18-1201

UNITED STATES COURT OF APPEALS

FOR THE

DISTRICT OF COLUMBIA

UNITED STATES COURT OF APPEALS
FOR DISTRICT OF COLUMBIA CIRCUIT
FILED JUL 3 1 2018
CLERK

CIRCUS CIRCUS CASINOS, INC. d/b/a CIRCUS CIRCUS LAS VEGAS	)	
Petitioner,	)	
and	)	**PETITION FOR REVIEW**
NATIONAL LABOR RELATIONS BOARD,	)	
Respondent.	)	

Pursuant to Section 10(f) of the National Labor Relations Act, 29 U.S.C. § 160(f), and Fed. R. App. P. 15, Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas petitions the Court to review and set aside the National Labor Relations Board's Decision and Order in *Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas and Michael Schramm*, 366 NLRB No. 110 (June 15, 2018). A copy of the Decision and Order is attached as Exhibit "A."

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WHEREFORE, Circus Circus prays that its Petition for Review of the Board's Decision and Order be granted; that upon such review the Board's Decision and Order be set aside and denied enforcement; and that Circus Circus be granted whatever other and further relief as the Court deems appropriate.

Dated this 31st day of July, 2018.

Respectfully submitted,
JACKSON LEWIS P.C.

/s/ Paul T. Trimmer

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CERTIFICATE OF SERVICE

In addition to filing this **PETITION FOR REVIEW** in the above captioned matter via the court's electronic filing system, we hereby certify that copies have been served this 31st day of July, 2018, by First Class Mail or email, upon:

Mr. Cornele A. Overstreet
Regional Director
National Labor Relations Board
Region 28
2600 N. Central Avenue
Suite 1400
Phoenix, Arizona 85004-3019

Michael Schramm
3125 West Warm Springs Road
Unit 1627
Henderson, Nevada 89014

/s/ Emily Santiago
An Employee of Jackson Lewis P.C.

EXHIBIT A

EXHIBIT A

NOTICE: This opinion is subject to formal revision before publication in the bound volumes of NLRB decisions. Readers are requested to notify the Executive Secretary, National Labor Relations Board, Washington, D.C. 20570, of any typographical or other formal errors so that corrections can be included in the bound volumes.

Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas *and* Michael Schramm. Case 28–CA–120975

June 15, 2018

DECISION AND ORDER

CHAIRMAN RING AND MEMBERS PEARCE AND MCFERRAN

On December 30, 2014, Administrative Law Judge Mary Miller Cracraft issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. The Respondent also filed a motion to reopen or supplement the record, the General Counsel filed an opposition to the motion, and the Respondent filed a reply to the opposition.[1]

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions, as further explained below, to amend the remedy,[3] and to adopt the recommended Order as modified and set forth in full below.[4]

We adopt the judge's finding that the Respondent violated Section 8(a)(1) by denying employee Michael Schramm a *Weingarten*[5] representative at a December 13, 2013 due process meeting concerning his December 10 suspension. Contrary to our dissenting colleague, we agree with the judge that Schramm's statement—that he had called the Union three times, the Union did not show up and that he was at the meeting without representa-

[1] The Respondent's motion to reopen or supplement the record seeks the admission of further documents relating to the judge's finding of an unlawful threat against Michael Schramm. Under Sec. 102.48(c)(1) of the Board's Rules and Regulations, a "motion to reopen the record must state briefly the additional evidence sought to be adduced, why it was not presented previously, and that, if adduced and credited, it would require a different result. Only newly discovered evidence, evidence which has become available only since the close of the hearing, or evidence which the Board believes may have been taken at the hearing will be taken at any further hearing." In addition, the Board has held that newly discovered evidence is "evidence which was in existence at the time of the hearing, and of which the movant was excusably ignorant." *Owen Lee Floor Service*, 250 NLRB 651, 651 fn. 2 (1980), enfd. mem. 659 F.2d 1082 (6th Cir. 1981). A motion to admit newly discovered evidence "must also show facts from which it can be determined that the movant acted with reasonable diligence ... ." Id. The evidence the Respondent seeks to introduce are work-order records for the month of November 2013. These records are routinely created and maintained in the Respondent's computerized Hotel Service Optimization System, or "HotSOS," and the Respondent was certainly aware of their existence. They are not newly discovered, nor were they unavailable at the time of the hearing, which was held October 20–22, 2014. Moreover, the Respondent has not adequately explained why, with reasonable diligence, the evidence could not have been presented at the hearing. Thus, we deny the motion.

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

Chairman Ring dissents from his colleagues' affirmance of the judge's finding that the Respondent violated Sec. 8(a)(1) by ignoring Michael Schramm's request for the presence of a union representative at a disciplinary interview. The right to a union representative at a disciplinary interview arises "only in situations where the employee requests representation." *NLRB v. J. Weingarten Inc.*, 420 U.S. 251, 256–257 (1975); see also *Appalachian Power Co.*, 253 NLRB 931, 933–934 (1980) (representation request must be initiated by employee), enfd. mem. 660 F.2d 488 (4th Cir.), cert. denied 454 U.S. 866 (1981); *Costco Wholesale Corp.*, 366 NLRB No. 9, slip op. at 4 (2018) (dismissing *Weingarten* allegation in absence of request for representation); *Kohl's Food Co.*, 249 NLRB 75, 78 (1980) (same). In Chairman Ring's view, the judge and the majority err in finding that Schramm's statements during his December 13, 2013 disciplinary interview amounted to a legally sufficient request. As the majority's discussion reveals, Schramm's efforts to secure a union representative were directed to the Union, not the Respondent. To the latter, Schramm said only that he had unsuccessfully tried to contact the union hall to obtain a representative and that he was attending the meeting without one. He did not tell the Respondent that he would like a representative, or ask the Respondent whether he needed or should have one. He did not request an alternative representative, even though his shop steward worked right across the hallway. Nor did he seek a delay so that a representative could be found. Thus, Chairman Ring would find that Schramm did not make a request that would trigger a Sec. 7 right to a *Weingarten* representative.

[3] In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in relevant part 859 F.3d 23 (D.C. Cir. 2017), we amend the remedy section of the judge's decision to require that the Respondent compensate Michael Schramm for his reasonable search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

[4] We shall modify the judge's recommended Order in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

The Respondent contends that Schramm's employment was temporary and therefore, if the Board finds that Schramm was discharged unlawfully, it should modify its standard reinstatement and make-whole remedies accordingly. However, the Respondent's collective-bargaining agreement permitted the Union to extend the term of Schramm's employment, and the record does not establish that it would have declined to do so absent his unlawful discharge. Accordingly, we will order the standard remedies, leaving the specifics to be resolved at compliance.

[5] *NLRB v. J. Weingarten, Inc.*, supra, 420 U.S. at 256–258.

tion—was sufficient to put the Respondent on notice that he desired union representation at the meeting.

Board law is clear that "[n]o magic or special words are required [to trigger a *Weingarten* request]. . . . It is enough if the language used by the employee is reasonably calculated to apprise the [e]mployer that the employee is seeking such assistance." *Houston Coca Cola Bottling Co.*, 265 NLRB 1488, 1497 (1982). *Weingarten* requests are interpreted liberally, and "need only be sufficient to put the employer on notice of the employee's desire for union representation." *Consolidated Edison Co. of New York*, 323 NLRB 910, 916 (1997). Statements or inquiries like "I would like someone there that could explain to me what was happening,"[6] "Should I have someone in here with me, someone from the union,"[7] and whether the employee needed a witness[8] have been found sufficient to trigger *Weingarten* rights.[9]

Here Schramm's statements were sufficient to put the Respondent on notice that he desired representation. When he was suspended pending investigation on December 10, Schramm telephoned the Union and left a message seeking help. On December 12, after HR representative Airth Colin contacted Schramm, notifying him that the due process meeting was set for December 13, and advising him to bring a steward if he desired representation, Schramm left additional messages with the Union for assistance, stating the date and time for the meeting with human resources. On December 13, before entering the office where the meeting was held, Schramm looked around for a Union representative responding to his messages. Once in the office, Schramm announced to the Respondent representatives—including Colin—that he had "called the Union three times [and] nobody showed up, I'm here without representation." We agree with the judge that Schramm's statement constitutes a request for representation. As explained by the judge, "[s]ubsumed in the statement is a reasonably understood request to have someone present at the meeting."

Accordingly, we adopt the judge's finding that the Respondent violated Section 8(a)(1) by failing to permit Schramm representation and continuing the due process meeting.[10]

ORDER

The National Labor Relations Board orders that the Respondent, Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas, Las Vegas, Nevada, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discharge if they engage in protected concerted activities.

(b) Refusing the requests of employees for union representation during investigatory meetings which they reasonably believe may result in discipline.

(c) Suspending, discharging or otherwise discriminating against employees because they engage in protected concerted activities.

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

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

(a) Within 14 days from the date of this Order, offer Michael Schramm full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Schramm whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Michael Schramm for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful suspension and discharge of Michael Schramm, and within 3 days thereafter, notify Schramm that this has been done and that the suspension and discharge will not be used against him in any way.

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[6] *Southwestern Bell Telephone Co.*, 227 NLRB 1223, 1223 (1977).

[7] *Illinois Bell Telephone Co*, 251 NLRB 932, 937–938 (1980), enfd. in relevant part 674 F.2d 618 (7th Cir. 1982).

[8] *Bodolay Packaging Machinery*, 263 NLRB 320, 325 and fn. 8 (1982).

[9] See also *New Jersey Bell Telephone Co.*, 300 NLRB 42, 49 (1990), enfd. 936 F.2d 144 (3d Cir. 1991).

[10] Our dissenting colleague would find no *Weingarten* violation, noting that Schramm did not request an alternative representative when a union representative did not show up; nor did he seek a delay of the meeting to find a representative. But the law is clear; once an adequate request for representation is made, an employer has three options: (1) grant the request, (2) present the employee with the option of continuing the interview unrepresented or forgoing the interview altogether, or (3) deny the request and terminate the interview. See, e.g., *E.I. Dupont de Nemours & Co.*, 362 NLRB No. 98, slip op. at 1 fn. 2 (2015); *New Jersey Bell Telephone*, supra, 300 NLRB at 48–49. Here, the Respondent failed to present Schramm with the choice of participating in the interview unaccompanied by his representative or having no interview at all; instead, it unlawfully continued with the interview without affording him representation.

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

(f) Within 14 days after service by the Region, post at its Las Vegas, Nevada facility copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at its Las Vegas facility at any time since November 21, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. June 15, 2018

John F. Ring, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit or protection

Choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten you with discharge if you engage in protected concerted activities.

WE WILL NOT refuse the requests of employees for union representation during investigatory interviews they reasonably believe may result in discipline.

WE WILL NOT suspend, discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

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

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

WE WILL make Michael Schramm whole for any loss of earnings and other benefits resulting from his suspension and discharge, less any net interim earnings, plus interest, and WE WILL also make him whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Michael Schramm for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Michael Schramm, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the suspension and discharge will not be used against him in any way.

CIRCUS CIRCUS CASINOS, INC. D/B/A CIRCUS CIRCUS LAS VEGAS

The Board's decision can be found at www.nlrb.gov/case/28–CA–120975 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Andrew Gollin, Esq., for the General Counsel.
Paul Trimmer, Esq., for Respondent.

DECISION

MARY MILLER CRACRAFT, Administrative Law Judge. In the fall of 2013,[1] Charging Party Michael Schramm (Schramm) worked for Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas (Respondent) as a temporary journeyman carpenter for special projects. After joining a safety meeting discussion about employee exposure to second-hand marijuana smoke, he was suspended and discharged for the stated reason that he failed or refused to attend mandatory testing and fitting for a respirator.[2] The General Counsel alleges that Schramm's suspension and discharge were actually due to Schramm's protected, concerted activity of joining with other employees who were complaining about a term and condition of employment and thus the suspension and discharge violated Section 8(a)(1) of the National Labor Relations Act (the Act).[3] The complaint also alleges that Schramm was threatened by his supervisor because Schramm complained about exposure to second-hand marijuana smoke and that Schramm was denied representation at the investigatory interview prior to his discharge.

On the entire record,[4] including my observation of the demeanor of the witnesses,[5] and after considering the briefs filed by counsel for the General Counsel and counsel for the Respondent, the following findings of fact and conclusions of law are made.

I. JURISDICTION AND LABOR ORGANIZATION STATUS

Respondent admits it is a limited liability company with a place of business in Las Vegas, Nevada, where it operates a hotel and casino. It further admits it meets the Board's jurisdictional standard for retail operations and that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that United Brotherhood of Carpenters and Joiners of America, Southwest Regional Council of Carpenters and its affiliated Local Union #1780 (the Union) is a labor organization within the meaning of Section 2(5) of the Act. Thus this dispute affects interstate commerce and the Board has jurisdiction of this case pursuant to Section 10(a) of the Act.

I. FACTS

There are 176 employees in Respondent's engineering department including laborers, painters, carpenters, and engineers. These employees comprise four separate bargaining units represented by four different unions. Rafe Cordell (Cordell), chief engineer, is in charge of the department while Aaron Nelson (Nelson) is immediately below him serving as assistant chief. The department performs maintenance, repair, construction, and remodels. Below Cordell and Nelson, six section managers provide direct day-to-day supervision. Cordell is consulted for guidance regarding disciplinary issues. Employees work three shifts which cover 24 hours each day, 7 days per week.

In September, the engineering department hired six temporary journeymen carpenters including Schramm. Carpenters work in teams and Schramm worked with another temporary journeymen carpenter, Andrew Saxton (Saxton). The two of them were assigned to install anti-theft metal doorjamb guards on all guest room doors using tamperproof metal screws. They also installed aluminum channels on window slides to restrict window openings. There are 3767 guest rooms. The temporary journeymen carpenters were supervised by Carpenter Foreman Brandon Morris (Morris).[6] Schramm encountered frequent exposure to second-hand cigarette smoke as well as second-hand marijuana smoke on entering the guest rooms to perform his work.

Complaint regarding Employee Exposure to Second-hand Marijuana Smoke

Weekly safety talks, usually held at four times each Thursday, are conducted in the engineering department by Henry Simms (Simms), training facilitator and senior watch engineer. Employees are on the clock during these meetings and are required to attend. Schramm and Saxton along with about 12

[1] All dates are in 2013 unless otherwise referenced.

[2] Schramm filed the unfair labor practice charge on January 22, 2014. Complaint issued on June 30, 2014. Hearing was held in Las Vegas on October 20–22, 2014.

[3] 29 U.S.C. §158(a)(1).

[4] Pursuant to Respondent's Motion to Correct the Transcript, the e correction is made at page 394, line 2: Insert "don't" between "honestly" and "recall." Further minor errors are corrected as follows: Page 63, line 4: change "eschew" to "skew;" page 74, line 5: change "implied" to "applied;" page 135, line 9: change "in" to "him;" page 412, line 19: change "right-line" to "*Wright Line;*" page 575, line 13, insert "JUDGE CRACRAFT:" after "Honor" and before "Well."

[5] When necessary, credibility resolutions have been made based upon a review of the entire record and all exhibits in this proceeding. Witness demeanor and inherent probability of the testimony have been utilized to assess credibility. Testimony contrary to my findings has been discredited on some occasions because it was in conflict with credited testimony or documents or because it was inherently incredible and unworthy of belief.

[6] At the time of the hearing, Morris no longer worked as carpenter foreman but he continued employment with Respondent.

engineers routinely attended the 3 p.m. safety talk. Either Cordell or Nelson usually attended as well.

At an Early November Safety Meeting which Cordell did not attend, Schramm and Engineer Fred Teeney (Teeney) voiced concern about workplace exposure to second-hand marijuana smoke

Schramm testified that at a safety meeting in early November, an engineer named Fred [Teeney] asked what Respondent was going to do about the second-hand marijuana smoke in the guest rooms because it was affecting him. Schramm spoke up saying he had concerns too. According to Schramm, assistant chief Nelson told Teeney that Respondent would look into the matter. Tenney's testimony as well as Nelson's was similar to Schramm's.[7]

Simms testified that Teeney brought up the topic of second-hand marijuana smoke at a safety meeting. He could not recall if the meeting was in November or not. Simms remembered telling Teeney that exposure to marijuana smoke was not a safety issue – there are no OSHA regulations on it—it is a security issue. Simms did not recall that Schramm spoke at this meeting. Simms believed that Cordell did not attend this meeting but was at a later meeting when Teeney brought up this subject again.

Because he had received no immediate answer from Respondent, Teeney filed a grievance regarding exposure to second-hand marijuana smoke requesting a procedure be put in place to remedy the situation. Teeney's grievance is dated November 12.

Based on the relative strength of their recollections, I find that both Schramm and Teeney spoke up at this meeting. Both Nelson and Simms conditioned their testimony noting the relative weakness of their recollections for dates and for which employees actually spoke at this meeting as opposed to subsequent meetings.

At a Second Safety Meeting Later in November or in Early December, Teeney and Schramm voiced concern again about workplace exposure to second-hand marijuana smoke

Then at later safety meeting—which Schramm thought was " getting near" Thankgiving—maybe the Thursday a week before (i.e., November 21) or maybe the Wednesday immediately before Thanksgiving (i.e., November 27)—Tenney raised the issue again stating a concern that he might test positive on a drug test due to exposure to second-hand marijuana smoke. Any on-the-job accident involving property damage or physical injury triggers drug testing of the employee(s) involved.[8] Teeney recalled raising the issue again because Simms had not responded to his earlier statements of concern.

Both Cordell and Nelson were present at this meeting. Cordell opined, according to Schramm, that the employees did not need to worry about a positive drug test due to exposure to second-hand marijuana smoke. Schramm then spoke up stating that Cordell was not a professional in evaluating exposure to second-hand smoke and a professional should make that determination. Schramm shared his experience at a prior employer where, he stated, employees were inundated with marijuana smoke – so much that they were inhaling it. Cordell once again said there was nothing to fear and Schramm said Cordell did not know this for sure. Cordell told employees to call security if they smelled marijuana smoke.

Tenney, who placed this meeting at "the end of November" and "before Thanksgiving," and "possibly the 21st," objected when Cordell told employees to call security and stated that he had done that on prior occasions and security would not do anything. Cordell said employees could tell their supervisor and Schramm objected that this would not solve the problem. He asked for an answer – a policy.

Similarly, Respondent's witness Brian Machala, locksmith, attended a safety meeting on an unspecified date in November where he recalled that Teeney brought up the subject of second-hand marijuana smoke in certain areas of the building where he was working. Schramm mentioned that he had run into the same situation. Cordell responded that employees should call their senior watch or call security. Someone mentioned that there was no procedure and Cordell stated that he would write a procedure. Either Teeney or Schramm expressed concern about possibly failing a drug test due to second-hand marijuana smoke. There was back and forth between Cordell and Teeney and Machala thought Cordell showed signs of frustration at having to repeat the same thing over and over. Machala also remembered there was something said about, "are you a doctor? Are you qualified to know the levels or, you know, how you would pass or fail?" Cordell responded that he doubted anyone would show up positive on a "pee test" by getting a whiff in the hallway.

Although Cordell recalled that Teeney raised the issue of second-hand marijuana smoke at a late November safety meeting, Cordell recalled that the meeting involving Teeney and Schramm both speaking up about second-hand marijuana smoke was a shift change meeting on December 6.[9]

Cordell was certain of the December 6 date because it was the date when he announced Respondent's policy for dealing with second-hand marijuana smoke. Thus, around November 18 Cordell received a grievance from Local 501 Operating Engineers member Tenney about exposure to second-hand marijuana smoke. In response to this grievance, Cordell and Tom O'Mahar, business agent for 501, formulated a policy that employees should report the odor of marijuana smoke to securi-

[7] Nelson could not remember whether Schramm spoke up at this meeting but remembered that other employees spoke up at this and subsequent meetings where the issue of exposure to second-hand marijuana smoke was raised.

[8] The drug testing procedures for each bargaining unit are controlled by the applicable collective-bargaining agreement. Section 13.03 of the Union's contract sets forth procedures applicable to "all employees" in the carpenters unit and provides for drug testing, inter alia, on probable cause or following an accident resulting in injury or property damage. Although the contract does not explicitly says so, according to Cordell, the term "all employees" includes temporary employees.

[9] Respondent asserts that Cordell readily admitted that he "conflated" the late November safety meeting and the December 6 shift change meeting. I do not find such an admission in the record. Cordell clearly testified that the meeting involving both Teeney and Schramm speaking up about second-hand marijuana smoke was on December 6.

ty so they could investigate the situation.

In any event, Cordell recalled that on December 6 at a shift change meeting which Teeney and Schramm attended, he announced the policy that he and O'Mahar formulated which was for employees to call security when they encountered second-hand marijuana smoke. Cordell added that once security was called, the employee should move away to another area.

Cordell's testimony mirrored that of Schramm, Teeney, and Machala as to the substance of the meeting, regardless of whether it was in late November or on December 6. Cordell testified that after the policy was announced, Teeney spoke up stating that he wanted an exemption from a positive drug test and Schramm joined in this request. Cordell recalled that Schramm stated that in his prior work at another Las Vegas hotel, the exposure to second-hand marijuana smoke was ten times worse than at Respondent's. Cordell recalled noting, in response, that Schramm passed the pre-employment drug test with Respondent anyway so there should be no danger of a positive test due to second-hand exposure. Cordell recalled that Schramm and Teeney countered that he (Cordell) was not a medical professional.

Respondent presented 4 additional witnesses regarding the safety meeting. All of them were vague regarding the exact time of these meetings. For instance, Respondent's witness Gerardo Tejeda (Tejeda), Swing Shift Labor Foreman, recalled attending a safety meeting "in November" where Teeney complained about exposure to second-hand marijuana smoke while making room calls. Teeney stated he was concerned about the marijuana smoke getting in his system. Schramm spoke up with the same concerns. Cordell responded that he did not think the drug could get into a person's system by smelling it in the hallways.

Respondent's witness Tim Cole (Cole), Assistant Chief of Facilities, recalled attending a safety meeting on an unspecified date in November in which Tenney brought up the issue of exposure to second-hand marijuana smoke. Cole remembered that Schramm also joined the discussion and mentioned something about his prior place of employment having the same problem. Cole recalled that Cordell told the employees they should report it to security. Simms thought Cordell responded that it was a security issue. Simms did not remember anyone else speaking up about second-hand marijuana smoke.

Nelson testified that he regularly attends the Thursday safety meetings. He recalled Tenney raising the issue of second-hand marijuana smoke on "probably at least three [occasions] in November." Nelson recalled explicitly that Schramm expressed concern about the second-hand marijuana smoke and failing a drug test due to that exposure. Nelson also recalled that Schramm talked about exposure at his prior workplace too. Nelson thought at another meeting, Cordell announced a policy to call security.

It is clear that only Schramm, Teeney, Cordell, and Machala were testifying about the same meeting. The testimony of Tejeda, Cole, Simms, and Nelson is so vague that it is impossible to determine if these witnesses were present at the same second meeting. After all, there are four safety meetings each Thursday. Thus, because Schramm, Teeney, Cordell, and Machala presented substantially identical testimony on this issue, I find that Teeney and Schramm voiced concern about workplace exposure to second-hand marijuana smoke at a second meeting held in late November or early December.

> At the Second Safety Meeting Later in November or in Early December, Cordell told Schramm that perhaps Respondent might not need his services any more

After the dialogue between Cordell, Schramm and Teeney, set out above, the testimony of these three witnesses diverges. According to Schramm, Cordell became red faced and asked whether moving Schramm to another area would solve his problem with exposure to second-hand marijuana smoke and Schramm said it would not because other employees would still be exposed. Cordell then said, "Well, you know what, maybe we just won't need you anymore." Tenney said that sounded like a threat and Schramm responded, "No, that didn't sound like a threat; that was, in fact, a threat." Cordell "just got redder and redder in the face, he turned around [and] abruptly left the meeting." After this meeting, Schramm continued to discuss the issue with his coworkers and requested that Union Steward Jerry Mong raise the issue at the next stewards' meeting.

Tenney recalled that Schramm told Cordell that Cordell could not possibly know whether exposure to second-hand smoke could cause an employee to test positive. Tenney recalled that Cordell told them they could move to another area and Schramm rejected this stating that other employees would still have to work in the area and asked what Respondent was going to do. According to Tenney, "Mr. Cordell, he turned red and said to Mr. Schramm, well maybe we just won't have a need for you." Tenney said, "that sounds like a threat to me" and Schramm responded, "that didn't just sound like a threat, that was a threat." Then Cordell turned and left the room.

Cordell denied that any statement was made about perhaps not needing Schramm's services anymore. Cordell also denied that he threatened Schramm:

> Q. Okay. Did you say something like, we just won't have any need for you to Mr. Schramm?
>
> A. No.
>
> Q. Okay. Did you tell Mr. Schramm that he'd be discharged?
>
> A. No, I did not.

When asked if he recalled anything further, locksmith Machala, who was subpoenaed to testify by Respondent, stated, inter alia, "That was really about it." Machala was not asked specifically whether Cordell threatened Schramm or made a statement to Schramm about maybe not needing Schramm's services anymore. Machala recalled that the discussion between Schramm, Teeney, and Cordell was about 5 minutes with a lot of repetition requiring Cordell to answer the same question numerous times. Machala opined that Cordell appeared frustrated.

As mentioned before, the remaining four witnesses offered only vague testimony and it is uncertain that they were discussing the same meeting because none of them recalled the portion of the conversation dealing with the request for a medical professional to evaluate the situation. In any event, these four witnesses portrayed Cordell's demeanor as thoroughly profession-

al and Schramm's demeanor as agitated.

Nelson recalled that Schramm raised his voice showing excitement and that Cordell did not raise his voice or look agitated or upset although he had to repeat himself a few times. Nelson was specifically asked about a threat: "Q: Do you recall Mr. Schramm saying something like, that was a threat? A: I don't—you know I couldn't swear on saying that, no.

Simms described Teeney as being generally vocal and dramatic but did not recall Cordell being vocal and dramatic at the meeting. Simms was not specifically asked if he recalled a threat by Cordell of not needing Schramm's services any further. Tejeda observed Cordell's behavior as normal, professional, "just holding the meeting." After testifying about everything he recalled, Tejeda stated that Cordell did not say anything else. Tejeda was not asked about the alleged threat.

Cole, whose recollection of the meeting was admittedly minimal, recalled the Cordell said employees should call their senior watch if they encountered second-hand marijuana smoke. Cole did not observe that Cordell raised his voice or turned red in the face. Cole recalled that Cordell was smiling during the meeting. Cole did not recall anything else about the meeting except the subject of marijuana smoke being raised.

The testimony of Tejeda, Nelson, Simms, and Cole is entitled to little weight. The record reflects that second-hand marijuana smoke was discussed at least two or three times. Each of them recalled one instance of dialogue between Cordell, Schramm, and Teeney about second-hand marijuana smoke. They could not identify when the meeting they attended took place.

Based on the relative weight of their testimony, witness demeanor, and inherent probabilities, I find that Cordell stated in response to Schramm's assertion that Cordell was not an expert on exposure to second-hand marijuana smoke that perhaps Respondent would not have further need of Schramm's services. Although Cordell denied making this statement, no other witness presented by Respondent was specifically asked about this statement. Further, many of these witnesses had admittedly vague recollections. They testified variously that Cordell maintained a professional demeanor, was not vocal or dramatic, did not raise his voice or turn red in the face and was smiling, but may have shown signs of frustration at having to repeat the same thing over and over. Further it is questionable which meeting these witnesses testified about. Even if the witnesses were testifying about the same meeting, the absence of a recollection one way or the other regarding a threat is absent from the record. For the witnesses called by Respondent, this was just another weekly safety meeting. For Teeney and Schramm, it was a memorable occasion. I find it more inherently probable that their recollections are true to the facts. Both were forthright and thoughtful in their testimony. Moreover, although Cordell denied making a threat, it is telling none of Respondent's witnesses, including Machala, was tested on this point.

Both Schramm and Teeney, a current employee,[10] recalled this incident in exactly the same manner. Both were forthright, non-argumentative witnesses whose demeanors evinced thoughtful reflection of each question and an attempt to answer according to their respective recollection of the actual event. Further, their testimony is supported by an independent witness, Machala— not specifically as to a threat. He wasn't asked about that. But in every other aspect, Machala's testimony is identical to that of Schramm and Teeney. Thus, on the record as a whole, I credit the testimony of Schramm and Teeney that Cordell stated that perhaps Schramm's services would no longer be needed in response to Schramm's insistence that a professional be consulted for the potential effects on employees of workplace exposure to second-hand marijuana smoke.

Although Teeney told Schramm that he entered Cordell's threat on a Blackberry memorandum, there was no such entry for November 21 or December 6

Hot SOS (Hotel Service Optimization System) is a computer maintenance management system which tracks work orders. Teeney and other employees (but not Schramm) were provided with Blackberries to monitor work orders. Employees can add a memorandum to the work order to update the status of the order. Tenney routinely created work orders for meetings. Teeney testified that he used Hot SOS to note that Cordell had threatened a carpenter.[11] He thought it said "Rafe [Cordell] threatened carpenter." As stated above, Tenney thought this meeting occurred at the end of November, before Thanksgiving, possibly on November 21—the Thursday before Thanksgiving. As part of its case, Respondent produced its Hot SOS records for the Blackberry utilized by Tenney on November 21. The records indicate a "meeting" with two memoranda notes about the meeting but there is no mention of a threat.

11/21/2013 15:10 – informed supervisors @ safety meeting that I get headaches when hallway is full of marijuana smoke. Memo was created on HOTSOS2GO 112/21/2013 at 3:11 PM

11/21/2013 15:31 Asked Rafe, Aaron and tim for procedure on Marijuana smoke. Rafe stated, call senior watch. Memo was created on HOTSOS2GO 11/21/2013 at 3:31 PM

Respondent also offered Teeney's Hot SOS records for December 6 which indicate that he created a work order for a "meeting" from 2:58 to 3:41 p.m. No memoranda were recorded on this work order.

The absence of a Hot SOS memorandum regarding the threat does not negate the testimony of Schramm and Teeney

It is clear that Schramm and Teeney did not hear each other's testimony, and they testified that they did not discuss their testimony prior to the hearing. Although it is troubling that Teen-

[10] As the Board stated in *Portola Packaging*, 361 NLRB 1316, 1316 fn.2 (2014), the judge relied on "Well-established Board precedent holding that the testimony of current employees 'in direct contradiction to certain statements of their present supervisors . . . is apt to be particularly reliable, inasmuch as the witness is testifying adversely to his or her pecuniary interest, a risk not lightly undertaken.' *Gold Standard Enterprises*, 234 NLRB 618, 619 (1978), enf. denied on other grounds 607 F.2d 1208 (7th Cir. 1979)." This factor is one among many utilized in resolving credibility issues. *Flexsteel Industries*, 316 NLRB 745, 745 (1995), affd. mem. 83 F.3d 419 (5th Cir. 1996).

[11] Tenney did not know Schramm's name at the time.

ey's Hot SOS memoranda for the November 21 and December 6 meetings do not reflect a threat, as he thought he had done, the record is unclear whether the meeting in which the threat was allegedly made was actually on either November 21 or December 6. Thus it is unclear whether Teeney's Hot SOS records for other dates might indicate that a threat was made. Moreover, the record does not indicate that Teeney was able to access previous Hot SOS memoranda to refresh his recollection about what was actually written. Thus, under all of these circumstances, I find that the absence of a Hot SOS memorandum on either November 21 or December 6 does not necessarily contradict Teeney's assertion that he created such a memorandum and, even if it did completely contradict Teeney's assertion, this fact alone does not require that Teeney's testimony be rejected as unworthy of belief given my prior findings that his testimony was inherently credible and entitled to greater weight than that of witnesses presented by Respondent.

Absence of the Hot SOS memorandum for November 21 and December 6 does not negate credible evidence that a threat was made

I find that the absence of a Hot SOS memorandum for either November 21 or December 6 does not negate testimony that Cordell stated, as Schramm and Teeney credibly testified, that perhaps Respondent would no longer need Schramm's services. Although Teeney testified that he made a Hot SOS memorandum regarding the statement at the time of the meeting, Teeney could not recall the date of the meeting when Cordell stated that maybe Respondent did not need Schramm's services. Teeney testified variously that the meeting occurred at the end of November, before Thanksgiving, possibly the 21st.

Teeney testified that he created Hot SOS tasks for each meeting. The only meetings for which Respondent introduced Teeney's safety meeting notes were for the meetings of November 21 and December 6. It is equally possible that the meeting at issue took place earlier than November 21 at a different safety meeting. It is also possible that Teeney, who made memos to the November 21 meeting, simply mis-remembered the substance of his memo. There is no evidence that employees are able to access past memoranda so no evidence that Teeney was able to refresh his recollection.

Thus, under the circumstances that it is possible that Teeney misremembered the substance of his Hot SOS memo or that his memo is appended to a different meeting, I find the absence of a Hot SOS memo to the effect that a threat was made on November 21 or December 6 does not negate the credible testimony that a threat was made.

A. Respirator Masks

The older sections of Respondent's physical facility contain what is known as "presumed asbestos containing materials." Carpenters and other trades may sometimes be required to work with or cut these materials. Accordingly, for this and other reasons, all engineering department employees, whether temporary or permanent, are required to utilize respiratory protection pursuant to Respondent's Respiratory Protection Program (RPP). Respondent provides each employee who may work with hazardous or potentially hazardous materials a personal respirator mask after the employee has been evaluated and fit tested. The testing is conducted by contractors.

Annually, the process begins with each employee completing a medical questionnaire which is submitted in a sealed envelope to a contract doctor. Contrary to Respondent's assertion,[12] I find that employees have the right to speak to the doctor about the content of the questionnaire before the questionnaire is submitted. Thus, the RPP Section 5.0 provides in relevant part,

> The medical evaluation requires that the questionnaire . . . be completed by the employee, confidentially, during normal working hours, and at a time and place convenient to the employee. The employee has the right to contact the Contract Doctor to discuss the content of the questionnaire. When the questionnaire is completed, the employee will seal it in an envelope, and forward it to the Respirator Program Administrator, who will send it, unopened, to the Contract Doctor for evaluation. If the physician questions the ability of the employee to perform assigned tasks while wearing a respirator for any reason, a medical examination shall be performed.

"Employees are responsible for completing the questionnaire" and must "identify any health issues that may complicate the wearing of a respirator."[13] Once the questionnaire is submitted, it is reviewed by the contract doctor to determine whether there are any abnormalities or a history warranting further medical examination. If none, the employee is fitted by Simms and issued a respirator mask. However, if there are concerns raised by answers to the medical questionnaire, the employee meets with the doctor for evaluation.

In agreement, Karl Beeman, safety manager, explained that the respiratory mask process begins with a written questionnaire formulated by OSHA. If an employee passes the questionnaire, i.e., if no medical issues are raised, the employee is fitted with a respirator without seeing a doctor. However, if answers to the questionnaire raise issues of ability to wear a respiratory mask, additional medical screening follows. If that is passed, the employee is then fitted with a mask.

Although this process appears rather straight forward and easy to understand, there is no evidence that the exact nature and order of the process would have been known to a new em-

[12] Respondent asserts in its post-hearing brief that it was not required to make a medical professional available *before* an employee completed the questionnaire, citing 29 C.F.R. §1910.134 (e)(4)(i) but quoting 29 C.F.R. §1910.134(e)(4)(ii): "The employer shall provide the employee with an opportunity to discuss the questionnaire and examination results with the PLHCP (physician or other licensed health care professional). According to Respondent, the reference to examination results "presupposes the completion of the questionnaire" before there is a right to consult the doctor or other licensed health care provider. However, the regulation may also be read to mean that an employee might consult either to discuss the questionnaire or to discuss the examination results. In any event, Respondent's RPP unambiguously states that the employee may consult the doctor prior to completing the questionnaire. This is also consistent with 29 CFR §1910.134 (e)(4)(i) which provides, "The medical questionnaire and examinations shall be administered confidentially during the employee's normal working hours. . . . The medical questionnaire shall be administered in a manner that ensures that the employee understands its content."

[13] RPP, Sec. 3.0.C.

ployee such as Schramm who had never undertaken the respiratory mask testing on a prior occasion. In any event, employees who cannot wear a mask are not issued one and are not assigned to any area where a respirator mask might be required. Employees are not terminated or disciplined due to inability to wear a respirator mask.

On the morning of December 10, Simms notified Schramm that he "was going to have a fitting today" and would need to take the respirator exam between 2 and 2:30 p.m. that afternoon. Later that morning, Schramm's foreman Brandon Morris told Schramm he might go right after his lunch at 1:30 p.m. so he would not have to waste time going back up to his work site in the tower after lunch and then back down at 2 p.m.

Schramm reported to the contract respirator clinic at about 1:35 p.m. He testified that due to personal problems—anxiety from putting on a mask—he wanted to "slip in and talk to the doctor." Schramm encountered two unknown men [contract clinic personnel] at the entrance who gave him some forms, probably releases, to fill out. He told them that before he did that, he wanted to see the doctor due to personal problems: "I have personal problems and I'd like to see the doctor. . . . Well, I want to see her before I begin this [process]." The men denied Schramm access to the doctor unless he completed the preliminary paperwork and preliminary medical exam questionnaire first. Schramm told them he would go talk to his foreman and come back at his appointed time between 2 and 2:30 p.m.[14] He told them he "would straighten this out because I got to see her [the doctor]." The contract clinic personnel did not testify.

On cross-examination, Schramm was closely questioned about his intentions:

> Q Okay. So you thought that you should be exempted from a work requirement.
>
> A No.
>
> Q No.
>
> A No, I thought I was to be exempted from wearing that mask, because it causes me such an anxiety, and this is something I wanted to discuss with the doctor—
>
> Q. I understand.
>
> A. — not with anybody else.
>
> Q. So you wanted to be exempted from wearing a respirator completely—
>
> A I wanted—
>
> Q.—is that right?
>
> A.—I wanted an exemption from wearing the respirator, yes.

On December 10, Karl Beeman, safety manager, received a phone call from the contract clinic personnel in the respiratory mask testing area stating that an employee had refused to "take" the questionnaire. When Beeman reported to the area, he was told by clinic personnel that an employee had "refused to take the exam and instead wanted to see the physician directly." Beeman was told the request to see the doctor had been refused by the contract clinic personnel. Beeman reported this information to Cordell who told him to send an email stating the relevant facts.

On a routine visit to the respirator testing area on December 10, Simms was told that temporary carpenter Schramm "had refused to do the medical" – had refused to undergo the medical exam. Simms reported this to Cordell who instructed him to send an email report on the matter.

In the meantime, Schramm returned to work in the tower. He could not find his foreman so he waited for him to come through on his normal rounds at 2 p.m. Schramm told his partner Saxton what had transpired at the respirator mask testing area and Saxton said that he had failed the respiratory mask test. Schramm responded, "Well, I wish they'd exempt me. I want an exemption." Saxton's phone rang at that point and after answering the phone, Saxton told Schramm that Morris wanted Schramm to come down to the shop.

Suspension Pending Investigation

Morris recalled that about the time Schramm should have been taking the respiratory exam, Cordell called Morris and told him to have Schramm report to the office. Morris responded that Schramm was in the respiratory exam "right now." In any event, Morris called Saxton's personal cell phone[15] and told him to have Schramm report to the shop. Schramm reported to Morris and they proceeded to Cordell's office. Although Cordell did not recall what time the meeting took place, both Morris and Schramm recalled that the meeting took place around 2 to 2:10 p.m. Neither of them knew the reason for the summons. When they got to Cordell's office, Cordell told Schramm that he was suspended pending investigation for refusal to take the respiratory exam which was an OSHA requirement. Schramm testified that he responded that he didn't refuse the exam – he just went down early because he wanted to see the doctor – that in fact his appointment time was right now. Schramm said he would go right away and take the exam. According to Schramm, Cordell said it was too late to take the exam. Cordell refused saying, "No, you're suspended."

Morris accompanied Schramm to Cordell's office and recalled that Cordell put Schramm on suspension pending investigation because Schramm refused to take the respiratory test

[14] Two individuals testified that they overheard Schramm's conversation at the clinic. Edward Romero, laborer, reported for his respirator mask testing and observed Schramm talking to the two medical technicians administering the program. He overheard Schramm say that he did not want to take the test and that he should not have to take the test. He further recalled Schramm saying, "I'm not going to take the test. I don't need to." Gerardo Tejeda, swing shift labor foreman, was present at the clinic when Schramm reported and heard Schramm say, "Why do I have to take a physical?" Then Schramm walked out saying, "I'm not going to do it." There is no evidence that either of these individuals were interviewed by HR in relation to the decision to discharge Schramm. Nor do I find this testimony, if credited, corroborative of the reports given to Cordell by Beeman and Simms regarding what the contract personnel told them about Schramm's statements. Thus, their testimony is disregarded.

[15] Temporary employees are not issued Blackberries. Schramm's personal cell phone had spotty reception in the towers so Morris called Saxton's personal phone instead.

which is an OSHA requirement. Morris recalled that Schramm protested saying, "Who is this doctor?" and "I know my body better than them." Morris did not independently recall Schramm asking to take the exam at the time of the suspension and he was not questioned about it specifically either. After Schramm was suspended, Morris and Schramm left Cordell's office and Morris wished Schramm good luck and gave him the number for the Union.

Cordell denied that Schramm said that his appointment time had not yet elapsed but did not deny that Schramm offered to take the exam right away. Cordell's testimony was that the merits of the situation were not at issue for purposes of announcing the suspension and he was not following what Schramm said regarding the merits. Cordell just wanted to deliver the suspension pending investigation.

> Q. All right. So he didn't tell you had he had tried to talk to the doctor. He didn't say that during the meeting.
>
> A. That was not part of the meeting. The meeting was just to remove him from the workplace, and I was not conducting an investigation, I was not conducting any—Q. I understand.
>
> A. —anything like that.
>
> Q. You may not have made that inquiries, but did he volunteer any information as to what he had done and what had happened?
>
> A. He was—I don't remember what it was that he was—he was excitable, and very loud, and very combative, and I didn't—so I just wanted to make sure the situation was calm, and he understood that he was being removed from the workplace so we could investigate it, and he—
>
> Q. Did he indicate to you—n
>
> A. —would have the opportunity to do that at a later date.

Nelson also attended the suspension pending investigation meeting. He did not recall specific conversation but remembered that the purpose of the meeting was to deliver the suspension but not to get into the merits of the situation.

The notice of suspension pending investigation, which Schramm signed, stated that he would have the opportunity to attend an investigational meeting with employee relations at a later time. Cordell also submitted an internal memorandum to employee relations stating in part, "Employee refused to go through evaluation for respirator . . . ."

Morris escorted Schramm to get his personal possessions. Schramm asked Morris for the Union's phone number as Morris escorted him from the property. Using the number provided by Morris, Schramm called the Union hall and left a voicemail message about his suspension and asked for help from the Union.

It is clear that Cordell was not interested in discussing the merits of the situation at the suspension meeting. He admittedly did not listen to what Schramm said. His focus was to remove Schramm from the workplace. Further, I note that Cordell did not deny that Schramm offered to take the test right away. Both Nelson and Morris had little recollection of the meeting and were not questioned closely regarding what was said at the meeting. Accordingly I find that Schramm's testimony, which was detailed and inherently probable based on the timing of the situation, should be credited.

Based upon Schramm's testimony and the reports of Beeman and Simms, I find that Cordell was orally advised around 2 p.m. that Schramm had refused to take the respiratory exam and he wanted to see the doctor directly. Cordell immediately made a decision to suspend Schramm. When called into Cordell's office around 2 to 2:10 p.m. and told he was suspended for refusal to take the exam, Schramm countered that he did not refuse to take the exam. He just wanted to see the doctor. Schramm offered to take the exam right away noting that his test time had not expired. Cordell did not want to discuss the merits of the situation at that point and refused to allow Schramm a chance to take the exam during his 2 to 2:30 test window period.

The Investigation

Airth Colin (Colin), HR Business Partner Associate, was contacted by Cordell on December 10 to handle the investigation of Schramm. The emails from Beeman and Simms to Cordell were forwarded to her. She also spoke to Beeman and Simms in person.

Beeman's email to Cordell of December 11 reiterated the information he received from contract personnel on December 10 stating, in relevant part,

> We were advised by [clinic personnel] that . . . Schramm refused to take the physical exam. [Schramm] did not fail the exam nor did he need to be rescheduled for other reasons. [Clinic personnel] stated clearly that Mr. Schramm refused to participate in the process from the very beginning. The only step Mr. Schramm was willing to take was to sign in.

Simms' 2:42 p.m. December 10 email to Cordell which was forward to Colin stated, inter alia, "Manny [clinic technician] told us that Michael Schramm had stated that he could not wear a respirator and that he would not go through the testing. He then left the clinic without going through the tests per Manny."

According to Colin's notes and testimony regarding her interview with Beeman, Beeman told her that Schramm would "not allow the pre-screening to be done. He just wanted to go see the Dr. Don't know if he knows job is secure. Just get reassigned to tasks that don't require respirator." Similarly, Colin's notes of her discussion with Simms on December 12 indicate that Simms reported that Schramm said, "I cannot wear a respirator so I don't need to go through the test."

Due Process Meeting, December 13

On December 12, Schramm was informed that he was to report for a meeting on the following day. Schramm had not heard back from the Union from his December 10 call so he called the Union again and left another message stating the date and time set for the meeting with human resources. Schramm did not receive a return call from the Union. Colin agreed that she spoke to Schramm on December 12 and set the time and date for the due process meeting for the following day at 3:30 p.m. Colin testified that she told Schramm that if he wanted Union representation that he needed to bring the steward with him.

On December 13, the "due process" meeting with Schramm took place in the human resources offices. In order to report to the meeting, Schramm walked through the facility. As he walked in, the carpenters' shop where Union Steward Mong worked was behind him. Schramm did not attempt to go to the shop to speak to Mong about representing him at the meeting at that time or at any time prior to the "due process" meeting.

Present at the meeting were Schramm, Cordell, and HR Business Associate Sondra Mower (Mower), as well as Colin. No Union representative was present. Schramm looked around before entering the office, searching for a Union representative who might have responded to his message about the time and place of the meeting. Upon entering the meeting, Schramm testified that he began the meeting by stating, "I called the Union three times [and] nobody showed up, I'm here without representation." Later Schramm testified on cross-examination that he told Mower that he wanted the Union at the meeting. According to Schramm, Mower said he did not need a Union representative because the meeting was "just an investigation."[16] Mower denied saying this but agreed that at the end of the meeting Schramm stated that he could not get a return call from the Union.

Although no Union representative was present, according to Cordell, Schramm did not mention whether he had tried to contact the Union.[17] Nor, according to Cordell, did Schramm request a Union steward. Cordell, who has worked for Respondent for 21 years, served 7 years as shop steward for the engineers unit. In his capacity as shop steward he routinely attended investigational interviews of unit employees.

At the meeting, Schramm testified that he explained that he had reported to the test area at 1:35 p.m., prior to his allotted time, and asked to speak to the doctor. His request was denied and he said he would return at his 2 to 2:30 p.m. time slot. Schramm further recalled that he was "peppered" with questions about why he refused to take the exam and why he did not consult human resources. Schramm explained that he was suspended at 2:15 p.m. without being given an opportunity to go back to the exam area and it never occurred to him to consult human resources.

Schramm told the attendees that he wanted to see the doctor due to his anxiety or phobia about placing a mask over his face and, "now everybody knows my business." Schramm asked them to stop questioning him. He told them he could not answer questions about why he did not do something instead of what he did. Schramm recalled that he told the meeting attendees that his partner Saxton failed the test and he wouldn't mind doing the same but he wanted an exemption. He explained that he was embarrassed about it but he would "freak out" having a respiratory mask on his face. Schramm denied that he stated that he wanted to talk to the doctor to ensure that he failed the respiratory mask test.

At the end of the meeting, he submitted a voluntary written statement which set forth the facts consistently with his testimony at this proceeding. The statement indicates, "

When I got to the exam room I asked to see the doctor and was told "No.—you cannot see the doctor without first going through the exam." I tried to explain that I had personal and important questions for the doctor and they said "No." . . . In summary: For the simple request of asking to see the doctor before we begin (so I can keep some privacy) I was denied. I tried to make it right but was preempted with a suspension.

According to Cordell, it was difficult to follow what Schramm said during the meeting. Schramm did not use the term "phobia" or request a medical accommodation but, according to Cordell, told Colin that his goal while in the evaluation room was to speak to the doctor so he could find out how to fail the test. Cordell agreed that Schramm said something about a condition during the meeting—"private things that he didn't want other people to know about." Cordell recalled that Schramm described, "a medical condition that he had some kind of issue with putting something on his face. . . ." and recalled that Schramm was asked why he did not notify human resources about his condition. At another point during the meeting, Cordell testified that Schramm was told human resources would consider letting Schramm complete the respirator evaluation and Schramm stated he would do so but he would lie so that he would fail. Cordell responded that Respondent could not let him complete the evaluation knowing that he planned to lie.

Colin attended the December 13 "due process" meeting along with Cordell and Mower. Colin's notes of the meeting, although not verbatim, reflect, inter alia, "Pleading with [contract clinic personnel] because had fears. If have to go through process then would have [indecipherable scratch out of two words] lie [indecipherable scratch out of one or two words] to fail the test." In another portion of these notes, Colin wrote, "Just wanted to speak to Dr. Didn't want anyone in eng. to know. Wanted to talk to Dr. Was taking height/weight they were looking at paperwork. Will take exam if returned."

Colin described Schramm as speaking loud and fast—explaining what had happened the day that his respirator exam was scheduled. According to Colin, Schramm explained that he just wanted to see the doctor to find out if he needed to lie on the pre-exam so he would not have to wear a respirator. Schramm stated that he pleaded with the exam personnel for access to the doctor. He didn't want to have to wear a respirator. He wanted the result to be that he would not have to wear a respirator. Colin, who acknowledged that Schramm's fears appeared significant, asked him why he had not come to HR, where an ADA[18] program was in place, for help if he had fears. Schramm responded that he had not thought of that. He stated that his fears prevented him from being able to wear a respirator. Colin was clear that Schramm did not ask for an accommodation. When asked whether he would take the exam if he was reinstated, Colin testified that Schramm said that he would but he would lie to skew the results so that he would not have to wear the respirator.

I find that at the beginning of the meeting, Schramm stated

[16] "I told Sondra I wanted the Union here, and Sondra said, you don't need anybody here, this is not a disciplinary action. This has -- this is only an investigation."

[17] Cordell estimated he has attended about 30 such meetings over a 9-year period. He further estimated that the union is present in these meetings about 60 percent of the time.

[18] Americans with Disabilities Act of 1990, 42 U.S.C. §12101 et seq.

that he had called the Union three times but the Union had not called him back and he was at the meeting without representation. Schramm convincingly provided context for this statement, noting that he had been looking around the area for a Union representative before entering the human resources office. Thus, it is inherently reasonable that his first remarks would be about expecting a union representative to be present in response to his messages. Mower confirmed that Schramm made a statement like this but she placed it at the end of the meeting. Colin's notes do not reflect this statement at the beginning or end of the meeting and Cordell denied that Schramm requested a representative. Neither the absence in Colin's notes nor Cordell's denial literally negates Schramm's statement that he called the Union and he was there without representation. Further, Colin's notes are not verbatim. I do not credit Schramm's later statement on cross examination that he told Mower he wanted the Union present at the meeting. In context, this remark appears to be a reiteration of his earlier statement that he had called the Union three times and no representative was present. Moreover, the General Counsel does not rely on this statement.

I further find that Schramm told Cordell, Colin, and Mower variously that he wanted to see the doctor before taking the exam due to his anxiety or phobia about placing a mask on his face. He said he would "freak out" if a mask was placed on his face. His written statement says he wanted to see the doctor to ask "personal and important questions." Cordell recalled Schramm mentioned a medical condition, a private thing, that precluded putting a mask on his face. Colin recalled Schramm demonstrated significant fear when speaking about placing a mask over his face and told the meeting participants that he pleaded with the contract personnel to see the doctor.

There is no dispute that Schramm told the due process meeting that if he were returned to work, he would take the exam. Cordell and Colin said this option was rejected because Schramm said he would lie on the exam in order to fail it. I do not credit their testimony about lying to fail the exam and I find that such a statement defies inherent probability. An employee would not normally defend himself against the possibility of discharge by asserting that he would lie if returned to work. Moreover, Colin's notes are seriously compromised by scratching out of the words before and after the word "lie." Additionally, these notes were not offered as verbatim. Frankly, the testimony that Schramm stated he would lie is illogical and appears blatantly fabricated. In my view, Schramm, who was already humiliated that others were aware of his condition, was acting in good faith to defend himself and would not assert that he would lie in the exam as a defense to being discharged. Moreover, the demeanor of both Cordell and Colin in testifying that Schramm stated he would lie to flunk the exam was unbelievable. Both of them hesitated before adding this testimony and appeared to be grasping for a life raft when making their assertions.

Decision to Discharge

After completing her investigation, Colin testified that she met with her HR Managers Rebecca Smith and Martha Diaz as well as Cordell to discuss what action to take. They decided to discharge Schramm for failure to take the respirator exam. Colin testified that she was unaware of the November secondhand smoke complaint made by Schramm until a week or two after his discharge. At that time, Cordell told her about it. I discredit this testimony. There is absolutely no context for this self-serving statement. The meeting in which Respondent determined that it would discharge Schramm is only referenced fleetingly. Nothing was adduced regarding of the discussion of the reason for discharge.

Following this meeting, Cordell called Union Business Agent Williams and told him Respondent was going to move ahead with termination of Schramm. Williams requested that Respondent change the status to layoff so that Schramm would be eligible for rehire by Respondent and Respondent complied with this request.

Separation of December 20

On December 20, Schramm met with Cordell, Colin, and Mower and received a personnel action notice of separation due to "Project Ended." Union Steward Mong attended this meeting or a subsequent meeting that same date. Mong asked Schramm why Schramm did not contact Mong earlier. Schramm did not respond. Mong attempted to reverse the discharge but was told the matter was closed.

III. ANALYSIS

A. Alleged Threat

Section 8(a)(1) of the Act[19] provides that it is an unfair labor practice "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 [of the Act]. Section 7 protects the right of employees to engage in "concerted activity" for, inter alia, their "mutual aid or protection." The Board assesses the objective tendency of statements to coerce employees rather than utilizing employees' actual subjective reactions. *Miller Electric Pump,* 334 NLRB 824, 825 (2001). Thus, the issue is how a reasonable employee would interpret the statement appropriately considering all surrounding circumstances. *The Roomstore,* 357 NLRB 1690, 1690 fn.3 (2011).

Under this objective standard, the Board determines whether a statement would reasonably tend to interfere with the free exercise of employee rights. See *Miller Electric Pump,* supra, 334 NLRB at 825 (rejecting judge's finding based on employee's reaction to statement and finding statement, when considered objectively, tended to interfere with protected right to discuss union on non-working time). Similarly, the Board does not consider the motivation behind the remark. *Joy Recovery Technology Corp.,* 320 NLRB 356, 365 (1995), enfd. 134 F.3d 1307 (7th Cir. 1998) ("The test of interference, restraint, and coercion does not turn on the employer's motive or on whether the coercion succeeded or failed . . . [t]he test is whether the employer engaged in conduct, which it may reasonably be said, tends to interfere with the free exercise of employee rights under the Act."). Finally, a statement may be found coercive whether or not that is the only reasonable construction. *Double D Construction Group,* 339 NLRB 303, 303 (2003).

There is no dispute that during a meeting in either November

[19] 29 U.S.C. §158(a)(1).

or December, Schramm joined Teeney in expressing concern about exposure to second-hand marijuana smoke in the workplace. Further, there is no dispute that in response to Teeney's grievance, Cordell announced a policy in late November or on December 6 to deal with employee exposure to second-hand marijuana smoke.

Both Teeney and Schramm's credible testimony is that Schramm told Cordell he was not a medical professional and his assessment that there could be no effect on employees from exposure to second-hand marijuana smoke should be verified by a medical professional, Cordell said that perhaps Schramm's services would no longer be needed. This unambiguous statement constitutes a threat of discharge because Schramm together with Teeney raised a workplace issue at an employee meeting and challenged Cordell's assessment of the problem.

B. Alleged Weingarten Violation

In *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 256–258 (1975), the Court held, inter alia, that an employee may request representation at an investigatory interview which the employee reasonably believes will result in disciplinary action. There is no dispute that the "due process" meeting was an investigatory interview.[20] There is further no dispute that an employee would reasonably fear that such a meeting would result in discipline because the stated reason for the meeting was to determine whether Schramm would be retained.

However, the right to a representative arises only when the employee requests representation. *Weingarten*, 420 U.S. at 257; see also, *Kohl's Food Co.*, 249 NLRB 75, 78 (1980) (failure to request representation defeats *Weingarten* allegation); *Lennox Indus.*, 244 NLRB 607, 608–609 (1979), enfd 637 F.2d 340 (5th Cir), cert. denied 452 U.S. 963 (1981) (same). The request need not be in precise words but must be sufficient to put the employer on notice of the employee's desire for union representation. *Consolidated Edison*, 323 NLRB 910, 910 (1997); see also *Houston Coca-Cola*, 265 NLRB 1488, 1496–1497 (1982) ("No magic or special words are required to satisfy this element of the *Weingarten* rationale."). Thus questioning an employer as to whether a representative should be obtained has been held sufficient to assert *Weingarten* rights. *General Die Casters*, 358 NLRB 742, 742 (2012) ("Do I need to get somebody in here?" sufficient to trigger *Weingarten*). Similarly, an employee request that "someone" be present is sufficient to invoke *Weingarten* rights. *Circuit-Wise*, 308 NLRB 1091, 1108–1109 (1997), enfd mem. 992 F.2d 319 (2d Cir. 1993) (I would like to have someone there that could explain to me what was happening).

Schramm told the due process meeting participants that he had called the Union three times but the Union had not called him back and he was at the meeting without representation. This statement constitutes a request for representation. Subsumed in the statement is a reasonably understood request to have someone present at the meeting. Accordingly, I find that Schramm requested representation and his request was ignored. Thus I find that Respondent violated Section 8(a)(1) of the Act by failing to permit Schramm a representative and continuing the interview. *General Motors Corp.*, 251 NLRB 850, 857 (1981), enfd in relevant part, 674 F.2d 576 (6th Cir. 1982)

C. Alleged Suspension and Discharge due to Protected, Concerted Activity

An employee's discharge independently violates Section 8(a)(1) of the Act when it is motivated by employee activity protected by Section 7. *Lou's Transport*, 361 NLRB 1446, 1446, 1447 (2014). "[A] respondent violates Section 8(a)(1) if, having knowledge of an employee's concerted activity, it takes adverse employment action motivated by employee's protected, concerted activity. *CGLM, Inc.*, 350 NLRB 974, 979 (2007), enfd. mem. 280 Fed.Appx. 366 (5th Cir. 2008), quoting *Meyers Industries (Meyers I)*, 268 NLRB 493, 497 (1984) revd. sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert denied 474 U.S. 948 (1985), on remand *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

Schramm was engaged in protected activity. Employees who seek to improve wages, benefits, working hours, their physical environment, dress codes, assignments, responsibilities, and other similar employment-related items are dealing with conditions of their employment as set forth in Section 7. *Eastex v. NLRB*, 437 U.S. 556, 563–568 (1978); *CGLM, Inc.*, supra, 350 NLRB at 979.[21] Moreover, Schramm was acting in concert with Teeney. Thus, I find that Schramm and Teeney were engaged in protected, concerted activity in seeking to improve their physical environment by determining whether exposure to second-hand marijuana smoke could affect their safety and whether it might affect the results of a drug test if an accident occurred while they were exposed to this smoke. They undertook these actions at employee meetings.

Utilizing the analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Mgt. Corp.*, 462 U.S. 393, 395 (1983), I find that Schramm's discharge violated Section 8(a)(1) of the Act. *Wright Line* applies to all 8(a)(1) and (3) allegations that turn on employer motivation. Pursuant to *Wright Line*, the General Counsel must persuade by a preponderance of the evidence that the employee's protected conduct was a motivating factor (in whole or in part) for the adverse employment action.

The General Counsel satisfies the *Wright Line* standard by showing that the employee was engaged in protected activity, the employer was aware of the activity, and the activity was a substantial or motivating reason for the employer's action. *Donaldson Bros. Ready Mix*, 341 NLRB 958, 961 (2004). Here,

[20] The Board has consistently found that an interview is investigatory for *Weingarten* purposes where, as here, an employee is summoned in front of management to explain his or her version of a disputed event. *Bentley University*, 361 NLRB 1038, 1038 fn. 4 (2014), and cases cited.

[21] See also, *Inova Health System*, 360 NLRB 1223, 1226 (2014) (employee engaged in protected activity when she emailed fellow employees about terms and conditions of employment); *Cibao Meat Products*, 338 NLRB 934, 934–935 (2003), enfd. 84 Fed.Appx. 155 (2d Cir.), cert. denied 543 U.S. 986 (2004) (activity of one employee, who speaks in the presence of other employees, regarding a change in employment terms affecting all employees is protected, concerted activity).

the General Counsel has shown that Schramm engaged in protected activity with the employer's full knowledge. Respondent's animus toward his activities is demonstrated by its threat cautioning him that his services might no longer be needed. Thus the General Counsel has shown that Schramm was engaged in protected, concerted activity, that Respondent was aware of this activity, and that the activity produced a threat of discharge which persuades that a substantial or motivating reason for the Respondent's discharge of Schramm was his protected, concerted activity. Not only have the three requirements of *Wright Line* as set forth in *Donaldson Bros.,* supra, been shown by a preponderance of the evidence but the General Counsel has also shown particularized motivating animus emanating from Cordell towards Schramm's protected activity as a nexus between Schramm's protected activity and the adverse action taken against him.[22] Thus, I find that the General Counsel has satisfied the initial *Wright Line* burden of persuasion.

The General Counsel's showing proves a violation of the Act subject to Respondent's affirmative defense of demonstrating by a preponderance of the evidence that the same adverse employment action would have taken place even in the absence of the protected conduct. *Wright Line,* supra at 1088-1089. In this regard, however, it is not sufficient for an employer to produce a legitimate basis for the adverse employment action[23] or to show that legitimate factors for adverse action were a part of its decision-making process.[24] Rather, *Wright Line* requires an employer to persuade by a preponderance of the evidence that it would have taken the same action in any event.

Respondent claims that Schramm's discharge was not motivated by any protected, concerted activity and puts forth a legitimate business reason for the discharge. Respondent asserts that it would have discharged Schramm in any event because of his refusal to take the respirator mask exam. I find this ground for discharge pretextual. Respondent's RPP specifically provides that an employee has the right to discuss the content of the questionnaire with the contract doctor prior to completing the questionnaire but Schramm was not afforded this opportunity. Respondent was aware of Schramm's request to see the doctor before completing the questionnaire and denied Schramm an opportunity to return to take the test. Thus, when he was suspended, it was still within his appointment time and Schramm told Cordell that he would take the exam right away. Cordell refused and was not interested in the substance of Schramm's conversation. These facts indicate that Respondent was predisposed to discharge Schramm and the motivation had nothing to do with Schramm's respirator test. If the true concern of Respondent was testing Schramm, he would have been allowed to speak to the doctor prior to testing or, at a minimum, sent back for testing while he was within his testing period.

Then, as part of the investigation, Simms reported to human resources that Schramm stated to the contract personnel that he could not wear a respirator and he would not go through the testing. Beeman told human resources that Schramm just wanted to see the doctor and would not allow the prescreening to be done.[25] At the due process meeting, all parties agree that Schramm said he wanted to see the doctor due to a medical condition. He had anxieties about having a mask on his face. Schramm also submitted a written statement explaining that he wanted to see the doctor before going through the exam and when he was called in to be suspended he was denied an opportunity to take the exam.

It is questionable whether Schramm's statements constituted a request for accommodation pursuant to the Americans with Disabilities Act of 1990 (ADA) §§101(9), 102(b)(5)(A), 42 U.S.C.A. §§12111(9), 12112(b)(5)(A). To request accommodation, an employee may use plain words and need not use the words "ADA" or "request accommodation." However, the employee must state that he/she needs an adjustment or change at work for a reason related to a medical condition. *Enforcement Guidance: Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act,* (Oct. 17, 2002) 2002 WL 31994335.

At the due process meeting, Schramm stated that before taking the mandated respirator test, he wanted to see the doctor due to his anxiety or phobia about placing a mask over his face. Cordell recalled Schramm stating that he had a medical condition regarding putting something on his face. Thus, focusing narrowly on his words, Schramm stated that he needed an adjustment (to consult with the doctor before undergoing the exam) for a reason related to a medical condition, a fear of placing a mask over his face, or focusing broadly, Schramm stated he needed an exemption from taking the respirator test due to a medical condition. Indeed, Schramm was asked why he did not come to HR with this issue. The question left unanswered is why HR, on hearing this information at the due process meeting, did not follow up and ask if Schramm was requesting HR's assistance. Instead he was stone walled. Such lack of inquiry indicates a strong probability that Respondent was merely going through the steps of a due process meeting but had already determined that Schramm would be discharged.

In any event, at the due process meeting Schramm offered to take the respirator test and was denied that opportunity. If this was truly Respondent's concern, Schramm's offer should have satisfied its concerns. After all, this is the only ground Respondent relies upon in defending the discharge. Thus, I find that Respondent's defense fails as pretext. Respondent would not have discharged Schramm absent his protected, concerted activity. Thus I find that Schramm was suspended and discharged because at an employee meeting, he complained together with Teeney about a workplace health and safety issue.

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[22] See, e.g., *Nichols Aluminum, LLC,* 361 NLRB 216, 221–228 (2014) (concurrence of Member Johnson stating particularized motivating animus toward employee's own protected activity is implicit in *Wright Line).*

[23] *Carpenter Technology Corp.,* 346 NLRB 766, 773 (2006) ("The issue is, thus, not simply whether the employer 'could have' disciplined the employee, but whether it 'would have' done so regardless of his union activities.")

[24] *Weldun International,* 321 NLRB 733, 747 (1996), enfd. in relevant part 165 F.3d 28 (6th Cir. 1998) (employer cannot carry this burden merely by showing it also had a legitimate reason for the action).

[25] Although Beeman testified he was told by contract personnel that Schramm refused to take the exam and instead wanted to see the doctor, neither Beeman's verbal report nor his written report to Cordell included the fact that Schramm wanted to see the doctor.

Respondent violated Section 8(a)(1) in doing so.

CONCLUSION OF LAW

By threatening employees with discharge, by denying the request of Schramm for a representative at an investigatory interview which Schramm reasonably believed could result in discharge, and by suspending and discharging Schramm because he engaged in concerted activity with other employees for the purpose of mutual aid and protection, Respondent violated Section 8(a)(1) of the Act. These unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in and is engaging in unfair labor practices within the meaning of Section 8(a)(1) of the Act, I shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent unlawfully discharged Schramm, it must offer him reinstatement and make him whole for any loss of earnings and other benefits, computed on a quarterly basis from the date of discharge to the date of proper offer of reinstatement, less any interim earnings, as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Further, Respondent shall compensate Schramm for any adverse tax consequences of receiving a lump-sum backpay award and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Latino Express,* 361 NLRB 1171 (2014). Additionally, the customary notice shall be posted and published in the usual manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

1. The Respondent, Circus Circus Casinos, Inc. d/b/a Circus Circus Las Vegas, its officers, agents, successors, and assigns, shall cease and desist from denying employees a representative at an investigatory interview which the employee reasonably believes could result in discharge, threatening or discharging employees for their protected, concerted activities or in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Respondent shall take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Michael Schramm full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Michael Schramm whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Reimburse Michael Schramm an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

(d) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Michael Schramm it will be allocated to the appropriate calendar quarters.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Michael Schramm and, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination against him will not be used against him in any way.

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

(g) Within 14 days after service by the Region, post at its facility in Las Vegas, Nevada, copies of the attached notice marked "Appendix."[27] Copies of the notice, on forms provided by the Regional Director of Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employment by the Respondent at its Las Vegas facility at any time since November 2013.

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

Dated, Washington, D.C. December 30, 2014

APPENDIX

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

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

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post, mail, and abide by this notice.

WE WILL NOT threaten you because you complain about the effect on employees of second-hand marijuana smoke in guest rooms.

WE WILL NOT deny you the right to Union representation at an investigatory meeting which you reasonably believe could result in discharge.

WE WILL NOT suspend and/or discharge you for complaining at employee meetings about your terms and conditions of employment.

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

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

WE WILL make Michael Schramm whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge, less any net interim earnings, plus interest.

WE WILL reimburse Michael Schramm an amount, if any, equal to the difference in taxes owed upon receipt of a lump-sum backpay payment and taxes that would have been owed had there been no discrimination against him.

WE WILL submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Michael Schramm, it will be allocated to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Michael Schramm and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discrimination will not be used against him in any way.

CIRCUS CIRCUS CASINOS, INC. D/B/A CIRCUS CIRCUS LAS VEGAS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28–CA–120975 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.