

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

CHIP’S WETHERSFIELD, LLC D/B/A
CHIP’S FAMILY RESTAURANT

CASE 01-CA-217597

and

JACQUELINE RODRIGUEZ,
AN INDIVIDUAL

OCTOBER 23, 2019

**EXCEPTIONS FILED BY CHIP’S WETHERSFIELD, LLC
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, as amended, Chip’s Wethersfield, LLC d/b/a Chip’s Wethersfield Restaurants (hereinafter, “Chip’s Wethersfield” or the “Employer”) files the following exceptions to the Decision, JD-72-19 (hereinafter, the “*Decision*”), of the Administrative Law Judge Elizabeth M. Tafe (hereinafter, the “ALJ”) as follows:¹

1. To the findings of fact and conclusions of law that Chip’s Wethersfield violated Section 8(a)(1) of the Act when it discharged Jacqueline Rodriguez (hereinafter, “Rodriguez”) pursuant to the ALJ’s *Atlantic Steel* analysis. *See Decision* at 18:9-11. The ALJ’s decision is not supported by the facts and it is based on a fundamental error of law, including as to the four factors analyzed in support of her conclusion as per *Atlantic Steel Co.*, 245 NLRB 814 (1979). *See Decision* at 11:25 to 15:22.
 - a. The ALJ’s formulation of the prima facie case incorrectly determined the facts and applied the law in support of the first factor, which she defined as ‘the place of the

¹ Chip’s Wethersfield is filing a memorandum in support of its exceptions

- discussion.’ *See Decision* at 13:25 to 14:6.
- b. The ALJ’s formulation of the prima facie case incorrectly determined the facts and applied the law in support of the second factor, which she defined as ‘the subject matter of the discussion.’ *See Decision* at 14:8 to 14:14.
 - c. The ALJ’s formulation of the prima facie case incorrectly determined the facts and applied the law in support of the third factor which she defined as ‘the nature of the outburst.’ *See Decision* at 14:16 to 14:28.
 - d. The ALJ’s formulation of the prima facie case incorrectly determined the facts and applied the law in support of the fourth factor which she defined as ‘whether Rodriguez’ outburst was provoked by the Chip’s Wethersfield’s unfair labor practice.’ *See Decision* at 14:30 to 14:40.
 - e. Further, the ALJ incorrectly determined the facts and applied the law regarding the ‘res gestae’ of the allegedly protected concerted activity when she determined that Chip’s Wethersfield disciplined Rodriguez for conduct that was part of an “otherwise protected concerted activity.” *See Decision* at 15, n.19.
2. To the findings of fact and conclusions of law that *Atlantic Steel* applies, to the exclusion of *Wright Line*, 251 NLRB 1083 (1980), to the allegations of Jacqueline Rodriguez (hereinafter, “Rodriguez”) against Chip’s Wethersfield. *See Decision* at 15, n.19. The ALJ’s decision is not supported by the facts and it is based on a fundamental error of law.
 3. To the ALJ’s conclusion that the General Counsel satisfied its initial burden under *Wright Line*, and her subsequent determination that the General Counsel’s *prima facie* case imposes a burden of proof on the employer to prove that it would have taken the same adverse action, absent the protected activity. *See Decision* at 15, n.19. The ALJ’s decision

is not supported by the facts and it is based on a fundamental error of law, including as to the four factors analyzed in support of her conclusion as per the four *Wright Line* factors.

- a. The ALJ's formulation of the prima facie case incorrectly determined the facts and applied the law in support of the first factor, which is defined as Rodriguez engaging in a protected activity on October 2, 2017. *See Decision* at 15:19 – 15:22.; *See Decision* at 15, n. 19.
- b. The ALJ's formulation of the prima facie case incorrectly determined the facts and applied the law in support of the second factor, which is defined as 'employer knowledge of the October 2, 2017 protected activity.' *See Decision* at 15, n. 19. In this regard, the ALJ does not cite any evidence that the decision-maker had any knowledge that Rodriguez was engaged in a protected activity on October 2, 2017.
- c. The ALJ's formulation of the prima facie case incorrectly determined the facts and applied the law in support of the third factor, which is defined as 'an adverse employment action.' *See Decision* at 15, n. 19.
- d. The ALJ's formulation of the prima facie case incorrectly determined the facts and applied the law in support of the fourth factor, which is defined as 'a nexus between the protected activity and the adverse employment action.' *See Decision* at 15, n. 19.
- e. Even if the ALJ had properly determined the four *Wright Line* factors, the ALJ subsequently failed to consider Chip's Wethersfield's legitimate business interest in discharging Rodriguez and, ultimately, applied an improper standard by merely discrediting the legitimate interest advanced by Chip's Wethersfield rather than considering whether there was, in fact, a legitimate business interest.

4. To the findings of fact and conclusions of law that Chip's Wethersfield violated Section 8(a)(1) of the Act when Anthony Cuzzo (hereinafter, "Cuzzo") informed Rodriguez on October 4, 2017 by e-mail that employees were prohibited from discussing-work-related incidents and managers' statements to them with other employees. *See Decision* at 16:1 to 17:22. The decision of the ALJ is not supported by the facts and it is based on a fundamental error of law, including as to the e-mail constituting interference with employees' rights under Section 7 of the NLRA. *See Decision* at 16:1 to 17:22. The ALJ further ignores and fails to mention the public policy behind confidential investigations, including in conflicting District Court authority. *See Decision* at 16:1 to 17:22.
5. To the ALJ's findings of fact and conclusions of law by which it was determined that Rodriguez had not exposed herself to discipline by Chip's Wethersfield on the basis of her conduct. *See Decision*, 11:25 to 15:22.
6. To the ALJ's rejection of Chip's Wethersfield's legitimate, non-discriminatory business reason for discharging Rodriguez because the ALJ personally or subjectively believed that Chip's Wethersfield had disciplined Rodriguez too harshly when compared with other employees whom she believed had committed worse transgressions. *See Decision* at 15, n. 19. In reaching this decision, the ALJ substituted her business judgment for that of the Respondent in an impermissible manner.
7. To the failure to follow and apply the law on adverse inference as it relates to witnesses available to Rodriguez who could have testified on her behalf, including Denise Bachand for (and with) whom Rodriguez alleges she acted in concert. In this regard, the ALJ improperly determined that Rodriguez was credible because "[she] was the only witness to this incident who testified . . ." *See Decision*, 10, n. 15.

8. To relying on a witness' respective demeanors when determining credibility, when witness demeanor is an exceptionally poor indicator of truthfulness. *See Decision, Cover Page. See Decision, 3 n. 6. See Decision, 10:3 to 10:6. See Decision, 14:26 – 14:28.*
9. To the failure to credit the testimony of Laura Robertson regarding Rodriguez' conduct and statements when her testimony was based upon two witnesses who were both participants in the altercation between Ms. Rodriguez and Ms. Olden. *See Decision, 9:45 to 10:6.*
10. To the failure to credit the testimony of Laura Robertson regarding what Denise Bachand had told her about Rodriguez' conduct – in that she yelled during the October 2, 2017 incident – but nonetheless crediting the testimony of Robertson regarding what Bachand said about her complaining about Santosha Olden. *See Decision, 2:36 to 2:37.* Notably, the ALJ accuses Respondent's counsel of frivolously using in its memorandum what Bachand and Olden had both said to Robertson about Rodriguez – that she yelled – which is also in Robertson's testimony as indicated herein.
11. To the failure to credit the testimony of Anthony Cuzzo regarding Rodriguez' conduct and statements when her testimony was based upon two witnesses who were both participants in the altercation between Ms. Rodriguez and Ms. Olden. *See Decision, 9:45 to 10:6.*
12. To the finding that Chip's Wethersfield "the Respondent was not contemplating any disciplinary action against Rodriguez based on the September 18 incident and that the decision to discharge Rodriguez was not based on the September 18 incident." *See Decision, 10:18 to 10:36.*
13. To the finding that Chip's Wethersfield, LLC is a "corporation" that has "six locations in

Connecticut.” *See Decision*, 2:5 to 2:18. The Respondent is an LLC that operated a single restaurant location.

14. To the finding that George Chatzopoulos is “Respondent’s owner”. *See Decision*, 2:29. Limited liability company’s do not have owners, but instead members; there is no testimony regarding the members of Chip’s Wethersfield, LLC.
15. To the finding that “[Santosha] Olden found herself at odds with some members of the staff”. *See Decision*, 2:29. Olden did not testify; any such determination is speculative.
16. To the finding that Rodriguez “specifically raised the servers’ perception that Olden was discriminating against server D. Bachand”. *See Decision*, 3:4 to 3:6. Rodriguez uses the term discrimination with respect to her belief during her testimony, but she did not do so during the October 5, 2017 interview. *See* November 6, 2018 Transcript, pg. 186, line 25; pg. 187, lines 1 – 6. *See also* November 5, 2018 Transcript, pg. 128, lines 3 – 5. *See also* November 6, 2018 Transcript, pg. 256, lines 7 – 24. *See also* November 6, 2018 Transcript, pg. 276, lines 22 – 25. Further, the only other server to testify before the ALJ, Ashley Curtis, never accused Santosha Olden of discrimination. *See* November 5, 2018 Deposition Transcript.
17. To the finding that “[i]n August or September of 2017, [George] Chatzopoulos told Rodriguez that there would be a meeting regarding the concerns that had been raised about Olden” *See Decision*, 3:10 to 3:11), which is unsupported by Rodriguez’ own testimony in which she claimed that “. . . Joel [Martinez] came to the server aisle and gather us and he say, George call, he was very excited that something was being -- was going to be done -- and he say, George call and he say for us servers to make a list . . .” (*See* November 5, 2018 Hearing Transcript, pg. 63, lines 13 – 16). Notably, the General Counsel never asked Mr.

Chatzopoulos if this assertion was correct, and notably the General Counsel did not obtain testimony or evidence from Mr. Martinez to confirm the assertion (or whether he was aware of the list, Ms. Robertson was aware of the list or Anthony Cuzzo was aware of the list). As to Mr. Chatzopoulos, Ms. Robertson, Mr. Cuzzo and Mr. Martinez, adverse inferences against Rodriguez should apply. It is also notable that Ashley Curtis, a server who was subpoenaed to testify by the General Counsel, confirmed that between the date that the list was created and the date of her testimony (November 5, 2018) she did not raise the issues with management, including Laura Robertson, and that she had not seen the list since it was transcribed. *See* November 5, 2018 Hearing Transcript, pg. 30, lines 7 – 12.

18. To the finding that “Rodriguez personally delivered the servers’ list of complaints to assistant manager Martinez” (*See Decision*, 3:36 to 4: 1), which is only supported by Rodriguez’ own testimony (*See* November 5, 2018 Hearing Transcript, pg. 65, lines 17 – 19). The General Counsel never asked Mr. Chatzopoulos if he had been given the list and Mr. Martinez was not called to testify to determine whether he had been given the list (or what he did with the list if he did receive it from Rodriguez). As to Mr. Martinez, an adverse inference against Rodriguez should apply.

19. To the finding that Santosha Olden “. . . refused to allow [Denise Bachand] to serve the customer.” *See Decision*, 4:10 to 4:15. The record establishes that Laura Robertson ‘cut’ Ms. Bachand from service in furtherance of Chip’s Wethersfield’s legitimate business interest in controlling costs. Being ‘cut’ from service, as Laura Robertson testified, means that a server is not permitted to take new customers; Ms. Robertson also testified that she ‘cut’ Ms. Bachand from the floor and that Ms. Olden was following her instruction regarding proper procedure. *See* November 6, 2018 Hearing Transcript, pg. 178, lines 16

– 24.

20. To the finding that “[g]ranting such exceptions [to allow a server ‘cut’ from service to nevertheless serve a new customer] was consistent with the value Respondent placed on regular customers and with its policy . . . that staff should go above and beyond . . .” *See Decision*, 4:22 to 4:25. Mr. Chatzopoulos testified that Rodriguez was wrong for claiming that when a server is ‘cut’ from service s/he can still take new customers upon customer request. *See* November 6, 2018 Transcript, pg. 278, lines 3 – 7. Notably, the General Counsel never asked Mr. Chatzopoulos if he would have permitted Ms. Bachand to serve the customer after she had been ‘cut’ from service and did not call Denise Bachand to testify about her having been ‘cut’ from service. As to Mr. Chatzopoulos and as to Ms. Bachand, an adverse inference against Rodriguez should apply.
21. To the finding that “. . . credit[s] Rodriguez’s testimony that she believed Olden’s decision to [give precedent to the policy about servers who were off the floor] was tainted by animosity towards D. Bachand.” *See Decision*, 4, n. 7. First, evidence before the ALJ, noted above, affirms that Laura Robertson ‘cut’ Denise Bachand from service and that Ms. Olden was following a directive from her manager. Second, evidence before the ALJ, noted above, affirms that George Chatzopoulos affirmed that not allowing Ms. Bachand to serve a new customer comports with Chip’s Wethersfield, LLC policy. The General Counsel never asked Mr. Chatzopoulos or Ms. Robertson if there was an exception to the policy which would have been applicable to Ms. Bachand. As to Mr. Chatzopoulos and as to Ms. Robertson, an adverse inference against Rodriguez should apply.
22. To the finding that “Rodriguez did not raise her voice at any point during the exchange . . .” *See Decision*, 5:3. The evidence establishes that Denise Bachand reported during the

October 5, 2017 meeting (to Laura Robertson, with Anthony Cuzzo present) that Jacqueline Rodriguez yelled during the altercation. *See* November 6, 2018 Transcript, pg. 214, lines 22 – 23 (Laura Robertson). Additionally, the written warning that Rodriguez received confirmed that she “argue[d] on [the server] line . . .” *See* Respondent’s ALJ Hearing Exhibit 6. Though the ALJ suggests that the written warning lacks credibility because Ms. Olden was not called to testify, that adverse inference should go against Rodriguez as the party that would seek to challenge its contents; this is especially true since Bachand’s report of the incident on October 5, 2017 is consistent with Olden’s report of the incident.

23. To the finding that “. . . Olden reacted by yelling ‘I am the manager, I make the decisions.’” *See Decision*, 5:5. Rodriguez did not testify that Ms. Olden yelled. *See* November 5, 2018 Hearing Transcript, pg. 74, lines 15 – 16 (“[S]he say, I am the manager, I make the decisions.”). Ms. Rodriguez does not allege that Ms. Olden yelled until *after* Rodriguez claimed that she was discriminating against Ms. Olden, though no claim is made as to what she said.
24. To the finding that “[t]here is no suggestion that Rodriguez or D. Bachand refused any directive from Olden or that they failed to perform any of their duties during the shift.” *See Decision*, 5:7 – 5:9. The evidence establishes that both Ms. Rodriguez and Ms. Bachand were written up, placed on leave and attended an investigatory meeting as a result of their conduct – Ms. Bachand for initially contesting the directive regarding being ‘cut’ from service, which was issued by Ms. Robertson, and initially confronting Ms. Olden about not being permitted to serve the new customer and Ms. Rodriguez separately confronting Ms. Olden and arguing in the server aisle about the decision by which Ms. Bachand had been

‘cut’ from service (by Laura Robertson) such that she was not allowed to serve a new customer. *See* Respondent’s ALJ Hearing Exhibit 6. *See* November 6, 2018 Hearing Transcript, pg. 188, lines 15 – 24. Notably, the ALJ even confirms that Rodriguez was aware that she did not have the right to challenge management on the issue of ‘cutting’ Ms. Bachand from service. *See Decision*, pg. 5:33 – 5:34.

25. To the finding that “. . . Olden contacted Laura Robertson . . . by telephone regarding the fact that D. Bachand and Rodriguez has protested her decision not to allow D. Bachand to serve the customer.” *See Decision*, 5:11 to 5:15. First, evidence before the ALJ, noted above, affirms that Laura Robertson ‘cut’ Denise Bachand from service and that Ms. Olden was following a directive from her manager. Second, evidence before the ALJ, noted above, confirms that George Chatzopoulos affirmed that not allowing Ms. Bachand to serve a new customer comports with Chip’s Wethersfield, LLC policy. *See* November 6, 2018 Deposition Transcript, pg. 195, lines 1 to 14 (Ms. Robertson, when asked by the General Counsel whether a server that has been ‘cut’ should be permitted to take new customers, confirmed that servers who have been cut from service “just don’t take any more” customers/tables and that a ‘cut’ server should only take a new customer (per customer request) “[i]f the server’s still on”). Mr. Chatzopoulos similarly testified that Rodriguez was wrong for claiming that when a server is ‘cut’ from service s/he can still take new customers upon customer request. *See* November 6, 2018 Transcript, pg. 278, lines 3 – 7. Mr. Chatzopoulos also testified that Rodriguez’ failure to follow the procedure for placing an order was not the same as ‘giving the pickle’ to the customer. *See* November 6, 2018 Deposition Transcript, pg. 279, lines 10 – 14 (“And I don't think this is -- we talk about giving the pickle thing. I don't think this is a pickle, absolutely not.”). Third, the

decision falsely insinuates that Denise Bachand and Jacqueline Rodriguez concertedly protested the ‘cutting’ decision. In this regard, Rodriguez testified that “. . . after Denise tells [her that she cannot serve the customer] . . . [she] went to Ms. Santosha and [she] told her, like this is not what George would do . . .” November 5, 2018 Hearing Transcript, pg. 74, lines 8 – 14. There is also no evidence that Ms. Bachand asked Ms. Rodriguez to confront Ms. Olden on her behalf (or that Rodriguez asked Bachand if Bachand wanted her to confront Olden on her behalf). As to Ms. Bachand, an adverse inference against Rodriguez should apply.

26. To the finding that the ‘cutting’ policy about which Rodriguez complained on October 2, 2017 was “included . . . in the list of complaints that [the servers allegedly] had recently submitted to the Respondent, [Chip’s Wethersfield, LLC]”. *See Decision*, 14:11. The list, recited by the ALJ on 3 of her *Decision*, contains no reference to the ‘cutting’ policy or to any other policy or procedure that Chip’s Wethersfield, LLC maintains for its business. There is similarly no correlation to “Olden’s management of the restaurant . . . [or] the working conditions of the servers” that is raised, in the list, with respect to Chip’s Wethersfield, LLC’s ‘cutting’ policy. *See Decision*, 14:33 to 14:34. Notably, Ms. Bachand was cut by Ms. Robertson and not by Ms. Olden.

27. To the finding that Anthony Cuozzo violated Rodriguez’ Section 7 rights when “. . . he stated that he did not want Rodriguez ‘to advocate for everybody.’ (Tr. 274.)”. Mr. Cuozzo at the time was testifying about a specific line in his e-mail, stating that he would want to hear from people who witnessed “the conversations personally” but did not want to receive “hearsay type of stuff, if she was privy to it I would love to hear from her.” November 6, 2019 Hearing Transcript, pg. 272, lines 5 – 11. Mr. Cuozzo, a former police officer trained

at Quantico by the FBI, was attempting to conduct a proper investigation by receiving credible information concerning the October 2, 2017 incident, not violate the National Labor Relations Act.

28. To the finding that “Rodriguez began [the October 5, 2017 meeting] by raising some of the complaints about Olden that servers had included on the list they provided to management.” *See* Decision, pg. 7:4 to 7:5. Ms. Rodriguez testified that she “told them how [she] felt about Santosha’s mistreatment with Denise . . . how I felt I didn’t do anything wrong . . . and the video with the pickle . . .” November 5, 2017 Hearing Transcript, pg. 92, lines 16 – 23. Notably, the October 2, 2017 incident involving Ms. Olden was not on the list as it was an after-occurring event. Ms. Rodriguez then testified that she “mention[ed] the threats done to me . . . sometime in September . . .” by Carlitos, the cook. pg. 93, lines 16 – 20. As to the list, Ms. Rodriguez did not testify that she discussed the list; rather she presumed that “. . . they were aware. They had the list, George was at the store one time that he called the store and asked for the manager to get us together, so we made a list for him, so he was aware.” November 5, 2018 Hearing Transcript, pg. 104, lines 13 – 16. However, as noted above, Mr. Chatzopoulos was not asked questions about this list and Mr. Martinez was not asked to testify by Rodriguez for the purpose of confirming whether he had been given the list (and further whether he had given the list to Mr. Chatzopoulos). As noted herein, an adverse inference against Rodriguez should apply.
29. To the finding that “Rodriguez continued to raise the group complaints that servers had about Olden’s management of the restaurant.” *See* Decision, pg. 7:4 to 7:5. First, this directly contradicts Rodriguez’ testimony as cited in the preceding paragraph. Second, when asked if she was speaking on behalf of others, Mr. Cuzzo testified that Rodriguez

made a vague, non-specific generalization that “. . . we weren’t happy with the manager there and some other things, but nothing, nobody specific.” November 6, 2018 Hearing Transcript, pg. 257, lines 16 – 19. On cross-examination, Mr. Cuzzo stated that management meant Santosha Olden. *See* November 6, 2018 Hearing Transcript, pg. 261, lines 23 – 25, pg. 262, lines 1 – 6 (“[S]he testified that others weren’t happy with management as well,” which meant “Santosha Olden”). There was no elaboration on what these issues were, and there is no evidence that group complaints were raised by Ms. Rodriguez.

30. To the finding that “Rodriguez also raised group complaints that servers had about Olden’s conduct.” *See* Decision, pg. 7:4 to 7:5. First, this directly contradicts Rodriguez’ testimony, above, regarding her comments concerning the October 5, 2017 meeting. Second, when asked if she was speaking on behalf of others, Mr. Cuzzo testified that Rodriguez made a vague, non-specific generalization that “. . . we weren’t happy with the manager there and some other things, but nothing, nobody specific.” November 6, 2018 Hearing Transcript, pg. 257, lines 16 – 19. On cross-examination, Mr. Cuzzo that management meant Santosha Olden. *See* November 6, 2018 Hearing Transcript, pg. 261, lines 23 – 25, pg. 262, lines 1 – 6 (“[S]he testified that others weren’t happy with management as well,” which meant “Santosha Olden”). There was no elaboration on what these issues were, and there is no evidence that group complaints were raised by Ms. Rodriguez.

31. To the finding that “[h]e concurred with Robertson’s recommendation that Rodriguez be discharged and that Chatzopoulos made the ‘ultimate’ decision.” *See* Decision, pg. 8:30 to 8:31. The document produced by Chip’s Wethersfield confirms that Laura Robertson made the decision regarding the suspension of Denise Bachand and the discharge of Robertson.

Specifically, Anthony Cuzzo responded to Laura Robertson's e-mail as follows: "Upon review of the current incident and both employees (sic) files, I concur with Laura's findings." *See* Respondent's ALJ Hearing Exhibit 9. However, George Chatzopoulos responded to Ms. Robertson's e-mail *before* Anthony Cuzzo responded to Ms. Robertson's e-mail; Mr. Chatzopoulos reminded Ms. Robertson to make sure there was shift coverage as a result of Ms. Robertson's decision. *See* Respondent's ALJ Hearing Exhibit 9 ("Laura make sure u cover all shifts including tomorrow don't wait for last [minute]").

32. To the finding that "[a]s noted above, Rodriguez did not raise her voice to Olden and the exchange took place in an area that was out of view of customers." *See* Decision, pg. 9:34 to 9:35. As to the raising of Ms. Rodriguez' voice, the evidence establishes that Denise Bachand reported during the October 5, 2017 meeting (to Laura Robertson, with Anthony Cuzzo present) that Jacqueline Rodriguez yelled during the altercation. *See* November 6, 2018 Transcript, pg. 214, lines 22 – 23 (Laura Robertson). Additionally, the written warning that Rodriguez received confirmed that she "argue[d] on [the server] line . . ." and that she was written up for "insubordination in front of other employees [and] guests." *See* Respondent's ALJ Hearing Exhibit 6. Though the ALJ suggests that the written warning lacks credibility because Ms. Olden not was called to testify, that adverse inference should go against Rodriguez as the party that would seek to challenge its contents; this is especially true since Bachand's report of the incident on October 5, 2017 is consistent with Olden's report of the incident. As to the exchange occurring out of the 'view of customers,' the legitimate business concern of Chip's Wethersfield, LLC is that Rodriguez had – for a second time including the issue with the cook – participated in an incident in which voices

were raised within the ‘hearing’ of – if not ‘visible’ to – customers. The ALJ ignores the fact that confrontations and arguments – regardless of how loud – can be readily heard by customers and co-workers when they do not occur in separate rooms. Further, Rodriguez testified that there were customers present that day. *See* November 5, 2018 Hearing Transcript, pg. 107, lines 16 – 19. And, as is clear, customers must have been present at the time of the incident for Rodriguez (as the ALJ found) to have “finished her October 2 shift” serving customers. *See Decision*, 5:6 to 5:7 and 14:25 to 14:26.

33. To the finding that “[t]he Respondent did not even present supporting or documentary evidence . . . to support Robertson’s and Cuzzo’s claim that Rodriguez raised her voice.” *See Decision*, pg. 9:38 to 9:40. As to the raising of Ms. Rodriguez’ voice, the evidence establishes that Denise Bachand reported during the October 5, 2017 meeting (to Laura Robertson, with Anthony Cuzzo present) that Jacqueline Rodriguez yelled during the altercation. *See* November 6, 2018 Transcript, pg. 214, lines 22 – 23 (Laura Robertson). Additionally, the written warning that Rodriguez received confirmed that she “argue[d] on [the server] line . . .” and that she was written up for “insubordination in front of other employees [and] guests.” *See* Respondent’s ALJ Hearing Exhibit 6. Though the ALJ suggests that the written warning lacks credibility because Ms. Olden not was called to testify, that adverse inference should go against Rodriguez as the party that would seek to challenge its contents; this is especially true since Bachand’s report of the incident on October 5, 2017 is consistent with Olden’s report of the incident.

34. To the finding that “[t]he disciplinary write-up that Olden prepared . . . did not claim that Rodriguez raised her voice.” *See Decision*, pg. 9:40 to 9:42. The written warning that Rodriguez received confirmed that she “argue[d] on [the server] line . . .” and that she was

written up for “insubordination in front of other employees [and] guests.” *See* Respondent’s ALJ Hearing Exhibit 6. Though the ALJ suggests that the written warning lacks credibility because Ms. Olden not was called to testify, that adverse inference should go against Rodriguez as the party that would seek to challenge its contents; this is especially true since Bachand’s report of the incident on October 5, 2017, which confirmed that Rodriguez yelled and raised her voice, is consistent with Olden’s report of the incident.

35. To the finding that “Robertson’s e-mail recommending that Rodriguez be discharged . . . does not suggest that Rodriguez raised her voice or that the exchange occurred in front of customers.” *See* Decision, pg. 9:42 to 9:45. The e-mail references the discussion on October 5, 2018, during which Ms. Bachand reported that Rodriguez yelled and raised her voice. *See* November 6, 2018 Transcript, pg. 214, lines 22 – 23 (Laura Robertson). The e-mail also references the write-ups that Rodriguez has received; the October 2, 2017 write-up references the argument in front of co-workers and customers. *See* Respondent’s ALJ Hearing Exhibit 6. Though the ALJ suggests that the written warning lacks credibility because Ms. Olden not was called to testify, that adverse inference should go against Rodriguez as the party that would seek to challenge its contents; this is especially true since Bachand’s report of the incident on October 5, 2017 is consistent with Olden’s report of the incident. Further, Rodriguez testified that there were customers present that day. *See* November 5, 2018 Hearing Transcript, pg. 107, lines 16 - 19. And, as is clear, customers must have been present at the time of the incident for Rodriguez (as the ALJ found) to have “finished her October 2 shift” serving customers. *See Decision*, 5:6 to 5:7 and 14:25 to 14:26.

36. To the finding that “I find not only that Rodriguez did not in fact raise her voice in front of

customers, but also find that Robertson and Cuzzo were not shown to have a reasonable basis for believing that she had done so at the time they disciplined her.” *See Decision*, 10:1 to 10:3. As to the raising of Ms. Rodriguez’ voice, the evidence establishes that Denise Bachand reported during the October 5, 2017 meeting (to Laura Robertson, with Anthony Cuzzo present) that Jacqueline Rodriguez yelled during the altercation. *See* November 6, 2018 Transcript, pg. 214, lines 22 – 23 (Laura Robertson). Additionally, the written warning that Rodriguez received confirmed that she “argue[d] on [the server] line . . .” and that she was written up for “insubordination in front of other employees [and] guests.” *See* Respondent’s ALJ Hearing Exhibit 6. Though the ALJ suggests that the written warning lacks credibility because Ms. Olden not was called to testify, that adverse inference should go against Rodriguez as the party that would seek to challenge its contents; this is especially true since Bachand’s report of the incident on October 5, 2017 is consistent with Olden’s report of the incident. Further, Rodriguez testified that there were customers present that day. *See* November 5, 2018 Hearing Transcript, pg. 107, lines 16 – 19. And, as is clear, customers must have been present at the time of the incident for Rodriguez (as the ALJ found) to have “finished her October 2 shift” serving customers. *See Decision*, 5:6 to 5:7 and 14:25 to 14:26.

37. To the finding of fact regarding the September 18, 2017 incident and Ms. Robertson’s reference to it in relation to her discharge decision (including the ALJ’s finding that “the decision to discharge Rodriguez was not based on the September 18 incident”). The October 7, 2017 e-mail that Ms. Robertson drafted explaining her decision to discharge Rodriguez expressly references the incident involving the cook. Specifically, Ms. Robertson expresses her regrettable conclusion as follows: “I feel like the issue of being

insubordinate will continue which is not conducive to having a strong and connected staff that works as a team.” *See* Respondent’s ALJ Hearing Exhibit 9. As to the insubordinate behavior involving the cook, Ms. Robertson testified that “there was also yelling that happened that day” and that Rodriguez violated the work rule regarding how orders are placed (in the computer as opposed to on a scrap of paper). *See* November 6, 2018 Hearing Transcript, pgs. 189 – 190. Ms. Rodriguez, in her own words, confirmed the confrontation by stating “[a]fter that me and Carlitos exchange a few words” and, as to the rule violation, that “[h]e wanted for me to specifically type everything on the system. **I understand that’s the proper way to do this . . .**” *See* General Counsel’s ALJ Hearing Exhibit 10 (emphasis added). Approximately two weeks later a similar issue arises where Ms. Rodriguez is again involved in a confrontation, where it is reported that she is yelling or raising her voice with respect to her knowing violation of a work rule (here, attempting to coerce Ms. Olden into violating the ‘cutting’ policy and the decision of Ms. Olden’s superior (Ms. Robertson) to ‘cutting’ Denise Bachand from service for the day. In this regard, there is evidence upon which Chip’s Wethersfield properly decided that Ms. Rodriguez’ insubordination will continue and that, as a legitimate business decision, discharge was appropriate.

38. To the finding of fact that “[d]ue to the presence of a wall/partition, Rodriguez and Olden were out of view of customers during the exchange in the server aisle.” *See Decision*, pg. 13:29 – 13:30. Rodriguez merely testified that there is a ‘wall’ that gives cover. *See* November 5, 2018 Transcript, pg. 48, lines 9 – 11 (“There’s a -- like a main -- like a wall and then you can’t see like – I don’t how to explain it. It’s just that they can’t see. It’s cover.”). Robertson more specifically testified that the server aisle is in the middle of the restaurant and that the partition does not entirely segregate the server aisle from the main

floor; the partition is approximately six (6) feet tall and could not block sound from reaching the main floor. *See* November 6, 2018 Transcript, pg. pg. 210, lines 2 – 7 (The server aisle is “. . . in the middle of the restaurant, yes, in line with the kitchen. . . . [It is n]ot completely [segregated from the floor]. . . . [The partition] goes up probably not more than six feet.”).

39. To the finding of fact regarding comparative discipline, which fails to address the fact that Rodriguez was involved in two similar, recent in time, instances of inappropriate workplace conduct by which she attempted to justify her violations of two known work rules or procedures, in addition to other prior incidents involving work rules and insubordination. As to the instances cited by the ALJ, there are factual errors. First, regarding the September 15, 2017 incident, the warning does show that the employee raised his voice but he did not throw a syrup bottle in front of customers. *See* General Counsel’s ALJ Hearing Exhibit 20(d) (He “threw a plastic syrup bottle at the wall on his way out the back.”). Second, the warning regarding a manager’s direction that two syrup bottles that needed ‘a little more’ attention – and a server’s argument about that direction – led to a written warning; this is not an example of ‘facially more severe’ incident, including for the reason that it is a first warning. *See* General Counsel’s ALJ Hearing Exhibit 20(a). Third, with regard to Denise Bachand’s receipt of a warning for the October 2, 2017 incident, instead of being discharged like Rodriguez, Ms. Robertson explained her decision to issue lesser discipline to Ms. Bachand, including for the reason that she did not continue to rationalize her insubordinate behavior and that she understood the issue. *See* Respondent’s Exhibit 9.
40. To the finding that Rodriguez was engaged in a protected activity as alleged. This is wholly

inconsistent with the ALJ's recognition that "[Rodriguez] had not intended to interfere with Chatzopoulos' business but to 'stand up' for it." See Decision, pg. 6:3 to 6:4.

41. The ALJ's finding was arbitrary and capricious with respect to whether Rodriguez engaged in a protected concerted activity within the meaning of Section 7 and whether Chip's Wethersfield violated Section 8(a) by violating a Section 7 right of Rodriguez.

WHEREFORE, Chip's Wethersfield, LLC respectfully requests that its exceptions to the ALJ's findings of fact and conclusions of law regarding Case No. 01-CA-217596 be sustained, that the Decision be vacated, and the allegations in the NLRB charge be dismissed in their entirety.

Dated: October 23, 2019

CHIP'S WETHERSFIELD, LLC D/B/A
CHIP'S FAMILY RESTAURANT

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CERTIFICATE OF SERVICE

In addition to filing this *Exceptions Filed by Chip's Wethersfield, LLC to the Administrative Law Judge's Decision* via the NLRB's electronic filing system, we hereby certify that copies have been served this 23rd day of October 2019, by electronic mail, upon:

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