Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria *and* Ralph D. Groves. Case 05–CA–194577

August 16, 2019

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS KAPLAN AND EMANUEL

On May 18, 2018, Administrative Law Judge Michael A. Rosas issued the attached decision. The General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief,[1] and the General Counsel filed a reply brief. In addition, the Respondent filed limited exceptions with supporting argument, and the General Counsel filed an answering brief.[2]

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,[3] and conclusions and to adopt the recommended Order as modified and set forth in full below.[4]

ORDER

The National Labor Relations Board orders that the Respondent, Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria, St. Mary's, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with and obtain remedies from the National Labor Relations Board.

(b) 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) Rescind the mandatory arbitration agreement in all its forms or revise it in all its forms to make clear to employees that the agreement does not bar or restrict employees' right to file charges with and obtain remedies from the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in any form that the agreement has been rescinded or revised and, if revised, provide them with a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at its St. Mary's, Maryland facility copies of the attached notice marked "Appendix."[5] Copies of the notice, on forms provided by the Regional Director for Region 5, 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

[1] While styled as an "Opposition" brief, the Respondent's brief responds to the General Counsel's exceptions and supporting brief and is therefore more accurately described as an answering brief.

[2] We deny the General Counsel's request that the Board disregard the Respondent's exceptions because they fail to meet the specificity requirements of Sec. 102.46 of the Board's Rules and Regulations. Although the Respondent's exceptions do not fully satisfy Sec. 102.46, they are not so deficient as to warrant rejection. Further, it does not appear that the General Counsel has been prejudiced by any shortcomings in the exceptions, given that he has filed an answering brief fully addressing them. See *Postal Service*, 339 NLRB 400, 400 fn. 1 (2003).

On January 22, 2019, the Respondent filed a notice of supplemental authority with the Board. In the filing, the Respondent contends that the Board's recent decision in *Alstate Maintenance*, 367 NLRB No. 68 (2019), supports its position that employee Ralph Groves did not engage in protected concerted activity at the October 15, 2016 employee meeting. On February 5, 2019, the General Counsel filed a response asserting that the Respondent misapplies *Alstate* in its supplemental filing.

[3] We agree with the judge, for the reasons he states, that Groves did not engage in concerted activity during the October 15, 2016 employee meeting. As a result, we adopt the judge's dismissal of the allegation that the Respondent violated Sec. 8(a)(1) of the Act by discharging employee Groves for his actions during that meeting. We further find that the judge's conclusion that Groves did not engage in concerted activity is consistent with *Alstate Maintenance*, above.

In addition, the judge found that the Respondent violated Sec. 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with and obtain remedies from the National Labor Relations Board. In its exceptions, the Respondent does not challenge the judge's findings regarding the lawfulness of the arbitration agreement. Instead, the Respondent argues only that the judge failed to apply the Board's arbitration deferral doctrines to the arbitration agreement allegation. We reject the Respondent's deferral-related arguments, however, as they were raised for the first time in the Respondent's exceptions and are thus untimely. See, e.g., *Delta Sandblasting Co*., 367 NLRB No. 17, slip op. at 2 fn. 8 (2018); *Master Mechanical Insulation*, 320 NLRB 1134, 1134 fn. 2 (1996). We therefore adopt the judge's finding that the Respondent violated Sec. 8(a)(1) by maintaining the mandatory arbitration agreement. In so doing, we find it unnecessary to pass on whether the Respondent's maintenance of the agreement also violated Sec. 8(a)(4) as such a finding would not materially affect the remedy.

[4] Because we find the Board's standard remedies are sufficient to effectuate the policies of the Act, we deny the General Counsel's request for a notice-mailing remedy. In addition, we shall modify the judge's recommended Order and substitute a new notice to conform to the judge's findings and to the Board's standard remedial language.

[5] 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."

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. 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 any time since May 6, 2017.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 5 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.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

Dated, Washington, D.C. August 16, 2019

John F. Ring, Chairman

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with and obtain remedies from the National Labor Relations Board.

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 rescind the mandatory arbitration agreement in all its forms or revise it in all its forms to make clear to employees that the agreement does not bar or restrict employees' right to file charges with and obtain remedies from the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement in any form that the agreement has been rescinded or revised and, if revised, WE WILL provide them with a copy of the revised agreement.

BUD'S WOODFIRE OVEN LLC D/B/A AVA'S PIZZERIA

The Board's decision can be found at www.nlrb.gov/case/05-CA-194577 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.

Oluwatosin Fadarey and *Patrick J. Cullen, Esqs.*, for the General Counsel.

Adam E. Konstas and *Leslie Robert Stellman, Esqs. (Pessin Katz Law, P.A.),* of Towson, Maryland, for the Respondent.

DECISION

STATEMENT OF THE CASE

MICHAEL A. ROSAS, Administrative Law Judge. This case was tried in Baltimore, Maryland, on April 3, 2017. The complaint

alleges that Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria (the Company, Respondent, or Ava's Pizzeria) discharged employee Ralph D. Groves on October 15, 2016,[1] in violation of Section 8(a)(1) of the National Labor Relations Act (the Act)[2] because he complained during an employee group meeting about a manager's failure to assist kitchen employees. Additionally, the complaint alleges that the Company compels employees to sign a mandatory arbitration agreement which waives their rights to receive any relief from the National Labor Relations Board's (the Board) processes in violation of Sections 8(a)(1) and (4). The Company denies the allegations, contending that Groves acted on his own behalf and did not engage in concerted activities with other employees for mutual aid and protection. Moreover, the Company asserts that its mandatory arbitration rule is lawful because it contains a carve-out provision enabling employees to file charges with the Board.

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

FINDINGS OF FACT

I. JURISDICTION

The Company, a limited liability company, operates a public restaurant selling food and beverages in St. Mary's, Maryland, where it derives gross revenues annually in excess of $50,000, and purchases and receives goods valued in excess of $5000 directly from points outside the State of Maryland. The Company admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Company's Operations

Ava's Pizzeria, an 88-seat pizzeria restaurant and wine bar, is one of two restaurants owned by the Company and its principal, Chris Agharabi. The restaurant employs approximately 30 employees. Brian Ball, the general manager, has overseen the general operations of Ava's Pizzeria and the Company's other restaurant, Theo's Steaks, Sides and Spirits, for over 6 years. His operational functions include supervising the managers, assistant managers and employees of each restaurant and, during labor shortages, assisting with cooking and other restaurant functions. In addition, Ball and other managers document operational and personnel developments in a logbook reflecting customer and employee concerns, daily sales and other information. Administratively, Ball meets periodically with the Company's owner, managers, assistant managers, employees, and Alice Pelanne, the Company's bookkeeper and director of human resources.

The restaurant consists of a dining room, which is separated from the main (or front) kitchen area by a short hallway, and the back kitchen, which is separated from the main kitchen by a patio. A typical kitchen staff shift includes a chef, three line cooks, a prep cook, and a kitchen expeditor. The line cooks are each assigned to one of three stations in the main kitchen—the pizza station, the sauté station or the salad station, but rotate as necessary. The kitchen expeditor facilitates the delivery of food from the main kitchen to the wait staff. The prep cook works in the back kitchen, preparing meatballs, sliced vegetables, cheese, and other food for the line cooks.

B. Ralph Groves

Groves, whose nickname is RJ, was initially hired by the Company in June 2015 as a dishwasher at the rate of $10 per hour. A few weeks later, Groves was promoted to line cook making salads and periodically filling in as pizza cook and prep cook. Agharabi and managers provided him with positive performance appraisals and two $1-hourly raises as of July 2016. The extent of Groves' previous disciplinary history consisted of several warnings by Ball regarding his loud playing of offensive music and mobile telephone usage in the kitchen.

By July 2016, Groves felt "burnt out" making salads and met with Agharabi and Marie Cabeceiras, an assistant manager. After explaining that he felt overwhelmed by the tremendous amount of work at the salad station and the lack of help, he gave 2 weeks' notice of his intention to resign. Agharabi and Cabeceiras, however, convinced him to reconsider, promoted him to the position of kitchen expeditor and gave him another raise, bringing his hourly pay rate to $13.50.[3]

C. Groves' Relationship with Management

During his tenure with the Company, Groves had a propensity for speaking up whenever he disagreed with management. Sometime in or around September 2016, the Company changed the smoking policy to limit the designated smoking area behind the restaurant to one smoker at a time. Groves and two other employees, Michael Cordan and Taylor Falon, were discussing the Company's change in the smoking policy when Ball overheard the conversation from his office. He "yelled down" to the employees "that if anybody had a problem" they "should say it to [his] face" and they "didn't need to be down there bitching about it." Groves did just that and went up to Ball's office to share his critique of the new policy and express dismay at Ball's disrespectful treatment. Ball apologized. However, during a followup discussion with Ball and Agharabi later that night, the latter criticized Groves for not being a team player and urged him to be supportive of company policies because other staff listened to him.[4]

In addition to the September altercation, Groves also harbored displeasure with Ball's management approach because he felt that Ball spent too much time observing and not enough time pitching in to help kitchen staff.[5] Some staff, including line cook

[1] All dates are in 2016 unless otherwise indicated.

[2] 29 U.S.C. §§ 151–169.

[3] Agharabi, although present throughout the hearing, did not testify.

[4] I credited Groves' hearsay testimony regarding his conversation with the two coworkers as inherently reliable and corroborated by his additional, undisputed testimony that Ball overheard their conversation, spoke with Groves about it, and Ball and Agharabi followed up with another meeting about the incident later that day. (Tr. 95–99.)

[5] Groves testified that coworkers expressed concerns to him about Ball's failure to pitch in "over and over again" and that "[i]t was a concern that everybody had shared and that we all talked about." However, Groves' reference to Ball's lack of participation as a "concern" on the part of others constituted uncorroborated hearsay. (Tr. 104–105.) See *W.*

Jerome Butler, did not have an issue with Ball's role and actually joked about his tendency to stand and observe by the wall.[6] Others, such as former employee Lynell Harris, simply told Ball to help them out when appropriate.[7]

D. The October 15th Staff Meeting

Prior to Ava's Pizzeria opening for business on October 15, Ball and Cabeceiras convened a meeting with approximately 10 kitchen and wait staff. Ball led the discussion and was not in a great mood. He commented "that he didn't come to work to be anybody's fucking babysitter" and proceeded to express frustration with various aspects, including the early closing of the dessert station, excessive smoke breaks and the use of mobile telephones. At the conclusion, he asked if anyone had anything to say, at which point Groves said, "how do you know you don't do shit around here." Groves then cited an example from the night before when Ball knocked over a rack of clean silverware during a busy time and merely watched as a hostess picked it up. Ball replied that he would discuss his job duties with Groves later.[8]

E. The Company Discharges Groves

Groves' work shift as a line cook proceeded uneventfully. After Groves' shift ended around 4 p.m., Ball approached him in the designated smoking area behind the restaurant. Ball initiated the conversation with a leading question: "You don't like working here, do you?" Groves denied the accusation, insisting that he liked working there but felt the need to speak up about things that needed to change in order for things to get better. Ball replied that he did not like that about Groves and, as a result, he was fired.[9]

The Company's daily log for October 15 contained Ball's notes at 10:23 p.m. referencing Grove's discharge based on "disrespect and poor attitude," but omitting any mention of poor or disruptive performance:

> 12k for the day with about 5 coming in for lunch. Spoke to the staff today about trying to close down stations way to (sic) early prior to the flag being pulled. Quite a bit of attitude of RJ and . . . the end of service [I] fired him for lack of respect, and poor attitude towards his job.

F. Maryland State Unemployment Insurance Decision and Award

Shortly after his discharge, Groves filed a claim for unemployment insurance with the State of Maryland Office of Unemployment Insurance. In his claimant statement, Groves asserted:

> I was discharged by Brian Ball, General Manager. The reason he gave for the discharge was because I spoke my mind. He stated he did not like that about me. It happened on the day I was fired. We were in a meeting. Front and Back of House meeting. Things were being addressed at the end of our job duties. Brian, General Manager, asked if there were any concerns that would help us do our jobs. I stated that he did not know what he was doing. I told him that we needed his help. I believed that there were times when he could be helping us when he does not. Like for an example he knocked over a complete tray of silverware that he dropped and did not bother to help. He stated he had to do payroll. I mentioned times when we needed help and had gotten it and times we hadn't. He started cutting me off. He asked if anybody else had anything to say. He said he would talk to me later. I finished out my shift. He asked me if I liked working there. I told him that it was not that I like working there but that I felt that something had to be said for the better of everybody. I am going to say it if I feel it needs to be said whoever it is. He told me he did not appreciate the way I spoke to him in front of everybody. I worked the rest of the shift after the staff meeting. I was discharged at the end of my shift that day.

Pelanne's reply on behalf of the Company regarding Groves' separation from employment was that he "voluntarily quit employment" based on the following explanations:

> Ralph continually had a very bad attitude which affected the whole kitchen staff and the day that he was fired he was very disrespectful to the General Manager at a staff meeting.
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> . . .
>
> The claimant was discharged for being disrespectful towards his General Manager. He would be fine then sometimes he would be dark. His mood would affect everybody around him. He was spoken to about his attitude. That he needed to be more positive. He made a comment about a staff party when the boss chartered a boat. It was a sunset dinner cruise. It was a very nice event. For some reason I heard that he was one of the only few that did not come. He was stirring up some trouble about blacks and whites. This was early September.
> Then in the meeting on 10/15 right in front of everybody Ralph stated that the General Manager did not know what he was talking about because he did not work as hard as the kitchen staff does. Both the front and the back of the house staff were present. The General Manager has owned like 15 restaurants during his career. He is a Chef himself and has worked in a Kitchen for like 30 years. It was rude and disrespectful. The Kitchen Manager did know what he was talking about and to

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D. Manor Mechanical Contractors, Inc., 357 NLRB 1526 (2011) (uncorroborated hearsay is entitled to "little weight")

[6] Butler agreed with Groves' comments that Ball did not help out like other managers and "stands [by] the wall all of the time," instead of "moving around like everyone else wanted him to." However, he did not characterize Ball's management style as a "concern" or complaint, explaining that "[t]here's no issue with me" and that other employees actually "joked" about the fact that Ball stood by the wall. (Tr. 65-71.)

[7] Harris also failed to corroborate Groves' testimony that employees complained or were concerned about Ball's management role. When asked whether she agreed with Groves' comments, Harris said, "I don't know if I did or I didn't." In fact, she had no problem telling Ball "to get over here and help us out" on occasion. (Tr. 73-78.)

[8] Groves and Ball provided a generally consistent account of the meeting. (Tr. 23–25, 108.)

[9] Ball's testimony—that Groves was discharged because he sabotaged the salad service—was not credible. (Tr. 19–25.) Groves credibly testified that he worked as a line cook, but not at the salad station that day. (Tr. 103–108.) In addition, Ball's daily log entry, as well as the Company's subsequent statements to the Maryland unemployment insurance agency, based Groves' discharge on his disrespect and attitude and omitted any reference to problems with the salad service. (GC Exh. 2.)

make a statement that he did not in front of the entire staff was the final straw. He had a bad attitude and it was only getting worse. He just brought everybody down and due to the comment at the staff meeting the decision was made to let him go.

Based on the foregoing, the agency initially determined that Groves' disrespect towards his general manager constituted gross misconduct. On appeal, the initial determination disqualifying him from receiving unemployment insurance benefits was reversed. In evaluating the evidence, the hearing examiner cited the Company's failure to appear at the appeal hearing, the "unexplained reasons" as to why "the employer believed that the claimant did not like working for the employer," and the absence of evidence of any wrongdoing on Groves' part.[10]

G. The Company's Mandatory Arbitration Agreement

On March 8, 2017, Groves filed the underlying unfair labor practice charge alleging that the Company violated Section 8(a)(1) by discharging him for engaging in protected concerted activity. On September 26, 2017, the Company reinstated Groves as a part-time employee since he had procured full-time work elsewhere. As a condition of his employment, the Company required that Groves sign a mandatory arbitration agreement. The agreement, which the Company has been "maintained since about May 6, 2017,"[11] states, in pertinent part:

> The parties to this Agreement agree to arbitrate any and all disputes, claims, or controversies ("claims") they may have against each other, including their current and former agents, owners, officers, directors, or employees, which arise from the employment relationship between Employee and Employer or the termination thereof. Claims covered by this Agreement include, but are not limited to: claims of employment discrimination and harassment under Title VII of the Civil Rights Act; the Age Discrimination in Employment Act, as amended; the Americans with Disabilities Act; 42 U.S.C. section 1981; the Employment Retirement Income Security Act; the Maryland Labor Code; including any claims brought by the Employee related to wages; breach of employment contract or the implied covenant of good faith and fair dealing; wrongful discharge; or tortious conduct (whether intentional or negligent) including defamation, misrepresentation, fraud, infliction of emotional distress, but excluding claims for workers' compensation benefits to remedy work-related injury or illness. The parties understand and agree that they are waiving their right to bring such claims to court, including the right to a jury trial.
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> . . .
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> The decision or award of the arbitrator shall be final and binding upon the parties. The arbitrator shall have the power to award any type of legal or equitable relief that would be available in a court of competent jurisdiction including, but not limited to attorneys' fees and punitive damages when such damages and fees are available under the applicable statute and/or judicial authority. Any arbitral award may be entered as a judgment or order in any court of competent jurisdiction. The parties agree that any relief or recovery to which they are entitled arising out of the employment relationship or cessation thereof shall be limited to that awarded by the arbitrator.
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> Nothing in this Agreement precludes Employee from filing a charge or from participating in an administrative investigation of a charge before any appropriate government agency. However, Employee understands and agrees that Employee cannot obtain any monetary relief or recovery from such a proceeding.
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> . . .*
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> A court or other entity construing this Agreement should administer, modify, or interpret it to the extent and such manner as to render it unenforceable. If, for any reason, this Agreement is declared unenforceable and cannot be administered, interpreted or modified to be enforceable, the parties agree to waive any right they may have to a jury trial with respect to any dispute or claim relating to employment, termination or employment, or any terms and conditions of employment with the Employer.
>
> Employee understands that s/he would not be hired by the Company if s/he did not sign this Agreement. Employee has signed it in consideration of employment by the Company. Employee has been advised of his or her right to consult with counsel regarding this Agreement. EMPLOYEE ALSO UNDERTANDS THAT BY ENTERING INTO THIS AGREEMENT, S/HE IS WAIVING ANY RIGHT TO A TRIAL BY JURY.[12]

Legal Analysis

I. GROVES TERMINATION

The complaint alleges that the Company violated Section 8(a)(1) of the Act by discharging Groves because he engaged in protected concerted conduct by criticizing Ball, the General Manager, during a staff meeting. The Company denies the allegations on two grounds. First, the Company alleges that Groves was not expressing a complaint on behalf of his coworkers, but rather, an individual gripe that he had about Ball's aversion to helping out kitchen staff.

Under *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), the General Counsel has the initial burden of establishing that an employee's union or protected concerted activity was a motivating factor in an employer's decision to take adverse action against the employee. Id. at 1089. The General Counsel meets this burden by showing that the employee engaged in protected concerted activity, that the employer had knowledge of that activity, and that the employer harbored animus against such activity.

[10] I received the state unemployment insurance report into evidence and have considered the prior statements of the parties contained therein, but do not adopt its legal conclusions. See *Cardiovascular Consultants of Nevada*, 323 NLRB 67 fn. 1 (1997) (decisions in State unemployment compensation proceedings are admissible and its findings may be considered but are not controlling).

[11] The Company admitted this allegation in its amended answer.

[12] In its answer to the amended complaint, the Company admitted that the arbitration agreement has been maintained since May 6, 2017.

See, e.g., *Mesker Door, Inc*., 357 NLRB 591, 592 (2011). If the General Counsel makes this initial showing, the burden then shifts to the employer to prove that it would have taken the same action even in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1089.

The credible evidence established overwhelmingly that Groves was discharged because he criticized Ball during the earlier staff meeting for not doing anything to help out kitchen staff. Groves' vulgar comment—"how do you know you don't do shit around here"—sought to undermine Ball's broad critique of staff performance, but was consistent with the tone set by Ball in opening the meeting by telling staff that he "didn't come to work to be anybody's fucking babysitter." As such, the knowledge and adverse action components of the analysis are quite evident. In addition, Ball's animus towards Groves' remarks was demonstrated by the suspiciously close timing of, and the admitted, shifting and unsubstantiated reasons for, the discharge. See In re *Medic One*, Inc., 331 NLRB 464, 475 (2000). Those same insufficiencies also preclude the Company from meeting its burden of establishing that it would have acted in the same manner absent the activity. See *Parkview Lounge, LLC d/b/a Ascent Lounge*, 366 NLRB No. 71 slip op. at 10 (2018) (inconsistent or shifting reasons alleged for discharge two days after the concerted protected activity were mere pretext to mask unlawful motive).

The remaining question is whether Groves acted on his own behalf or engaged in protected concerted conduct during the October 15 staff meeting. The Board defines concerted activity as that which is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries*, 268 NLRB, 493, 497 (1984). This definition includes instances in which an individual employee brings group complaints to the attention of management. *Meyers Industries*, 281 NLRB 882, 887 (1986). The Board has found individual action to be concerted where the evidence supports a finding that the concerns expressed by the individual are the logical outgrowth of the concerns expressed by the group. *Mike Yurosek & Son, Inc.*, 306 NLRB 1037, 1038 (1992) citing *Salisbury Hotel*, 283 NLRB 685, 687 (1987).

Determining whether action is concerted depends on whether the employee's actions can be linked to those of his coworkers. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 153 (2014), citing *City Disposal Systems*, 465 U.S. 822, 831 (1984). The concept of "mutual aid or protection" focuses on the goal of the concerted activity, specifically, whether the employee involved seeks to improve employees' terms and conditions of employment. Id. at 153.

It is undisputed that Groves engaged in concerted protected activity about a month or so earlier with respect to conditions imposed by management on employees' use of the designated employee smoking area. In that instance, neither Ball nor Agharabi refuted Groves' version of the incident in which Ball overheard Groves and two other employees discussing the new smoking policy. In addition, Agharabi urged Groves' acquiescence to Company policies because other employees looked up to him. Moreover, Groves' interactions with Ball and Agharabi that day provides ample evidence of the Company's animus towards his protected concerted activities. That incident alone, however, does not alleviate the General Counsel's burden to establish that Groves engaged in protected concerted activity on October 15. There is no assertion that he was discharged because of his earlier smoking policy advocacy; such an argument would fail in any event, as his discharge was clearly precipitated by his criticism of Ball on October 15.

Ball helped out on occasion with cooking duties, but Groves was not pleased with his lack of hands-on involvement in kitchen operations. I did credit Groves' testimony that he expressed *his* feelings about Ball to coworkers. In addition, I found that Ball's penchant for standing by the wall was a topic that came up with coworkers. However, there was no corroboration for Grove's hearsay testimony that any of his coworkers complained about or otherwise shared *his* concerns about Ball's involvement in kitchen operations. Moreover, testimony by employees that they joked about Ball's actions or inaction, or actually asked him to help them out in certain cases, falls short of concerted activity. *Manimark Corp*., 7 F.3d at 550 (citing *ARO, Inc. v. NLRB*, 596 F.2d 713 (6th Cir. 1979) (concerted activity requires a showing that the employee was "acting on behalf of, or as a representative of, other employees rather than acting for the benefit of other employees only in a theoretical sense."). Lastly, while Groves' criticism of Ball was directed at working conditions that affected all of the kitchen employees, that alone does not constitute Section 7 activity. See *Jim Causley Pontiac v. NLRB*, 620 F.2d 122, 126 fn. 7 (6th Cir.1980) (the employee "must be actually, rather than impliedly, representing the views of other employees.").

It is also difficult to imagine how lashing out at a manager who asks employees for feedback by asking, "how do you know you don't do shit around here," even begins to lay the foundation for meaningful dialogue about employees' terms and conditions of employment. Protected activities have been found to include terms and conditions of employment such as wages, benefits, working hours, the physical environment, dress codes, assignments, responsibilities, and the like." See *New River Industries, Inc. v. NLRB,* 945 F.2d 1290, 1294 (4th Cir. 1991). They do not include, however, employees' personal gripes directed at supervisors and managers unrelated to their terms and conditions of employment. In this case, Groves insulted Ball by accusing him of doing nothing at the restaurant, an expression that can be reasonably interpreted as questioning the scope of his managerial responsibilities. It did not entail the very nature of Groves' work conditions, but rather, was calculated to undermine Ball's managerial authority. Groves' comments thus encroached on a management prerogative which had nothing to do with his individual terms and conditions of employment. See *Joanna Cotton Mills Co. v. NLRB,* 176 F.2d 749, 753 (4th Cir. 1949) (activity was unprotected where the purpose but was to "get rid of or humiliate the supervisory employee with whom he was angry"); *New River Industries,* 945 F.2d at 1294 (employee's criticism of management by preparing a letter mocking the value of a gift from management to employees was not protected activity).

Under the circumstances, the allegations that the Company discharged Groves in violation of Section 8(a)(1) of the complaint are dismissed.

II. THE MANDATORY ARBITRATION AGREEMENT

The complaint alleges that "[s]ince about May 6, 2017," the

Company has maintained a rule in the form of a mandatory arbitration agreement which interferes with employees' protected activities in violation of Section 8(a)(1) and discriminates against them in violation of Section 8(a)(4). Specifically, the agreement allegedly interferes with employees' rights to file charges or otherwise access the Board's processes and prohibits them from obtaining remedies through the Board's processes. The Company disputes that interpretation, insisting that the agreement contains a carve-out exception enabling employees to access the Board's processes and asserts, in any event, that there are legitimate justifications for maintaining it.

Board analysis as to the lawfulness of mandatory arbitration agreements is akin to that applied to work rules. Both parties agree, however, that the Board's most recent guidance on the lawfulness of rules, *Boeing Co*., 365 NLRB No.154 (2017), does not apply. In *Boeing,* which partially overturned the analysis in *Lutheran Heritage Village-Livonia*, 314 NLRB 646 (2004), the Board set forth three work rule categories: Category 1 includes rules that are lawful to maintain either because they do not prohibit or interfere with the exercise of the Act when reasonably interpreted, or the potential adverse impact is outweighed by the justifications. Category 2 includes rules that warrant individualized scrutiny to determine whether they would interfere with rights under the Act, and whether any adverse impact on Section 7 activity is outweighed by legitimate justifications. Neither category applies here since the arbitration agreement clearly prohibits or interferes with the exercise of Section 7 rights and the Company failed to articulate legitimate justification for such infringement.

Assuming, *arguendo*, that *Boeing Co*. does apply to arbitration agreements, the provision at issue clearly falls under Category 3 because it limits protected conduct, such as the filing of an unfair labor practice charge and obtaining a remedy through the Board. In *Boeing*, the Board analyzed the rule in that case from the perspective of an objectively reasonable employee. There, the employer's justification for its rule was tied to protection of national security information, trade secrets, and employees' personal information. Such a rationale is absent here and a reasonable interpretation of the rule would convey a clear sense to employees that it would be futile to even file a charge. As the Supreme Court stated in *Scrivener*, 405 U.S. 117, 121 (1972), this result would interfere with Congressional intent to grant employees access to the Board's processes. Therefore, under the *Boeing* analysis, the Company's arbitration agreement unlawfully impedes the filing of charges with the Board.

The appropriate analysis here is set forth in *Hoot Winc*, LLC, 363 NLRB No. 2, slip op. at 1 (2015) (the 8(a)(1) violation where mandatory arbitration agreement would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board). It is well settled that a work rule violates Section 8(a)(1) if employees would reasonably believe that it interferes with their ability to file Board charges, even if the policy does not expressly prohibit access to the Board. See *Murphy Oil USA, Inc.*, 361 NLRB 774, 792 fn. 98 (2014); *D. R. Horton, Inc.*, 357 NLRB 2277, 2278 fn. 2 (2012), enf. denied on other grounds 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (2014); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. mem. 255 Fed.Appx. 527 (D.C. Cir. 2007).

It is undisputed that the Company has "maintained" the arbitration agreement since May 6, 2017. The clear implication, therefore, is that employees have been required to sign the agreement as a condition of employment. The agreement requires arbitration of "any and all disputes" arising from the employment relationship, and limits "any relief or recovery" to the arbitrator's award." The exclusivity of that provision as the avenue for relief is amplified in a purported carve-out provision:

> Nothing in this Agreement precludes Employee from filing charges or from participating in an administrative investigation of a charge before any appropriate government agency. However, employee understands and agrees that Employee cannot obtain any monetary relief or recovery from such a proceeding.

Operating on the belief that half a loaf is better than none, the Company glaringly ignores the fact that the provision explicitly prohibits employees from obtaining monetary relief, e.g., backpay, and or other "recovery," which can reasonably be construed to encompass requested relief for job reinstatement and cease and desist directives affecting other conditions of employment. Moreover, while not explicitly prohibiting employees from filing charges with the Board or participating in a Board *investigation*, employees could reasonably construe the arbitration provision as precluding them from even *testifying* at Board hearings.

The foregoing prohibitions and restrictions evident from the arbitration agreement convey the notion that it would be futile for an employee to file unfair labor practice charges since the Act's statutory remedies are beyond reach. Based on those considerations, the arbitration agreement restrains employees' Section 7 rights to engage in protected concerted conduct in violation of Section 8(a)(1). See *Ralph's Grocery Co.,* 363 NLRB No. 128, slip op. at 3 (2016) ("meaningful" access to and implementation of the Board's processes includes investigation of the charges, a determination on the merits and the appropriate statutory relief available under the Act).

The Company's primary assertion—that its carve-out language is similar to provisions in other mandatory arbitration agreements relied upon by the 5th Circuit—is incorrect. See *Murphy Oil USA, Inc. v. NLRB,* 808 F.3d 1013, 1019–1020 (5th Cir. 2015), cert. granted 137 S.Ct. 809, 196 L.Ed. 2d 595 (2017); *Jack in the Box, Inc. v. NLRB,* 671 Fed.Appx. 316, 317 (5th Cir. 2016); *Logisticare Solutions, Inc. v. NLRB,* 866 F.3d 715 (5th Cir. 2017). None of those decisions even remotely convey the notion that affording employees some, but not all, of the Board's processes can be lawfully justified.

The General Counsel also contends that the requirement that employees agree to its arbitration policy as a condition of their employment violates Section 8(a)(4) because it discriminates against their rights to pursue relief under the Act. Under Section 8(a)(4), it is an unfair labor practice for an employer to discriminate against an employee because he has filed charges or given testimony under the Act. Its purpose is to ensure effective administration of the Act by providing protection to employees who initiate unfair labor practice charges or assist the Board in proceedings under the Act. *General Services, Inc.*, 229 NLRB 940, 941 (1977).

The General Counsel concedes that the Board has treated similar arbitration policies solely as 8(a)(1) violations without

mentioning Section 8(a)(4). See *Ralph's Grocery Co.*, supra at 4. However, she relies on *Bill's Electric, Inc.* 350 NLRB 292 (2007), as an example where the Board, when specifically presented with the 8(a)(4) theory, has found such a violation. That case is distinguishable, however, since that employer actually took further steps to enforce the unlawful policy in letters to alleged discriminatees. No such proof exists here and I decline to find such a violation.

Under the circumstances, the Company violated Section 8(a)(1) of the Act. The additional allegation that the arbitration agreement violated Section 8(a)(4) is dismissed.

CONCLUSIONS OF LAW

1. By maintaining a mandatory and binding arbitration agreement that explicitly interferes with employees' Section 7 rights to file charges and obtain remedies through the National Labor Relations Board, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
2. All other allegations in the complaint are dismissed.

REMEDY

Having found that the Respondent Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[13]

ORDER

The Respondent, Bud's Woodfire Oven LLC d/b/a Ava's Pizzeria, St. Mary's, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory and binding arbitration agreement that explicitly interferes with employees' Section 7 rights to file charges and obtain remedies through the National Labor Relations Board.

(b) 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) Rescind or revise the arbitration agreement to make it clear to employees that the agreement does not constitute a waiver of the right to obtain remedies from, or otherwise file charges with, the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign or otherwise become bound to the arbitration agreement that it has been rescinded or revised, and provide them with a copy of the revised policy, if any.

(c) Within 14 days after service by the Region, post at its facility St. Mary's, Maryland, copies of the attached notice marked "Appendix."[14] Copies of the notice, on forms provided by the Regional Director for Region 5, 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the 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 this proceeding, the Respondent has gone out of business or closed the facility involved in this proceeding, 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 any time since May 6, 2017.

(d) 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. May 18, 2018

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT maintain a mandatory arbitration agreement with provisions that interfere with your right to file charges and obtain relief or recovery through the National Labor Relations Board.

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

WE WILL rescind certain portions in our arbitration agreement that interfere with your right to file charges and obtain relief or recovery through the National Labor Relations Board.

BUD'S WOODFIRE OVEN LLC D/B/A AVA'S PIZZERIA

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

[14] 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 Administrative Law Judge's decision can be found at www.nlrb.gov/case/05-CA-194577 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.