh. P.), even though CEO Winakor had previously extended her leave through July 12. Thus, although Respondent had extended Kucuk's leave for more than two months after the exhaustion of her FMLA leave, it suddenly decided that it could not wait just one more week to have her return full-time without restrictions, as Respondent had insisted was necessary.

The evidence therefore establishes that Kucuk complied with every requirement Respondent imposed for her to return to work, but still Respondent fired her. Moreover,

the evidence shows that Respondent had no problem with Kucuk returning on a part-time basis with restrictions before it acquired knowledge of her union activity. This evidence strongly suggests that Respondent's asserted motivation for the discharge is pretext, and it would not have prevented Kucuk from returning to work in the absence of her union activity. The record thus does not establish Respondent's *Wright Line* defense, and there is reasonable cause to believe that Respondent violated Section 8(a)(3) of the Act in discharging Kucuk.

f. Respondent Unlawfully Changed an Employee's Work Hours without Notifying or Bargaining with the Union

The evidence further establishes reasonable cause to believe that Respondent violated Section 8(a)(5) of the Act by changing the work schedule of employee Ivisdenia Cassius-Linval without notifying or bargaining with the Union. Cassius-Linval's testimony establishes that Respondent had readily changed her work hours to accommodate her nursing school schedule before the Union was certified as the bargaining representative of the Unit. (Exh. I, pg. 2-3, ¶ 4-5.) However, after the Union was certified, Respondent decided to no longer accommodate employees' school schedules. Cassius-Linval testified that on June 7, 2016, Office Administrator Dawn Shea told her explicitly that Respondent was changing Cassius-Linval's work hours "back to whatever it was before the Union." (Exh. I, pg. 3, ¶ 5.) Respondent then returned Cassius-Linval's work hours to what it had been before the Union was certified, fully knowing that those hours did not comport with Cassius-Linval's school schedule. (*Id.*) As a result, Cassius-Linval has been prevented from working the number of weekly hours she had previously worked for Respondent.

The evidence establishes that Respondent failed to notify the Union of its intent to change Cassius-Linval's hours, nor did it provide the Union with an opportunity to bargain over the change. (Exh. F, pg. 2-3, ¶ 5-6.) Respondent has presented no evidence to suggest that such notification or bargaining occurred.

The Act prohibits an employer from unilaterally making changes to union-represented employees' terms and conditions of employment without first notifying and bargaining with the employees' representative. *N.L.R.B. v. Katz*, 369 U.S. 736 (1962). At a minimum, the employer is obliged to maintain the status quo and bargain with the union in good faith over proposed changes until impasse is reached. *Daily News of Los Angeles*, 315 NLRB 1236 (1994) (employer's unilateral discontinuance of its past practice of granting annual merit raises violated the Act because the raises had become an established condition of employment).

In the instant case, Respondent's unilateral change of Cassius-Linval's work hours represents a material change to a Unit employee's terms and conditions of employment and is a mandatory subject of collective bargaining. *Pepsi-Cola Bottling Co. of Fayetteville, Inc.*, 330 NLRB 900, 904, n.26 (2000). Respondent could not lawfully make this change without first notifying and providing the Union an opportunity to bargain over it. See *Kurziel Iron of Wauseon, Inc.*, 327 NLRB 155, 155-56 (1998) (employer violates Section 8(a)(5) by making, or even announcing, unilateral changes to union-represented employees' work schedules). Accordingly, there is reasonable cause to conclude that Respondent has violated Section 8(a)(5) of the Act.

B. The Just and Proper Standard

The Second Circuit has recognized that Section 10(j) is among those “legislative provisions calling for equitable relief to prevent violations of a statute” and courts should grant interim relief thereunder “in accordance with traditional equity practice, ‘as conditioned by the necessities of public interest which Congress has sought to protect.’” *Morio v. North American Soccer League*, 632 F.2d 217, 218 (2d Cir. 1980) (quoting *Seeler v. The Trading Port, Inc.*, 517 F.2d at 39-40). In applying these principles, the Second Circuit has concluded that Section 10(j) relief is warranted where serious and pervasive unfair labor practices threaten to render the Board’s processes “totally ineffective” by precluding a meaningful final remedy (*Kaynard v. Mego Corp.*, 633 F.2d at 1034 (discussing *The Trading Port, Inc.*, 517 F.2d at 37-38)); or where interim relief is the only effective means to preserve or restore the status quo as it existed before the onset of the violations (*The Trading Port, Inc.*, 517 F.2d at 38); or where the passage of time might otherwise allow the respondent to accomplish its unlawful objective before being placed under any legal restraint (*Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1055). *Accord: Kreisberg v. HealthBridge Management, LLC*, 732 F.3d at 143; *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d at 469; *Hoffman v. Inn Credible Caterers, Ltd.*, 247 F.3d at 368 (Section 10(j) relief “is just and proper when it is necessary to prevent irreparable harm or to preserve the status quo”); *Silverman v. Major League Baseball Player Relations Comm., Inc.*, 880 F. Supp. 246, 255 (S.D.N.Y.), *affd.* 67 F.3d 1054 (2d Cir. 1995).

As the Second Circuit stated in, *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d at 469, the “principal purpose of a Section 10(j) injunction is to guard against harm to the collective bargaining rights of employees” such that delay in remedying

unfair labor practices does not impair or undermine future bargaining efforts. *Id.*; *see also, Hoffman v. Inn Credible Caterers Ltd.*, 247 F.3d at 368-69. Moreover, the Second Circuit has emphasized that time is truly of the essence in cases involving discharged union supporters, as “. . . delay is a significant concern because the absence of employees who support a union can quickly extinguish organizational efforts and reinforce fears within the workforce concerning the consequences of supporting a unionization campaign.” *Paulsen v. Remington Lodging & Hospitality, LLC*, 773 F.3d at 469 (citations omitted). The Second Circuit precedents further demonstrate that injunctive relief under Section 10(j) is just and proper where the reinstatement of key union supporters is necessary to prevent employees from losing of interest in a nascent union campaign. *See e.g., Kaynard v. Palby Lingerie, Inc.*, 625 F.2d at 1053 (reinstatement of two “active and open union supporters” was just and proper because their discharge “risked a serious adverse impact on employee interest in unionization”).

Other circuit courts have emphasized that unfair labor practices committed by an employer in the period after a union has been selected by employees, but before a first collective-bargaining agreement is reached can produce particularly harmful effects on employees’ bargaining rights, absent interim relief. For example, the Eleventh Circuit has noted that bargaining units are “highly susceptible to management misconduct” during the period when a union has only recently been certified and bargaining for an initial contract is ongoing. *Arlook v. S. Lichtenberg & Co., Inc.*, 952 F.2d 367, 373 (11th Cir. 1992) (citation omitted). In such circumstances, “the Board’s ability to foster peaceful labor negotiations through normal procedures would be imperiled,” without a Section 10(j) injunction. *Id.* at 374; *see also, Ahearn v. Jackson Hosp. Corp.*, 351 F.3d

226, 239 (6th Cir. 2003) (noting the “inherently chilling effect” of employer unfair labor practices committed while initial contract bargaining is ongoing).

District courts in the Second Circuit applying Section 10(j) have found that an employer’s repeated commission of varied unfair labor practices demonstrates the employer’s failure to respect employees’ rights under the Act or the union that employees have chosen to represent them. *See e.g., Mattina v. Kingsbridge Heights Rehabilitation and Care Center*, 2008 WL 3833949 at *24 (S.D.N.Y. 2008). Injunctive relief is appropriate in these situations because “absent prompt action,” the employer’s unlawful conduct will persist and will continue to undermine employee support for and confidence in their bargaining representative. *Id.*

1. The Just and Proper Standard is Met

Respondent’s repeated and various unfair labor practices in the present case – including the discharges of two lead Union advocates and bargaining committee members because of their protected activity, the discriminatory withholding of wage increases and denial of work opportunities to employees because they selected the Union as their bargaining representative, and the unilateral changes to employees’ terms and conditions of employment – have already had a deleterious chilling effect on employees’ exercise of Section 7 rights. Employees have, in large numbers, abandoned their once-robust support for the Union and have instead disengaged from the Union and remain fearful to openly assist the Union in light of Respondent’s unlawful retaliatory conduct. The dramatic loss of employee support for the Union comes at a critical time when the Union must retain employee support and engagement in order to effectively negotiate an initial collective-bargaining contract with Respondent.

Injunctive relief under Section 10(j) of the Act is therefore “just and proper” in this case because absent an interim remedy returning the unlawfully discharged employees to the workplace, rescinding Respondent’s unlawful unilateral changes and assuring employees of their rights to engage in union and protected concerted activity, Respondent will continue to violate the Act, flout the Union and convey to employees that their selection of the Union as their bargaining representative was meaningless. The employees, in turn, will learn to refrain from engaging in Section 7 activity out of fear that such protected activity will elicit harsh retribution from Respondent, and the Union’s status as the employees’ collective-bargaining representative will be irreparably undermined.

a. Employee Engagement with the Union Has Been Severely Chilled

Respondent’s unlawful conduct has already had a pervasive chilling effect on employees’ willingness to engage with the Union or participate in other protected concerted activities. The Union once enjoyed overwhelming support among the Unit (Exh. Q), but now, in the wake of Respondent’s unfair labor practices, employees who once supported the Union are telling Union Organizer Beriza Luciano that they no longer think it was a good idea to select the Union as their bargaining representative. (Exh. F, pg. 4, ¶ 8.) Employees have largely withdrawn from the Union, for example by refusing to assist the Union in pursuing charges with the Board (Exh. F, pg. 5, ¶ 10; Exh. G, pg. 9, ¶ 14) and declining to attend Union meetings. (Exh. J, pg. 3-4, ll. 15-12.)

The decline of employee engagement with the Union is directly attributable to Respondent’s unlawful conduct. Numerous employees have told their co-worker Carmine Randazzo and Union Organizer Luciano that they now feel forced to refrain

from union activity out of fear of retaliation by Respondent.⁵ (Exh. G, pg. 8-9, ¶ 13-14; Exh. F, pg. 4-5, ¶ 8-10.) Employees have seen two of the foremost Union supporters summarily discharged because of their protected activity, with seemingly no adverse consequence for Respondent, causing them to conclude that neither the Union nor the government can protect their rights. (Exh. G, pg. 8, ¶ 13.) As observed by the District Court in *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, *1, (S.D.N.Y. Jun 6, 1986), “no other worker in his right mind would participate in a union campaign” under such circumstances. *See also, Abbey’s Transp. Servs., Inc. v. NLRB*, 837 F.2d 575, 576 (2d Cir. 1988) (employees are “certain to be discouraged from supporting a union if they reasonably believe it will cost them their jobs”). Many employees have concluded, moreover, that Respondent is free to unilaterally alter their terms and conditions of employment without regard to the Union and withhold wages and benefits from employees because they supported the Union, which has caused employees to devalue the utility of Union representation itself. (Exh J, pg. 5-7, ll. 4-2.) Respondent has thus successfully imparted to its employees the unlawful message that collective-bargaining through the Union is futile and that they too may be targeted for their union activity.

Respondent’s unlawful conduct has been particularly harmful to the collective-bargaining process, as employees have been too fearful to assist the Union in negotiating an initial collective-bargaining agreement with Respondent. Whereas employees and the Union had originally selected five Unit members to serve on the Union bargaining

⁵ Hearsay testimony regarding employee statements reflecting the effect of Respondent’s unfair labor practices are admissible in support of this Petition for preliminary injunction. *See, Mullins v. City of New York*, 626 F.3d 47, 48 (2nd Cir. 2010) (“hearsay testimony is admissible to support the issuance of a preliminary injunction”); *see also, Asseo v. Pan American Grain Co., Inc.*, 805 F.2d 23, 26 (1st Cir. 1986) (granting injunctive relief under Section 10(j) of the Act based on hearsay evidence).

committee, only one current employee remains willing to participate in the negotiations. (Exh. J, pg. 3, ll. 1-10.) Two of the original five bargaining committee members – Anthony Randazzo and Sandra Kucuk – have been unlawfully discharged, while two more – Maria Lizardo and Edwin Martinez – have withdrawn from the committee out of fear of retaliation by Respondent. (*Id.*) No other workers have been willing to risk their jobs to fill such a leadership role in the Union (*Id.*), and few employees are even willing to meet privately at Union meetings to discuss bargaining issues or strategies. (Exh. J, pg. 3-4, ll. 15-12.) Unit members’ withdrawal of support for the Union and their refusal to assist the Union in bargaining seriously disadvantages the Union in its ongoing negotiations with Respondent and frustrates the Union’s ability to understand and address workplace issues through the bargaining process. (*Id.*)

b. Immediate Relief Is Necessary to Prevent Remedial Failure

Unless Respondent is promptly enjoined from violating its employees’ rights and unless an effective remedy for Respondent’s unfair labor practices is promptly implemented, the employees will withdraw further from the Union, the collective-bargaining process will be further undermined, and the Union will be permanently unable to regain the status it once enjoyed among the Unit. As more time passes before a remedy is effectuated, employees will come to understand that supporting the Union or engaging in other protected activity will likely result in their discharge and that neither the Union nor the Board can protect them in an effective or timely manner. *See, Kaynard v. Palby Lingerie*, 625 F.2d at 1053; *Silverman v. Whittall & Shon, Inc.*, 125 LRRM at 2151, 1986 WL15735 at *1 (S.D.N.Y. 1986); *Hoffman v. Cross Sound Ferry Service, Inc.*, 109 LRRM 2884, 2889-89, 1982 WL2016 at *6 (D. Conn. 1982).

The harm Respondent has inflicted on its employees' Section 7 rights will not likely be undone by a final Board order because that order, issued years later, will come too late to erase the chilling effect of Respondent's misconduct. *See, Aguayo v. Tomco Carburetor Co.*, 853 F.2d 744, 749-50 (9th Cir. 1988); *Angle v. Sacks*, 382 F.2d 655, 660-61 (10th Cir. 1967); *Paulsen v. Renaissance Equity Holdings, LLC*, 849 F. Supp. 2d 335, 347 (E.D.N.Y. 2012) ("The purpose of securing injunctive relief is to ensure that a final adjudication will be meaningful and will not have come too late"). The delayed remedy that could result from ordinary Board proceedings will fail to serve this purpose. By the time the Board order issues, the employees will have "observed that other workers who had previously attempted to exercise rights protected by the Act had been discharged and must wait . . . years to have their rights vindicated." *Silverman v. Whittall & Shon, Inc.*, 125 LRRM 2150, 2151, 1986 WL 15735, *1. Thus, absent injunctive relief, the Board's final order will be rendered a nullity. Only an immediate remedy for Respondent's unfair labor practices will convince Unit employees that they need not fear retaliation and that they are free to support the Union or engage in other protected concerted activities. *See e.g., Silverman v. Whittall & Shon, Inc.*, 125 LRRM at 2151, 1986 WL15735 at *1; *see also, Schaub v. West Michigan Plumbing & Heating, Inc.*, 250 F.3d 962, 971 (6th Cir. 2001); *Pye v. Excel Case Ready*, 238 F.3d 69, 74-75 (1st Cir. 2001); *Sharp v. Webco Indus., Inc.*, 225 F.3d 1130, 1135, 1136 (10th Cir. 2000); *NLRB v. Electro-Voice, Inc.*, 83 F.3d at 1572-73.

Injunctive relief is also "just and proper" in this case because the passage of time before the issuance of an eventual Board order requiring Respondent to reinstate terminated employees Randazzo and Kucuk will reduce the likelihood that the

discriminatees will accept reinstatement, whenever it is finally required. *See e.g., Blyer v. Domsey Trading Corp.*, 139 LRRM 2289, 2291, 1991 WL 148513, at *3 and 1991 WL 150817 (E.D.N.Y. 1991); *Silverman v. Reinauer Transportation*, 130 LRRM 2505, 2508, 1988 WL 159172, at *4 (S.D.N.Y. 1988), *affd. mem.* 880 F.2d 1319 (2d Cir. 1989). Without an interim reinstatement order, therefore, it is likely that a final Board reinstatement order will be meaningless because the leading union adherents will have found work elsewhere and will not return to this Unit. As a result, Respondent will effectively have accomplished its unlawful goal of permanently ridding the workplace of Union supporters, and the Unit will likely be deprived of the Union's most articulate and committed supporters, thereby permanently stifling the Union's organizing drive and irreparably undermining the Union's status as bargaining representative. *See e.g., Arlook v. S. Lichtenberg & Co.*, 952 F.2d at 370, 373-74. Indeed, several Unit employees have already left Respondent's workplace and sought employment elsewhere in order to escape the coercive and retaliatory atmosphere created by Respondent's unlawful conduct. (Exh. J, pg. 7, ll. 3-8.) Serious remedial failure will result if the Union's support is further depleted by additional Unit employees leaving the workplace or finding alternate employment.

Furthermore, injunctive relief is necessary to foster collective bargaining between Respondent and the Union. As described above, Respondent's unlawful conduct has virtually decimated the Union's bargaining committee, as employees have been refusing to participate in bargaining or meet with Union officials to discuss bargaining issues or strategies. Without such employee participation, the Union is unable to fully appreciate or advocate for the employees' interests in bargaining. A timely remedy that effectively

reassures employees of their right to assist the Union in bargaining is thus particularly important to restore the Union's sources of communication to and from the Unit and ensure that the parties can bargain an initial contract on a level playing field.

c. Balance of Equities Supports Injunctive Relief

The balance of hardships clearly favors granting interim relief. Respondent will suffer little, if any, harm if an interim order requiring reinstatement of Anthony Randazzo and Sandra Kucuk is granted. Such an order would merely require Respondent to reinstate experienced and skilled former employees, whose statutory rights outweigh any employment rights of workers Respondent may have hired to replace them. *Paulsen v. Remington Lodging & Hospitality, LLC* 773 F. 3d at 469 (“the rights of improperly discharged employees take priority of the rights of those hired to replace them”). Indeed, Respondent has already offered to reinstate Kucuk to a new supervisory position outside of the bargaining unit represented by the Union (Exh. C, ¶ 10; Exh. J, pg. 4-5, ll. 20-3), demonstrating that Respondent would suffer no adverse consequences from reinstating the unlawfully discharged workers.

Nor would Respondent suffer any undue hardship from an order requiring it to rescind its unilateral changes to employees' schedules, reinstitute the practice of allowing Unit employees to work at other Respondent facilities and grant wage increases to Unit employee commensurate with the raises granted to employees at other facilities. Respondent was not lawfully permitted to change Unit employees' terms and conditions of employment without bargaining with the Union or deny employees wages and benefits because of their union activities, so Respondent will suffer no undue burden from being required to reverse these unfair labor practices. Moreover, interim relief under these

circumstances greatly serves the public interest by ensuring that Respondent's unfair labor practices do not succeed in thwarting a nascent union organizing campaign. *See e.g., Frankl v. HTH Corp.*, 650 F.3d 1334, 1365-66 (9th Cir. 2011) ("the public interest is to ensure that an unfair labor practice will not succeed"); *Small v. Avanti Health Systems*, 661 F.3d 1180, 1197 (9th Cir. 2011).

Finally, an interim order requiring Respondent CEO Alan Winakor to read a notice to employees reassuring them of their rights and promising that Respondent will not discharge them in retaliation for their union or other protected activities, will not withhold wage increases or prevent employees from working in other Respondent facilities because of their union activity, and will not make changes to employees' terms and conditions of employment without notifying and bargaining with the Union, is required to counteract the adverse effects of Respondent's unlawful conduct. It was CEO Winakor, after all, who made the unlawful statements to employees about Respondent withholding employees' benefits because of their union activity and implying the futility of bargaining through the Union. Therefore, only a notice read to employees by Winakor will have the effect of reversing his previous unlawful statements and conduct. At a minimum, Respondent should be required to permit a Board agent to read the District Court's injunction order to employees, in the presence of a Union representative, at a staff meeting on working time. Without receiving such immediate assurances, employees' reluctance to engage with the Union and exercise their Section 7 rights will likely persist.

In sum, there is ample evidence of irreparable harm to employees' Section 7 rights and to the Union's organizing campaign that will result in the absence of interim

relief. Injunctive relief is therefore essential to restoring the status quo as it existed before Respondent's unfair labor practices, as it will help remove the chill created by the unlawful discharges, restore the Union's leadership to the workplace, prevent erosion of the Union's support among the Unit, preserve the Union's ability to bargain effectively for a first contract on behalf of the employees, and prevent nullification of the Board's final order.

VI. CONCLUSION

In light of the foregoing, Petitioner respectfully submits that the evidence establishes that there is reasonable cause to believe that Respondent violated Section 8(a)(1), (3) and (5) of the Act as alleged in the Petition and that the injunctive relief sought is "just and proper."

Dated at Brooklyn, New York, October 20, 2016.

Respectfully submitted,


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