UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

CHANTICLEER HOLDINGS, INC. d/b/a
LITTLE BIG BURGER

and **Case 19-CA-239759**

LITTLE BIG UNION/INDUSTRIAL
WORKERS OF THE WORLD

COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

The Regional Director, on behalf of the General Counsel of the National Labor Relations Board ("General Counsel"), issued a Complaint and Notice of Hearing ("Complaint") upon a charge filed by Charging Party Little Big Union/Industrial Workers of the World alleging that Chanticleer Holdings, Inc. d/b/a Little Big Burger ("Respondent") unlawfully terminated its employee Zaria Lazuli ("Lazuli") for her protected concerted activity. The case was heard before Administrative Law Judge Jeffrey D. Wedekind ("ALJ") in Portland, Oregon, on November 12, 2019.

The evidence adduced at hearing establishes that Lazuli was fired for nothing more than seeking, along with her coworkers, equal treatment by Respondent. Although Respondent has produced post-hoc rationalizations for its conduct, the record confirms that store manager Jalen Ford ("Ford") treated Lazuli, a transwoman, differently than her coworkers. Upset and concerned, Lazuli turned to her coworkers and, together, they decided to approach Ford and confront him about how he singled out Lazuli for unfair treatment. When this group of employees approached Ford and confronted him about his behavior, he was dismissive. A day later, Ford denied Lazuli and another employee their breaks. When Lazuli confronted Ford about this denial, he, by his own admission, immediately initiated the termination process.

General Counsel respectfully submits this post-hearing brief and seeks to have the ALJ find that Respondent clearly violated the National Labor Relations Act (the "Act") as alleged and award the appropriate remedy, including consequential damages.

II. LAZULI'S HIRING, PROTECTED CONCERTED ACTIVITY, AND TERMINATION

Respondent operates Little Big Burger branded fast casual restaurants in and around Portland, Oregon, including a Little Big Burger location on Division Street in Southeast Portland. (15:6-11, 14-18).[1] The Division Street location is small, with a customer seating area and a small kitchen open to customers' view. (18:18-22). The kitchen, approximately 15 to 30 feet long and 4 feet wide, contains several stations, such as a grill, deep fryer, and sandwich bar, as well as a cash register and hand washing station. (18:22-25; 26:1-3; 60:6-8). On the other side of the kitchen is a back room, containing storage and a couch, that is not visible to customers. (19:5-6).

The Division Street location serves lunch and dinner, and employees are scheduled for an opening shift between 11:00 a.m. and 4:00 p.m., a closing shift from 4:00 p.m. to 11:00 p.m., or an overlap shift of 12:00 p.m. to 8:00 p.m., so that 3 to 4 employees are staffing the restaurant during meal times. (19:22-25; 20:1-6). While working, employees generally move between the various stations in the kitchen informally, completing orders as efficiently as possible. (21:3-10). Store managers, Respondent's front-line supervisors, may direct an employee to perform a certain task. (21:11-19). When employees take breaks is also arranged collaboratively, with employees and managers arranging a mutually acceptable time within the shift. (62:8-25).

[1] References to the transcript appear as (–:–). The first number refers to the pages; the second to the lines. References to General Counsel Exhibits appear as (GC Exh–). References to Respondent Exhibits appear as (R Exh–).

The store manager at the Division Street location is Ford.[2] (16:22-25; 21:20-25; 22:1). He reports to District Manager Ben Cook ("Cook"), who, in turn, reports to Vice-President of Operations Adrian Oca ("Oca"). (214:3-6;5-13). Emma Lindell ("Lindell") is also a District Manager. (227:21).

A. Zaria Lazuli Begins Work, and Ford Immediately Treats Her Differently

Zaria Lazuli was hired as an associate at the Division Street location in late January 2019. (15:2-5). Lazuli had several years of food service experience at the time she was hired, and held an Oregon food handlers' card, both of which had provided her training on the importance of safe food handling and hand washing.[3] (15:21-23; 16:1-2; 41:16-23).

Once she started working at the Division Street location Lazuli immediately noticed that Ford corrected her work more than other employees, telling her to wash her hands as many as ten times a shift, when often she had, in fact, just washed her hands and Ford had watched her do so. (24:8-10; 29:10-16). Incredulous, Lazuli would challenge Ford that it was impossible for him to not have seen her wash her hands. (25:13-16). When Lazuli challenged or disagreed with Ford, he would become upset, snapping at Lazuli, grumbling under his breath, and angrily stomping away. (27:11-15). Ford also would cut Lazuli's breaks short, telling Lazuli her 10-minute break was over after only 5 minutes. (29:16-19; 30:1-14).

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[2] By its Answer, Respondent admits Store Manager Jalen Ford's supervisory status under Section 2(11) of the Act.

[3] Lazuli testified at hearing, unprompted, regarding proper food handling and Respondent's hand washing procedure: that, after using the restroom, an employee washes their hands twice, once in the bathroom, and again outside the bathroom. (42:5-7)

Lazuli's coworkers noticed Ford's unusual treatment of Lazuli. In fact, coworker Kayla Black ("Black") recalled that, although Lazuli had already been approved as proficient on the grill by Ford, he would nevertheless stand at the grill and watch Lazuli working and correct her, an unusual practice for a manager after initial training was complete. (64:13-20; 65:1-6). Lazuli's coworker Canaan Schlesinger ("Schlesinger") noticed that, shortly after Lazuli started her employment, Ford was "policing" Lazuli and would "nit-pick" Lazuli's work, interrupting her work multiple times a shift. (102:19-25; 103:6-13). Schlesinger also confirmed having observed Ford telling Lazuli to wash her hands when she had done so immediately prior, in his presence. (103:21-24).

B. Zaria Lazuli and Her Coworkers Engage in Protected Concerted Activity

Concerned about Ford's behavior, Lazuli spoke to Black, Schlesinger, and coworker Ian Decker ("Decker"), about this treatment when Ford wasn't present. (28:19-23; 104: 13-15). Lazuli spoke to her coworkers on multiple occasions about how Ford treated her, and they confirmed the way Ford was treating her was uncommon and that it was "odd" he was subjecting her to such scrutiny. (65:9-17; 66-9-12; 105:14-18). For his part, Schlesinger stated that Ford's treatment of Lazuli had reached the point of harassment. (104:17-22).

During this same period, the first few weeks of Lazuli's employment, it was also clear to her coworkers that Lazuli was a confident individual who was not willing to allow others to be treated poorly. For example, this was evident on one occasion when a delivery person was mis-gendering Black, also a transwoman, in front of Lazuli. (90:16-20). When Black appeared uncomfortable correcting the delivery person, it was Lazuli who stepped in and corrected the delivery person's gender usage. (90:20-24).

In addition to being a strong and confident individual, Lazuli was also a competent employee. More experienced employees such as Schlesinger had no concerns regarding her ability to do the job and, while she was new and admittedly not as efficient as an experienced employee, Schlesinger considered her skills equal to other new workers, and perhaps more competent. (114:8-18).

Some of Lazuli's coworkers were not as amenable to her strong personality. After working with Lazuli during a closing shift, employee Juleanna Manning ("Manning") – a "key," essentially an assistant manager or lead, from Respondent's Hawthorne location – sent a message to Ford expressing frustration with Lazuli.[4] (168:15-25; 169:1-15; R Exh 11). After receiving Manning's text message Ford shared the information with another manager, and had a conversation with Lazuli reminding her to wash her hands, but took no disciplinary action or further measures. (187:7-22).

Sympathetic to the distress and frustration Lazuli was experiencing, Schlesinger asked if speaking to Ford about his harassing behavior might be helpful. (32:19-22; 66:22-25; 105:2-9). Lazuli indicated she thought it would. As such, Lazuli, Black, and Schlesinger agreed to approach Ford together, planned what to cover in the conversation, and prepared what they would say, as well as what they hoped to avoid. (66:13-25; 106:9-11, 17-22). On March 1, 2019, at the end of Lazuli's shift, Schlesinger asked Ford to speak to them, and Lazuli, Black, and Schlesinger went to the back room with Ford. (34:21-25; 67:6-8; 106:25; 107:1-3).

[4] Manning's testimony was confused at best, as she testified she worked with Lazuli "like 10 times maybe" when Ford was adamant that the shift that prompted Manning's text message was the first she had worked with Lazuli. (168:11-14, 185:16-19). It is also apparent from the tone of her text message and her demeanor during her testimony that Manning had a personal dislike of Lazuli, referring to her as "challenging," and having a "bad attitude," likely because Lazuli was a new employee that did not defer to Manning. (159:19-22; 166:2-6).

Schlesinger began the conversation by telling Ford that they wanted to have a conversation about the way in which Ford was singling out Lazuli, how this was discriminatory, and that it was not okay to treat Lazuli differently. (35:7-12; 67:17:22; 107:9-17, 18-24). Schlesinger then asked Ford to listen and be receptive, and that this was not an attack on him, but, instead, co-workers attempting to help him by highlighting behavior that he may not have been aware he was doing. (67:22-25; 68:1-3).

Lazuli then spoke and shared her experience of being treated differently in the time she had been employed at Little Big Burger. (68:3-7). Lazuli also explained that she had previously had experience, when employed elsewhere, with managers that had been malicious because she was a transwoman and, while Ford was not as direct as these managers, his treating her differently because she was a transwoman was still targeting her, even if that was a subconscious bias. (68:15-22; 201:8-13).

Black also shared her experience as a transwoman working with Ford, explaining that Ford didn't speak to her when she started at the Division Street location. (70:14-20). After all three had spoken, Ford started to disagree, stating he treated Lazuli the same as everyone else. However, Schlesinger asked him to not dispute the issue at the time, but instead to listen. (35:17-22; 68:7-12; 108:18-25; 109:1). Ford said if he wasn't allowed to talk or disagree, he was done, and promptly left the room. (36:4-7).

The following day, March 2, Lazuli and Black were working the opening shift with Ford, who had been called in when another manager was unavailable. (36:20-25; 37:2-7; 71:11-17; 72:6-11). Even though the day was busy, Ford left the store at approximately 3:00 p.m. without notifying Lazuli or Black and was gone for some time. (37:7-13; 72:6-12). Neither Lazuli nor Black had an opportunity for a break, yet as time passed it was

apparent Ford was taking a long break, which upset both Lazuli and Black. (37:18-25). When Ford returned, about fifteen to twenty minutes before 4:00 p.m., when Lazuli and Black's shift would end, Lazuli and Black approached Ford. (38:4-11; 72:21-25; 196:18-25).

Lazuli asked Ford if he wanted her and Black to wait in the back room for ten-minutes before clocking out, which employees had done previously when they had not had an opportunity to take their break. (38:4-11, 48:22-25; 73:4-7, 19-22; 197:17-24). Ford refused, saying "no, just leave. This isn't the time." (73:21-22). Lazuli responded their breaks were a legal right, not a privilege or accommodation, and it wasn't Ford's choice whether to give them a break. (38:18-22; 74:8-12). Lazuli then again asked if they should sit in the back before punching out. (73:23-25, 1-2). Ford again refused, and Lazuli asked him to put the denial in writing. (38:23-25; 74:11-12; 198:12-14). Ford stated he was going to call District Manager Cook, took out his phone, and began typing as if writing a text message. (39:2-14). Lazuli reiterated her request for Ford to send her the denial in writing, punched out, and left. (39:11-17; 74:13-15).

After Lazuli left, Black asked Ford, who by this point was sitting with his head in his hands, if she should wait in the back, as Lazuli had mentioned, or whether Ford wanted to just change their times sheets to reflect that they clocked out ten minutes later, another way management had previously addressed missed breaks. (74:19-25; 202:17-25, 203:1-3). Ford replied, "I'm sorry. I just told Zaria no. I just can't today." (75:1-2).

Black then made the same point Lazuli made earlier, that breaks were a legal right, Ford didn't get to decide employees did not receive a break. (75:3-7). Ford sighed, explained it had been a "rough" day and week, and that things had been "hard." (75:7-

9). Black replied it was true, but the stress of the job was part of the reason employees needed their breaks. (75:10-14). Ford replied that Black had "always been helpful and a good worker," and that because of that, he was going to change Black's time sheet to reflect a ten-minute break. (75:17-19). Black then left for the day. (75:198-20).

C. Respondent Retaliates Against Lazuli for Complaints

According to Ford, he decided to recommend Lazuli for termination during her shift on March 2.[5] (194:14-24; 209:7-9). After Lazuli left work on March 2, Ford called Cook.[6] (198: 12-25). Ford raised the issue of Lazuli's work performance, and when Cook asked what Ford thought should be done about it, Ford stated Lazuli should be terminated. (200:4-14). During this conversation, Ford, by his own description, also raised both the protected concerted activity of March 1, when employees confronted him about his treatment of Lazuli, and March 2, when Lazuli and Black had raised the issue of breaks with him. (207:17-25, 208:1-21).

Lazuli's next shift was on March 7. (39:20-21). When Lazuli clocked in, managers Cook and Lindell were at the Division Street location. (40:2-5). Cook handed Lazuli a termination paper and said they were letting Lazuli go; it wasn't because of anything she did or that she did anything wrong, but, instead, a non-disciplinary termination of Lazuli's at-will employment. (40:9-16; R Exh 10). Lazuli challenged this assertion, stating that she believed it was because she talked to Ford about his discrimination and because she

[5] During his testimony Ford *emphasized* that he made the decision to terminate Lazuli on March 2, stating "I tried to give her as much leeway to being a successful co-worker at Little Big Burger, but all of my hopes and dreams just kind of died *at one point* and just didn't work out." (188:7-10) (emphasis added).

[6] After Ford contacted Cook on March 2, Cook then contacted Oca at an unspecified date and Oca approved the termination recommendation. (223:6-14). Cook then arranged for District Manager Lindell to accompany him to the meeting to terminate Lazuli on March 7, as per his usual practice. (223:17-22).

had insisted on her right to a break. (40:18-20). Cook denied that was the case and Lazuli left. (40:20).

Ford claimed later that Lazuli had performed poorly or handled food in an unsafe manner.[7] For example, he described a situation where he alleged he observed Lazuli handle raw meat and then the spatulas for handling cooked meat. (191:21-25; 192:1-25; 193:1-10). Ford claimed he spoke with Lazuli at the end of an unspecified shift about food handling and her negative attitude. (193:14-20). However, he didn't document the incident or discipline her, or do anything that would provide independent verification. Instead, according to Ford, incidents like this continued until he decided her job performance was so unsatisfactory that termination was necessary at almost the exact same moment employees confronted him and argued with him about breaks. (194:19-24).

III. RESPONDENT UNLAWFULLY DISCHARGED LAZULI BECAUSE OF HER PROTECTED, CONCERTED COMPLAINTS ABOUT WORKING CONDITIONS

Under § 7 of the Act, employees have the right to engage in concerted activities for their mutual aid and protection. 29 U.S.C. § 157. Accordingly, for employee activity to be protected under this portion of the Act, two elements must be satisfied: the activity engaged in must be "concerted," and the concerted activity must be engaged in "for the purpose of … mutual aid or protection." *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 3 (2019). Adverse actions, such as a termination, taken against an employee because of this protected concerted activity violate § 8(a)(1) of the Act. *NLRB v.*

[7] Specifically, Ford had difficulty describing when he spoke to Lazuli about hand washing and what he said, as well as articulating his concerns about Lazuli's job performance. In each instance, he was only able to describe anything with the assistance of leading questions. (179:1-23, 180:1-25, 181:1-25, 182:1-8; 184:18-22; 187:19-22). At times, Ford even asked for the leading question to be repeated before answering. (180: 17-20; 184:10-12).

Washington Aluminum Co., 370 U.S. 9, 12-15 (1962). Both the concertedness element and the 'mutual aid or protection' element are analyzed under an objective standard … the motives of the participants are irrelevant … what is crucial is that the purpose of the conduct relate[s] to collective bargaining, working conditions, or other matters of 'mutual aid or protection' of employees." *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151, 154 (2014).

Regarding the first element, the Board has held that activity is concerted if it is "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), *rev'd. 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). Concerted activity also includes "circumstances where individual employees seek to initiate or to induce or to prepare for group action" and where an individual employee brings "truly group complaints to management's attention." *Meyers II*, 281 NLRB at 887.

The Board has long held that second element, that the concerted action is taken "for the purpose of … mutual aid or protection," encompasses a broad range of legitimate activity whereby employees seek to improve their working conditions. *Fresh and Easy Neighborhood Market*, 361 NLRB at 154, citing *Eastex, Inc*. v. NLRB, 437 U.S. 565 (1978). Conduct as diverse as complaints over supervisory handling of safety issues, protest of racially discriminatory hiring practices, protest of sexual harassment of employees, and contacting the Occupational Health and Safety Administration has been

found to have met this standard. *Fresh and Easy Neighborhood Market*, 361 NLRB at 155 (citations omitted).

In cases where the evidence can support both a lawful and unlawful reason for an adverse action, a so-called mixed motive case, the General Counsel must demonstrate by a preponderance of the evidence that the employee was engaged in protected activity, the employer had knowledge of that activity, and the employer's hostility to that activity ”contributed to" its decision to take an adverse action against the employee. *Director, Office of Workers' Comp. Programs v. Greenwich Collieries*, 512 U.S. 267, 278 (1994), *clarifying NLRB v. Transportation Mgt.*, 462 U.S. 393, 395, 403 n.7 (1983); *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd. on other grounds*, 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 455 U.S. 989 (1982).[8]

Evidence that may establish a discriminatory motive – *i.e.*, that the employer's hostility to protected activity “contributed to” its decision to take adverse action against the employee – includes: (1) statements of animus directed to the employee or about the employee's protected activities (*see, e.g.*, *Austal USA, LLC*, 356 NLRB 363-64 (2010) (unlawful motivation found where HR director directly interrogated and threatened union and supervisors told activist that management was “after her” because of her union

[8] The *Wright Line* standard upheld in *Transportation Mgt.* and clarified in *Greenwich Colleries* proceeds in a different manner than the “prima facie case” standard utilized in other statutory contexts. *See Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 142-43 (2000) (applying Title VII framework to ADEA case). In those other contexts, “prima facie case” refers to the initial burden of production (not persuasion) within a framework of shifting evidentiary burdens. In the NLRA context, by contrast, the General Counsel proves a violation at the outset by making a persuasive showing that the employer's hostility toward protected activities was a motivating factor in the employee's discipline. At that point, the burden of persuasion shifts to the employer to prove its affirmative defense. Because *Wright Line* allocates the burden of proving a violation and proving a defense in this distinct manner, references to the General Counsel's “prima facie case” or “initial burden” are not quite accurate, and can lead to confusion, as the General Counsel's proof of a violation is complete at the point where the General Counsel establishes by a preponderance of the evidence that employer's hostility toward protected activities was a motivating factor in the discipline.

activities)); (2) statements by the employer that are specific as to the consequences of protected activities and are consistent with the actions taken against the employee (*see, e.g., Wells Fargo Armored Services Corp.*, 322 NLRB 616, 616 (1996) (unlawful motivation found where employer unlawfully threatened to discharge employees who were still out in support of a strike, and then disciplined an employee who remained out on strike following the threat)); (3) close timing between discovery of the employee's protected activities and the discipline (*see, e.g., Traction Wholesale Center Co., Inc. v. NLRB*, 216 F.3d 92, 99 (D.C. Cir. 2000) (immediately after employer learned that union had obtained a majority of authorization cards from employees, it fired an employee who had signed a card)); (4) the existence of other unfair labor practices that demonstrate that the employer's animus has led to unlawful actions (*see, e.g., Mid-Mountain Foods*, 332 NLRB 251, 251 n.2, *passim* (2000), *enfd. mem*., 11 Fed. Appx. 372 (4th Cir. 2001) (relying on prior Board decision regarding respondent and, with regard to some of the alleged discriminatees, relying on threatening conduct directed at the other alleged discriminatees)); or (5) evidence that the employer's asserted reason for the employee's discipline was pretextual, such as disparate treatment of the employee, shifting explanations provided for the adverse action, failure to investigate whether the employee engaged in the alleged misconduct, or providing a non-discriminatory explanation that defies logic or is clearly baseless. *See, e.g*., *Lucky Cab Co.*, 360 NLRB No. 43, slip op. at 6 (Feb. 20, 2014); *ManorCare Health Services – Easton,* 356 NLRB 202, 204 (2010); *Greco & Haines, Inc.,* 306 NLRB 634, 634 (1992); *Wright Line*, 251 NLRB at 1088, n.12, citing *Shattuck Denn Mining Co. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966); *Cincinnati*

Truck Center, 315 NLRB 554, 556-557 (1994), *enfd. sub nom*. *NLRB v. Transmart, Inc.*, 117 F.3d 1421 (6th Cir. 1997).

Once the General Counsel has established that the employee's protected activity was a motivating factor in the employer's decision – the unlawful reason – the employer can, as an affirmative defense, nevertheless defeat a finding of a violation by establishing it acted for the lawful reason, that it would have taken the same adverse action even in the absence of the protected activity. *See NLRB v. Transportation Mgt.*, 462 U.S. at 401 ("the Board's construction of the statute permits an employer to avoid being adjudged a violator by showing what his actions would have been regardless of his forbidden motivation"). The employer has the burden of establishing that affirmative defense. *Id*.

A. The Prima Facie Case

1. Lazuli Was Engaged in Protected Concerted Activity

a. The Group Activity on March 1 and 2 Was Concerted Activity

The record evidence fully establishes that Lazuli engaged in activity that was both concerted and protected on at least two occasions immediately preceding her termination. On March 1, Lazuli, Black, and Schlesinger put a plan into motion that they had previously discussed, and that was designed to address the way in which Ford singled out and harassed Lazuli. It is uncontested that they three employees planned the meeting together, approached Ford together, and spoke to him together, each in turn.

On March 2, Ford was again faced with group action when Lazuli and Black approached him about not providing them breaks. As with the day before, the evidence establishes Lazuli and Ford discussed their frustrations before approaching Ford, and when he returned from his break, they approached him together. They both addressed

the exact same issue with Ford, taking turns speaking, with Lazuli speaking first and then leaving before Black spoke.

Unlike cases where the concerted activity consists merely of employees exploring the idea of group action, or a single employee solicits support, the employees here discussed a problem on both March 1 and March 2, planned group action, and carried out that group activity. Thus, this is not a case where the activity is limited to a personal complaint; here, both Schlesinger and Black testified without reservation that they agreed with Lazuli's concerns, told her as much, and encouraged a meeting with Ford. Further, they themselves were affected by the treatment of Lazuli and they too experienced the issue concerning breaks.

Specifically, regarding March 1, while the discussion focused on Ford's treatment of Lazuli, the concern addressed was not limited to Lazuli. As the group explained to Ford, they believed he was singling out Lazuli and treating her differently because she was a transwoman. Black, for her part, shared in the same meeting that she, as a transwoman, had also experienced some of the same treatment. Further, Schlesinger made it clear that this perceived harassment and discrimination was a concern to all employees, not just employees who were themselves transgender. Just because Ford singled out Lazuli for harsh treatment in that instance, it does not make group complaints about discriminatory treatment only a personal concern of Lazuli's.

On March 2, both Lazuli and Black did not have a break. As with the day prior, a problem was identified, discussed, and then a group action carried out to address that problem. Even if it is assumed that Lazuli and Black serially questioned Ford individually about their lack of breaks, to call this an expression of individual concerns is to parse the

idea of concerted activity far too finely. Whether Lazuli and Black said "my break" or "our breaks," they approached Ford together and protested management's failure to give each of them a break. In doing so, they engaged in concerted activity.[9] To find otherwise is to make the same error referenced in *Alstate*: placing the grammar used above the facts. *Alstate Maintenance, LLC*, 367 NLRB slip op. at 4. In sum, their action was jointly undertaken, after a joint decision to discuss their concerns about their breaks with Ford. That makes it concerted.

b. The Group Activity on March 1 and 2 Was Protected Activity

In addition to being concerted, there can no dispute that the employees' conversations with Ford on both March 1 and March 2 were "for the purpose of … mutual aid or protection" as well. During the March 1 meeting, Lazuli, Black, and Schlesinger explicitly accused Ford of treating Lazuli poorly because she was a transwoman. Respondent disputes that Ford singled-out Lazuli and subjected her to harsh treatment, but Ford did not deny, and Respondent did not dispute, that this was the subject discussed. As with the earlier meeting, Ford did not deny, and Respondent did not dispute, that Lazuli and Black had a dispute over breaks with Ford at the end of their shift on March 2.

The Board has repeatedly held that employee protests regarding employment practices, harassment, or discrimination based on race, sex and other considerations are

[9] It must also be noted that the specifics of the break dispute and who was correct are not material to the case. The evidence suggests it was likely Ford appeared to believe that directing Lazuli and Black to clock-out ten minutes before the end of their shift was equivalent to giving them a ten-minute break. Lazuli and Black disagreed, likely because they believed they would not be paid for the time if they clocked out early. Ultimately, who is correct is not material; what matters is that Lazuli and Black took concerted action to make their case on the break issue, and Ford's anger at this assertion resulted in his retaliation against Lazuli.

protected. *Vought Corp*., 273 NLRB 1290, 1294 (1984), *enf'd*. 788 F.2d 1378 (8th Cir. 1986) (employee attempt to alleviate racially discriminatory employment conditions protected activity); *Ellison Media Co*. 344 NLRB 1112, 1113 (2005), citing *Phoenix Transit System*, 337 NLRB 510, 510 (2002) (activity protected because of employees common interest in eliminating offensive remarks from the workplace); *Fresh & Easy Neighborhood Market*, 361 NLRB at 154 (employee seeking support in bringing workplace sexual harassment to the attention of management engaged in protected activity); *Don Chavas*, 361 NLRB 101 (2014) (protesting supervisor's sexual harassment of employees protected). Similarly, the Board has repeatedly held that employees protesting an employer's failure to provide breaks is protected. *Chipotle Mexican Grill*, 364 NLRB No. 72 (2016) (employee was unlawfully discharged for circulating a petition to other employees about the Employer's failure to provide guaranteed breaks). Thus, there can be no good faith basis for claiming that the employees' March 1 and 2 activities, including Lazuli's, was not protected and concerted.

2. Respondent Had Knowledge of Lazuli's Protected Concerted Activities

Ford is an admitted Section 2(11) supervisor and he admitted on the stand that he was present for the employees' March 1 and 2 protected concerted activity and that their protests were directed at him as the store manager. He further admitted that he was the one that initiated the termination process immediately following the confrontation with Lazuli about the employees' breaks on March 2. There can be no reasonable denial that Respondent, at the time it made the decision to terminate Lazuli, had full knowledge of Lazuli's protected concerted activity on both March 1 and 2.

3. Respondent Was Motivated by Unlawful Considerations

As noted previously, the following have been found to demonstrate animus: close timing; and evidence of pretextual defense such as shifting explanations or providing a non-discriminatory explanation that defies logic or is clearly baseless. All are present here and clearly establish that Ford's discharge of Lazuli was motivated by his being confronted regarding both his discriminatory harassment of Lazuli and his failure to give Lazuli and Black their breaks.

First, as to timing, Ford's own version of events establishes that he decided it was necessary to terminate Lazuli during her shift on March 2, less than 24 hours after the initial protected concerted activity. If this is true, by Ford's own description, he decided to terminate Lazuli within a day of her protected concerted activity. More likely, however, given the issues with Ford's credibility discussed in a following section, is that he decided to terminate Lazuli after their confrontation over breaks, her second incidence of protected concerted activity in two days. Ford's actions support this likelihood: on March 2, immediately after Lazuli and Black complained about not receiving their breaks, Ford called Cook and initiated Lazuli's termination.

Respondent introduced extensive evidence of its supervisory hierarchy, presumably attempting to make the termination decision look carefully considered and distanced from Ford's March 2 call. However, there is no contention that Cook, Lindell, Oca, or any other manager ever investigated the validity of Ford's recommendation or examined the Lazuli situation further; they merely passed Ford's assessment up the chain. The decision to fire Lazuli was made entirely on Ford's recommendation, and it is

undisputed Ford's recommendation was made immediately after Lazuli's back-to-back protected concerted activity took place.

In addition to timing, Respondent's pretextual excuses further highlight Respondent's unlawful motive. Respondent has put forth a broad range of shifting explanations as to why it fired Lazuli. At hearing, in addition to job performance and insufficient hand washing, Ford proffered a whole host of additional post-hoc rationalizations, raising issues from Lazuli's attendance to the existence of customer complaints. Yet none of these after-the-fact explanations have support in any contemporaneous record of Respondent, and Respondent's witnesses are not at all consistent on whether these additional reasons were even discussed in regard to termination. Lazuli's termination notice, the only documentation related to the termination, makes no reference to any of the purported reasons for her termination.

Instead of addressing the reasons for Lazuli's termination, the termination letter attempts create a type of no-fault termination by stating that Lazuli's termination was "non-disciplinary," and that her at-will employment simply came to an end during her probationary period. Or, to use the phrase of Oca, her employment was not a good "fit." By this argument it appears Respondent is trying to avoid the question of motivation altogether. However, Respondent had hired Lazuli, an employee with a food handlers' license and some experience. It then spent some amount of time and effort training her for the position, furthering her acquired skills. Respondent fired Lazuli for a reason, and the only reason Lazuli did not "fit" was because of her willingness to join with others and stand up for employees' rights. In other words, engage in protected concerted activity.

All of Respondent's arguments at hearing also stand in stark contrast to the statement in the termination letter that Lazuli termination was non-disciplinary and she was eligible for re-hire. Given that Respondent now goes to great length to argue it had a legitimate non-discriminatory basis for the termination it raises a legitimate question about how much credence can be given to Respondent's contentions. A documentary record completely empty of any corroborating evidence can't help but raise the specter of incredulity and blatant pretext.

Finally, in addition to timing and Respondent's shifting explanation for terminating Lazuli, a significant consideration in inferring an unlawful motivation is that Respondent's non-discriminatory explanation defies logic and is baseless. In Ford's version of events, a version where he spends time counseling Lazuli regarding performance and food handling concerns, he coincidentally decided her job performance had reached the breaking point at precisely the same moment she engaged in protected concerted activity. This defies belief.

Ford provides no credible explanation why he chose to terminate Lazuli on March 2. His recounted alleged incidents of Lazuli performing poorly or handling food in an unsafe manner were undocumented and unsupported, and contradict the credible testimony of multiple employees. It seems that Ford decided at almost the exact same moment employees confronted him and argued with him about breaks that these alleged undocumented and unsupported incidents were so unsatisfactory that termination was necessary. Ford's hostility to being confronted is self-evident from his actions, and the implausibility of this coincidence is apparent on its face.

Respondent will, no doubt, contend that by asserting it lacked a rational basis for its decision the General Counsel is substituting his judgment for that of Respondent. Respondent will also try to argue the General Counsel's case disregards the importance of hand washing when food handling, or about how a busy store requires fast, efficient workers. This is not accurate, as the General Counsel's case does neither; instead, the General Counsel's case is based on the credible evidence demonstrating that Lazuli's job performance and food handling was acceptable to Respondent until the moment that Lazuli engaged in protected concerted activity with her coworkers two days in a row.

4. Ford's Testimony Cannot Be Credited and Shows His Animus

Ford was evasive, vague, and had difficulty articulating his own version of events throughout his testimony. Specifically, Ford had difficulty describing when he spoke to Lazuli about hand washing and what he said, as well as difficulty articulating his concerns with Lazuli's job performance, and in each instance did so only with the assistance of leading questions. At times, Ford even asked for the leading question to be repeated before answering.

Ford's lack of credibility is fatal to Respondent's case. While Respondent called multiple witnesses attempting to make its decision to fire Lazuli look more well-reasoned, neither Oca, Cook, or Lindell ever worked in the Division Street location, performed any investigation of Ford's complaints, spoke to employees, or otherwise did anything except rubber-stamp Ford's recommendation. To the extent they referenced anti-discrimination policies and other generalities, these have no probative value to the instant case and were not relied upon contemporaneously in effectuating the discharge, as their own paperwork shows.

Manning's February text message from does not rescue Ford's non-credible testimony. In fact, Manning's testimony was also not credible, and her demeanor during her testimony alternated between aggressive and terse, demonstrating her hostility toward Lazuli. When questioned about Lazuli's alleged poor performance, she exaggerated, claiming to have worked with her repeatedly, when the evidence establishes that the February 12 shift that led to the text message was the first time they had worked together. Further, even if everything in Manning's text was true, Ford did nothing in response. He only took action against Lazuli two weeks later when Lazuli engaged in protected concerted activity.

Because her text message is the only purported evidence of Lazuli's performance issues outside of Ford's testimony, it is not surprising Respondent highlights this evidence, but it was sent weeks prior to Ford's decision. Simply put, the question of whether Respondent violated the Act is a question of what motivated Ford when he made the decision to terminate Lazuli on March 2. The rest is window dressing.

In contrast to Ford, who had difficulty even though his testimony pleased his employer, and Respondent's other Monday-morning quarterbacking witnesses, Black and Schlesinger testified in detail, at length and with certainty, while testifying against the interests of their current employer. Lazuli, too, testified in detail and with clear recollection. From Lazuli's conviction in her testimony it is apparent that the difficult circumstances surrounding her termination led to strong memories.

B. The Evidence of Discriminatory Motive Demonstrates Respondent Would Not Have Taken the Same Action Even Absent Lazuli's Protected Concerted Activity

The pretextual nature of Respondent's work performance and hand washing defense is addressed in detail in the preceding sections. It is not necessary to repeat the analysis demonstrating how hostility to protected concerted activity was the impetus behind Respondent's decision. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003) (if the evidence establishes that the proffered reasons for the employer's action are pretextual – *i.e.*, either false or not actually relied upon – the employer fails by definition to show that it would have taken the same action for those reasons in the absence of the protected conduct). For the reasons addressed above, Respondent has failed to meet its burden.

IV. CONCLUSION

As described above, Respondent violated § 8(a)(1) of the Act by its discharge of Zaria Lazuli. For the reasons stated above, the General Counsel respectfully requests that the Administrative Law Judge find as violative each allegation in the Complaint and issue the attached proposed Order and Notice to Employees consistent with those findings.

Signed at Seattle, Washington, on December 17, 2019.

Respectfully submitted,

Ryan Connolly
Counsel for General Counsel
National Labor Relations Board
2948 Jackson Federal Building
915 Second Avenue
Seattle, WA 98174

PROPOSED ORDER

The Respondent, Chanticleer Holdings, Inc. d/b/a Little Big Burger, its officers, agents, successors, and assigns, shall

1. Cease and desist from

    (a) Discharging employees because they engage in protected concerted activities, such as making complaints to supervisors regarding their working conditions, including discrimination based on gender or asserting their right to take breaks.

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

    (b) Within 14 days from the date of this Order, Make Zaria Lazuli whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, including for all consequential damages incurred.

    (c) Compensate Zaria Lazuli for any search-for-work and work-related expenses, regardless of whether Ms. Lazuli received interim earnings in excess of those expenses, or at all, during any given quarter, or during the overall backpay period.

    (d) Within 14 days from the date of this Order, compensate Zaria Lazuli for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and (1) file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters, and (2) provide a copy of the IRS form W-2 for wages earned in the current calendar year.

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

    (f) 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, if any, under the terms of this Order.

(g) Within 14 days after service by the Region, post at all of its facilities, copies of the attached notice marked Appendix.[10] Copies of the notice, on forms provided by the Regional Director for Region 19 after being signed by the Respondent's authorized representative, shall be posted by 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 Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Respondent.

(h) 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.

[10] 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."

PROPOSED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

FEDERAL LAW GIVES YOU THE RIGHT TO:

- Form, join, or assist a union;
- Choose a representative 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 interfere with, restrain, or coerce you in the exercise of the above rights.

YOU HAVE THE RIGHT to freely bring discrimination and harassment complaints to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

YOU HAVE THE RIGHT to freely bring issues regarding your terms and conditions of employment, including breaks, to us on behalf of yourself and other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT fire you because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees.

WE WILL offer Zaria Lazuli immediate and full reinstatement to her former job, or if that jobs no longer exist, to a substantially equivalent position, without prejudice to her seniority or any other rights and privileges previously enjoyed.

WE WILL pay Zaria Lazuli for the wages and other benefits she lost because we fired her, including for any consequential damages and for all search for work expenses she may have incurred.

WE WILL pay Zaria Lazuli for the adverse tax consequences, if any, of receiving a lump-sum backpay award and **WE WILL** file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters, and provide a copy of the IRS form W-2 for wages earned in the current calendar year.

WE WILL remove from our files all references to the discharge of Zaria Lazuli and **WE WILL** notify her in writing that this has been done and that the discharge will not be used against her in any way.

WE WILL NOT in any like or related manner restrain or coerce you in the exercise of your rights under Section 7 of the Act.

Chanticleer Holdings, Inc. d/b/a Little Big Burger
(Employer)

Date: _____ **By:** _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

1220 SW 3rd Ave., Suite 605
Portland, OR 97204

Telephone: (503) 326-3085
Hours of Operation: 8 a.m. to 4:30 p.m.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

CERTIFICATE OF SERVICE

I hereby certify that a copy of the Counsel for the General Counsel's Brief to the Administrative Law Judge was served on the 17th day of December, 2019, on the following parties:

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