

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 19

**LITTLE BIG UNION, INDUSTRIAL
WORKERS OF THE WORLD,**

Charging Party,

And

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

Respondent.

Case No. 19-CA-239759

RESPONDENT'S POST-HEARING
BRIEF

I. INTRODUCTION

Little Big Burger (“LBB” or “Respondent”) terminated Zaria Lazuli’s employment during her probationary, “introductory” period due to poor performance and disregard for food safety rules. While the General Counsel alleges that Lazuli engaged in two instances of protected concerted activity, the General Counsel failed to establish that either of these instances actually resulted in LBB’s decision to terminate Lazuli’s employment. Moreover, in one instance—where Lazuli alone asked for a break—the General Counsel failed to establish the existence of any protected concerted activity. The General Counsel’s own witnesses confirmed that other employees engaged in similar—if not identical—protected activity as Lazuli but were not fired. The General Counsel has failed to establish any causation between Lazuli’s protected concerted activity (if any) and LBB’s decision to terminate her employment.

Because the General Counsel failed to establish a *prima facie* case, the Board need not examine LBB’s stated reasons for terminating Lazuli’s employment.

However, if the Board reaches the issue, then the Board should conclude that LBB terminated Lazuli for performance reasons alone. Lazuli's poor job performance and disregard for training on basic food safety issues was unacceptable, had been identified prior to her protected activity (if any), and actually resulted in LBB's decision to terminate her employment.

II. FACTS

A. Little Big Burger

Founded in Portland, Oregon in 2010, LBB is a fast-casual restaurant concept offering fresh, high quality cooked-to-order burgers, truffle fries and root beer floats. LBB's success revolves around its business model of serving a simple, gourmet menu that is focused on quality and served in a fun atmosphere. Consistent with its business model, LBB hires employees who are interested in a fun working environment. Its employee policies are stated concisely and casually; the bulk of its key policies are found on one page of its orientation packet. Among the policies are:

guest service

- Be friendly! You're working on an open line, try to be lively and engaging with the people sitting in front of you.
- Be SUPER CLEAN at all times – people are watching! (it is especially important to wash your hands after touching cash before you jump back on the line)
- ...
- When you're working at the register – you are the CRITICAL first impression for LBB, and your interaction affects everyone's tips. So even though it can be repetitive, perk up and be awesome! Having fun will increase your tips!

Exhibit R-3, p. 2 (emphasis original).

B. Little Big Burger's Policies

LBB employees are subject to Oregon law as well as a number of personnel policies and business practice guidelines related to food safety and training.

Additionally, LBB has a strict anti-harassment policy that encourages reports of any inappropriate workplace conduct.

1. Food Safety

In the food services industry, safety is paramount. To work at LBB, employees must have a food handler's card. Tr. 159:8-11; Exhibit R-3 ("Food Handler's Card: You must have this before you begin work."); Exhibit R-7 (describing Associate's job and stating requirements including "Must possess or acquire valid food handler's certification"). This ensures that LBB Associates are familiar with the Oregon Food Code ("OFC"), which they develop through required online courses and tests that are "all about food safety." Tr. 16:1-21 (Lazuli testimony).

Under Oregon law, an employee's duty to wash their hands is among the most critical duties an employee is required to carry out. The Oregon Health Authority ("OHA") has jurisdiction to promulgate and enforce rules regarding handwashing and cleanliness of food workers in Oregon restaurants, *see* ORS 624.041, and has used that authority to adopt the OFC. Under the OFC, handwashing is deemed a "Priority Item," meaning that it is a fundamental aspect of serving food to the public.

Handwashing is so fundamental that the OFC, which applies to permit holders such as LBB and its staff, references handwashing over one hundred times. The OFC notes that handwashing is a "Priority Item" because it is a:

[P]rovision...whose application contributes directly to the elimination, prevention or reduction to an acceptable level, hazards associated with

foodborne illness or injury, and there is no other provision that more directly controls this hazard.

See OFC § 1-201.10(B) (defining “Priority Item”). As such, the OHA has deemed improper handwashing to be a “violation creating a significantly increased risk for foodborne illness.” See OFC § 1-201.10(B) (defining “Violation Creating Significantly Increased Risk for Foodborne Illness”).

To ensure compliance with such Priority Items, the OFC places requirements on employees and supervisors alike. See OFC § 2-103.11(D) (requiring that supervisors or “persons in charge” ensure that “employees are effectively cleaning their hands, by routinely monitoring the employees’ handwashing” (emphasis added)); OFC § 2-301.11 (“Food employees shall keep their hands and exposed portions of their arms clean”). In fact, the OFC deems handwashing to be so important and such a personal responsibility of each food employee, that it devotes an entire section to describing when and how to wash hands and keep them clean. See OFC § 2-301.11-16.

Handwashing policies are an especially important component of LBB’s safety efforts because of this governing law and the hands-on nature of food preparation. To prepare a little big burger, employees touch food directly when they place buns on the griddle and assemble the burger. See Exhibit R-2. LBB also has a number of postings reminding employees to wash their hands in compliance with both LBB policy and local and state health laws. See Exhibits R-4 and R-5. These signs appear both in restroom facilities and in LBB’s kitchen. *Id.*

2. Introductory Period

The food services industry has high turnover; the job is not for everyone. See *Job Outlook, Food and Beverage Serving and Related Workers*, U.S. Bureau of
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Labor Statistics (available at <https://www.bls.gov/ooh/food-preparation-and-serving/food-and-beverage-serving-and-related-workers.htm#tab-6>, accessed December 17, 2019) (“Job prospects for food and beverage serving and related workers will be excellent because many workers leave the occupation each year, resulting in a large number of job openings.” (emphasis added)). In recognition of this high turnover, LBB utilizes an introductory period:

Introductory Period: Full-time and part-time employees are on an introductory period during their first 90 days of employment. During this time, you will be able to determine if your new job is suitable for you and your manager will have an opportunity to evaluate your work performance. However, the completion of the introductory period does not guarantee employment for any period of time since you are an at-will employee both during and after your Introductory Period.”

Exhibit 1, p. 7. When an employee is new, it is undisputed that they are monitored more closely and given additional coaching and training opportunities. See Tr. 216:11-217:3 (Cook testimony regarding the “added focus” on monitoring new employees); 229:3-9 (Lindell testimony regarding the management team at the store’s monitoring of new employees). The General Counsel’s witnesses confirmed that this is the case. See Tr. 82:6-25 (Black testimony that monitoring occurs when an employee is first hired); Tr. 122:15-20 (Schlesinger testimony that it is unfair to say that a new employee has made a mistake or to “apply the same terminology and standards to people who are in training as it is people who know better, been here longer”).

3. Anti-Harassment

LBB does not tolerate inappropriate workplace behavior. LBB’s anti-harassment policy states:

We prohibit harassment of one employee by another employee, manager, or third party for any reason based upon an individual's race; color;

religion; genetic information; national origin; sex (including same sex); pregnancy, childbirth, or related medical conditions; age; disability; or any other category protected under federal, state, or local law (“protected class”).

...

We also absolutely prohibit retaliation, which includes: threatening an individual or taking any adverse action against an individual for (1) reporting a possible violation of this policy or (2) participating in an investigation conducted under this policy. Our managers are covered by this policy and are prohibited from engaging in any form of harassing, discriminatory, or retaliatory conduct.

Exhibit R-1, pp. 6-7. In practice, LBB enforces this policy:

Q And does Little Big Burger tolerate any discrimination or retaliation on the basis of transgender status?

A No.

Q If it was discovered that a manager was discriminating on that basis, what actions would you have taken as a district manager?

A I would open an investigation into that allegation and likely terminate that manager if it was proven to be true.

Tr. 231:8-15 (Lindell testimony). Lindell testified Cook and Oca—two key decision-makers at LBB, and the decision-makers in Lazuli’s termination—never behaved in a way that was discriminatory or retaliatory during her two and half years working with them. She further testified that she was particularly sensitive to such issues as she identifies as part of the Portland queer community. *See* Tr. 235:22-237:1.

LBB expressly encourages employees to discuss concerns with their manager and provides for multiple alternatives for employees to raise concerns without the need to go through their manager:

If you have any concern that our No Harassment policy may have been violated by anyone, you must immediately report the matter. Due to the very serious nature of harassment, discrimination and retaliation, you must report your concerns to one of the individuals listed below:

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1. Discuss any concern with your manager.
2. If you are not satisfied after you speak with your manager, or if you feel that you cannot speak to your manager, discuss your concern with Adrian Oca, Vice President of Operations, at (503) 893-5962.
3. If you are not satisfied after you speak with Adrian Oca, or if you feel that you cannot speak to him, discuss your concern with April Miller, Trainer/Human Resources, at (404) 512-9863.

You should report any actions that you believe may violate our policy no matter how slight the actions may seem.

We will investigate the report and then take prompt, appropriate remedial action. The company will protect the confidentiality of employees reporting suspected violations to the extent possible consistent with our investigation.

You will not be penalized or retaliated against for reporting improper conduct, harassment, discrimination, retaliation, or other actions that you believe may violate this policy.

Exhibit R-1, p. 7 (emphasis original).

LBB also honors requests to change locations. If an employee and a manager don't get along, but neither the employee nor the manager have engaged in any wrongdoing, then the employee is free to request a transfer to ensure that they work with a manager with whom they have better chemistry. Tr. 78:21-23; Tr. 79:18-22.

C. Zaria Lazuli

Lazuli was a probationary employee of LBB. Lazuli acknowledged receipt of LBB's employee handbook, containing the policies described above. See Exhibits 8 and 9. Lazuli also acknowledged holding an Oregon food handlers card, the examination for which was "all about food safety," including "hand washing." See Tr. 16:7-11.

Lazuli applied to work as an Associate at LBB in January 2019. See Exhibit R-6 and R-7. District Manager Ben Cook and Store Manager Jalen Ford were present for her interview. Cook did most of the talking, liked Lazuli, and made the

decision to hire her. *Id.*; Tr. 215:19-216:4. Ford was present, primarily to observe, and did not take any position on whether to hire Lazuli. Tr. 177:17-178:4. After accepting the job, Lazuli signed a job description that noted that her job duties would include maintaining a clean work area, ensuring compliance with “the city and state health department codes.” Exhibit R-7.

D. Lazuli’s Job Performance During the Introductory Period

Shortly after Lazuli began working at LBB, concerns about her performance became apparent. These problems prompted both complaints from her co-workers and remedial efforts by LBB management as early as February 13, 2019. Jalen Ford, a manager at LBB’s Division Street location, supervised Lazuli. Ford developed concerns about Lazuli’s job performance within about two weeks of her date of hire.

Specifically:

Within the first couple of weeks, I kind of noticed that there was a -- that she was kind of slow on the line, wasn't able to keep up with the pace, so when food should be coming out, food should be coming out, like seven to eight minutes, depending on the order. And possibly, like she would have food out by, like 10, later. And then she also had multiple -- she had the -- I had to bring it up multiple times about hand washing policies and making sure that she's washing her hands from going from the register, you know, using -- you're touching cards and money, to go into the hand washing station.

Tr. 178:7-16.

Ford stated that Lazuli’s job performance was not universally bad (Tr. 183:18-20), but she struggled mightily to be able to get orders out within seven to eight minutes (Tr. 184:5-17). Ford attempted to help Lazuli. With regard to his concerns about handwashing, Ford coached Lazuli on proper practices and she affirmed that she understood. Tr. 179:1-8. With regard to his concerns about Lazuli’s speed of work, Ford

“tried to teach her multiple times” about “little tips” that would help her improve her speed and proficiency, just as he does with any new employee. Tr. 180:3-16. However, Lazuli’s performance did not improve. Tr. 182:6-8.

Ford’s concerns were corroborated by other LBB employees. On February 13, roughly two weeks after Lazuli began working at LBB, Ford received an unsolicited text message from another employee, Juleanna Manning, expressing concerns about Lazuli’s handwashing. Tr. 184:18-186:2; Exhibit R-11. The text messages “shocked” Ford. Tr. 185:14. Ford had talked to Cook about Lazuli’s poor performance both before and after receiving the text messages from Manning. Tr. 186:6-8. In addition to Manning, Ford had “multiple co-workers come up to me regarding Zaria's performance. Letting me know that she's like still being slow, not keeping up, being on her phone all the time.” Tr. 186:14-16.

Based on this information, Ford spoke with Cook about Lazuli. Ford raised the issue of Lazuli’s handwashing “around like five times within the time that she was working” at LBB. Tr. 204:23-24. It is common for Cook to check on how new employees are progressing, and it is his job to monitor the progression of struggling new employees. Tr. 216:11-217:3. At the end of February 2019, both Ford and Cook anticipated that Lazuli would not advance past the introductory period. Cook testified:

Q Is there anything you talked about with Mr. Ford during your conversations from early February until that March 2nd conversation that you hadn't shared?

A No, I believe it's all related to the -- to the concern in deficiencies.

Q Okay. And by the end of February, did you have any thoughts on what would be the likely outcome of Ms. Lazuli's probationary employment?

A Well, I definitely anticipated a potential departure at that point just due to the repetition of similar infractions.

Tr. 219:16-25. *See also* Tr. 188:4-10 (Ford testimony that in late February “It wasn't really looking too good. She was kind of on thin ice from my point of view.”).

E. Lazuli’s Job Performance on March 2, 2019

On March 2, 2019 Ford and Lazuli worked together along with a third employee, Kayla Black. The shift was significant for two main reasons. First, Ford’s co-manager was scheduled to work but failed to report to work or call in. As a result, the store was short-staffed. Second, the store was abnormally busy, exacerbating the challenges caused by being short-staffed. While not ideal, LBB employees are expected to be able to work on three-person teams and to respond to surges of customers.

During that shift, Ford made a number of first-hand observations about Lazuli’s job performance, which were consistent with prior observations and Ford’s efforts to train and coach Lazuli:

- As she did every week or two (Tr. 190:12-16), Lazuli arrived ten to fifteen minutes late for the shift (Tr. 191:4-5).
- Lazuli had a negative attitude toward customers (Tr. 193:14-24) and drew a customer complaint for a problem with an order, forcing Ford to re-make their entire order during the middle of a “rush” (Tr. 189:8-16).
- Lazuli was slow at taking customer orders, to the point where Ford had to switch tasks with her to try to improve customer flow. Tr. 191:14-17.
- Lazuli violated food safety rules, using an ungloved hand to put raw meat on the grill and then failing to wash her hands before using the burger-flipping spatula. Tr. 191:21-193:10.

Overall, the shift exposed Lazuli’s lack of progression during the introductory period.

F. Ford and Cook Discuss the Challenging Shift and Lazuli's Performance

After the shift, Ford called Cook to discuss the shift. Ford explained the factors that had made the shift challenging and alerted Cook that he would likely hear about the customer complaint. Cook also followed up on his earlier conversations with Ford and inquired about Lazuli's progress. Ford shared ongoing concerns about Lazuli's performance. Tr. 199:2-25. In response to Ford's update about Lazuli, Cook asked Ford for a recommendation on how to proceed. Tr. 200:1-5. Ford said that it wasn't working out, and it was then Cook's decision how to proceed with regard to Lazuli's employment. Tr. 200:4-21.

G. LBB Terminates Lazuli's Employment

Based on his discussion with Ford, Cook decided to terminate Lazuli's employment, which was ratified by Cook's supervisor, Adrian Oca. Tr. 223:5-6. Ford did not pressure Cook to take that action, nor was he a decision-maker:

Q [W]hat else was said between you and Ben [Cook] about Zaria [Lazuli]? Did he ask you any questions about what should happen?

A Yeah. He asked me, I mean, what do you think we should do about it? And I mean, I asked him if -- because at the time, I didn't exactly know what -- how the, like 90-day probation period, like works. You know, but if -- I didn't know how to let him know how it wasn't working out, if that makes sense. Like, because I didn't know, like what the full steps in were to the termination. I just let him know, like hey, I mean, my personal recommendation is that we don't, you know, keep her anymore. She's unable to, you know, take orders correctly. She's unable to, you know, keep up with washing hands and, you know, taking care of the store.

Q Okay. And based on your conversation, whose responsibility was it to make a decision? Was it your responsibility or someone else's?

A Ben [Cook]'s.

Q Okay. And is it your understanding that he then made a decision?

A Yeah.

Q And what's your understanding of what happened after your phone call with Ben [Cook]?

A He just let me know that he would kind of look into it and kind of talk to everyone else about -- everyone that was in the, like manager, like hierarchy, I guess.

Q Okay. And is it your understanding that the decision was, in fact, made to terminate Ms. Lazuli's employment?

A Yes.

Q Did you have any role in the actual termination of Ms. Lazuli?

A No, I was not present.

Tr. 200:1-201:7 (Ford Testimony). Contemporaneously, Cook communicated the decision, and the reason for the decision to another District Manager, Emma Lindell.

Cook's clear explanation was that the termination was solely because of Lazuli's ongoing observed performance problems, specifically her slow work and poor hygiene practices:

Q [D]id you ask him for any more details about the reasons for the termination?

A Yeah, I asked him for the reasoning behind it and he explained that it was introductory period termination; we were having issues with hand washing and speed throughout the training process.

Q And were you satisfied by that explanation?

A Yes.

Q Okay, why?

A That's a pretty typical termination that I've been involved in before.

Q Okay. And did you have any reason to think that there was anything else going on besides from what Mr. Cook told you?

A No.

Tr. 232:4-17 (Lindell testimony).

Ford and Lindell communicated Lazuli's termination on March 7. Tr. 233:4-8, Exhibit R-10. Lindell did most of the talking and explained to Lazuli that she was being terminated but could reapply in the future. Tr. 234:7-13. As is LBB's practice vis-à-vis introductory employees, Lindell did not delve into the precise reasons for the decision to terminate Lazuli's employment.

H. Lazuli's Complaints

Lazuli made two complaints prior to her employment being terminated. However, she made those complaints well after the deficiencies in her performance were observed and discussed in detail, at a time when her termination already was likely. The record is void of any direct or persuasive evidence of causation.

1. Alleged Unfair Scrutiny

On March 1, Lazuli complained that she believed that Ford was scrutinizing her job performance unfairly due to her being a transgender woman. The accusation of unfair scrutiny played no role in Ford's decision to talk to Cook about Lazuli's performance. Tr. 201:10-12.

Lazuli communicated her belief of unfair scrutiny with two other employees, Canaan Schlesinger and Kayla Black; the three employees confronted Ford at the end of a shift. Tr. 66:9-68:12. Schlesinger admitted that he silenced Ford when Ford attempted to explain that he was merely fulfilling his job duties as manager by monitoring the performance of a new employee. Tr. 88:13-15 ("Q So he was never allowed the opportunity to explain to you his point of view in the circumstance, was he? A Not in that moment."). Again, as noted, monitoring employee job performance is both legally required and clearly within the scope of a manager's job duties. See OFC § 2-

103.11(D) (requiring that supervisors or “persons in charge” ensure that “employees are effectively cleaning their hands, by routinely monitoring the employees’ handwashing”).

2. Breaks

On March 2, with approximately ten minutes remaining in her scheduled shift, Lazuli complained to Ford that she had not received a break. Tr. 38:2-11.

However, Lazuli acknowledges that there was no requirement to seek a manager’s permission to take a break. Sometimes managers would direct employees to take their breaks. However, other times, employees could simply say “Oh, hey, I’m going to take my break.” Tr. 22:5-9. Black gave a similar account of how breaks are handled:

You generally just take your break. Usually it's about halfway through or a few hours into the shift. And you're welcome to take it when you need it. It's generally just if it seems like a good time to take your break and you would like one, you can go do that.

Tr. 62:8-12. On March 2, Lazuli worked for hours—including at times when Ford was not present—without asking for or simply taking a break, as was common and approved practice at LBB. Tr. 37:4-38:11. There was no evidence that Ford ever refused to grant employee’s request for a break or that otherwise ever prevented any employee from taking a break at any point before Lazuli raised the issue with approximately ten minutes remaining in her scheduled shift.

I. Lazuli’s Complaints Had Nothing to do with the Decision to Terminate Her Employment

The evidence demonstrates that other employees engaged in similar conduct to the alleged protected conduct by Lazuli, but were not terminated. The conversation about the break played no role in Ford’s decision to talk to Cook about Lazuli’s performance. Tr. 202:13-16. The evidence also establishes that Lazuli was an

introductory employee with significant performance problems. It is common for LBB to terminate an introductory employee who continues to exhibit significant performance problems. Tr. 146:4-147:7 (Oca testimony).

1. Other Complaint of Unfair Scrutiny

This was not the first time that Schlesinger and Black had confronted Ford. Tr. 118:12-119:19. In late January or early February of 2019, Schlesinger, Black, Ian Decker, and Sam O'Neill confronted Ford "because he engaged in similar bullying toward Decker." Tr. 118:22-23. LBB never took any action against Decker, and he remained employed at LBB until October 2019, when he resigned his employment. Tr. 120:9-11.

2. Other Complaint of Missed Break

Black also complained about a missed break on March 2. Tr. 74:19-75:24. However, Black's employment was not terminated and she remains employed by LBB. Tr. 58:14-18.

Additionally, LBB supports its employees taking breaks. Cook admonished Ford for not ensuring that all employees took their breaks on March 2:

Q Okay. Did he talk to you about his ability to give employees breaks?

A He did.

Q Okay. And what did he say about that?

A He mentioned that at the end of our shift, Zaria relayed to him that she did not receive her 10-minute break.

Q Okay. And how did you respond to that information?

A I [said] that Jalen had failed in his -- in his oversight for that shift, and that 10-minute breaks are necessary for every shift and that in the future he needs to make different maneuvers in order to adapt to being understaffed.

Tr. 221:1-11 (Cook testimony). In former employee Manning's experience, LBB does not discriminate against employees who ask for a break. Tr. 167:11-14.

J. Areas of Disputed Fact

At hearing, there was testimony from eight witnesses who gave different accounts of several issues. The contrast in their testimony will be relevant to the ALJ's credibility determinations.

1. Lazuli Received Adequate Training

Lazuli minimized the amount of training that she received. Tr. 21:22-22:4 (Lazuli testimony that Ford did not complete her training). However, other LBB employees affirmed that training occurred on an ongoing basis as part of food preparation activities. See Tr. 63:22-64:16 (Black testimony that Ford's training of Lazuli included demonstrations of food preparation, training in the back of the house, and working through a checklist); Tr. 182:2-20 (Ford testimony that his training of Lazuli included how to wrap a burger, how to make a burger to the customer's desired doneness, lobby cleanup and maintenance, ordering, dishwashing, and customer care, among other things). Additionally, of course, Lazuli had completed the steps necessary to obtain a food handler's card, including taking the required online courses and tests that are "all about food safety." Tr. 16:1-21.

2. Lazuli's Job Performance was Flawed

Lazuli entirely dismissed the notion that Ford had ever given her appropriate feedback on her job performance. Lazuli's perspective is that every time that Jalen Ford corrected her performance, he was wrong. Incredibly, she testified that "At no point was I corrected and had done it [built a sandwich] incorrectly." Tr. 46:22-

25. That perspective was not shared by other employees. Schlesinger, another LBB employee at the Division store (and the General Counsel's witness), testified that although he preferred the term "trial and error learning" over "mistakes" the reality was that neither Lazuli nor any other LBB employee is perfect. Tr. 122:9-20.

3. No LBB Agent Harbors Animus Towards Transgender Employees

Lazuli believes that she was coached, corrected, and terminated because she is a transgender woman. However, the record lacks any evidence that either Ford or LBB harbor any bias against members of the queer community and contains considerable evidence that no such bias exists. Black is also a transgender woman. Tr. 89:8-10. Black never complained to Manning about being discriminated or retaliated against for being transgender. Tr. 167:23-25. Schlesinger is non-binary. Tr. 115:25-116:1. Both Schlesinger and Black continue to work at LBB's Division location with Ford and have not requested to transfer away from Ford. Tr. 58:14-18; 98:11-14. Manning testified that in her experience, LBB does not discriminate against employees who are members of the queer community. Tr. 167:7-10.

Additionally, Emma Lindell, one of the District Managers who informed Lazuli of her termination, is a member of the queer community and "would never work for a company or under people that would discriminate against any protected class[.]" Tr. 236:24-237:1. Lindell worked closely with Oca and Cook for two and a half years and does not believe that either of them have any bias against transgender individuals. Tr. 235:19-236:22. Oca confirmed that although LBB does not closely track the sexual or gender identity of its employees, it employs many members of the queer community,

including transgender individuals. Tr. 143:12-17. LBB does not tolerate any discrimination on the basis of transgender status. Tr. 143:4-11.

III. DISCUSSION

The General Counsel failed to prove its case and there is no evidence here that LBB made the decision to terminate Lazuli because of any protected concerted activity.

A. **Lazuli's Complaint About her Break was not Protected Concerted Activity**

The National Labor Relations Act (NLRA) establishes an employee's right to "engage in ... concerted activities for the purpose of ... mutual aid or protection." 29 U.S.C. §§ 157. Thus, by its express language, Section 7 of the NLRA protects collective, not individual, activity. *E.I. Du Pont De Nemours & Co. v. N.L.R.B.*, 707 F.2d 1076, 1078 (9th Cir. 1983). The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. *Meyers Industries, Inc.* (Meyers I), 281 N.L.R.B. 882, 886 (1986). When the record evidence demonstrates group activities, whether "specifically authorized" in a formal agency sense, or otherwise, the conduct is concerted.

Here, Lazuli complained about her break alone. Therefore, she was not engaged in protected concerted activity. Lazuli initially claimed that Black was present for the conversation (Tr. 49:25-50:2), but conceded that she was uncertain whether Black or Decker were watching the front of the store while she spoke with Ford in the back (Tr. 50:3-12). However, Ford testified credibly that Lazuli approached him alone and only addressed her own break. Tr. 196:6-11.

B. The General Counsel Failed to Establish Causation Between any Protected Concerted Activity and LBB's Decision to Terminate Lazuli

In order to find an § 8(a)(1) or (3) violation, the Board must first establish an unlawful motivation on the part of the Employer. *See American Gardens Management Co.*, 338 NLRB 644, 645 (2002). Here, there simply is not any evidence to sustain the General Counsel's burden of proof with respect to causation. The General Counsel's case does battle with Occam's Razor, contending unconvincingly that Lazuli was terminated for reasons other than the significant, ongoing performance concerns that were observed by managers and non-managers alike during her short tenure at LBB. Lazuli was terminated solely for the legitimate reasons stated by LBB.

1. Legal Standard

The General Counsel bears the initial burden of establishing that an employee's union or other protected concerted activity was a motivating factor in an employer's adverse employment action at issue. The burden then shifts to the Respondent to establish by a preponderance of the evidence that it would have taken the same action even in the absence of the employee's union or other protected concerted activity. *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), *approved in NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983).

Wright Line is inherently a causation test. To meet the General Counsel's initial burden, there must be evidence of animus to support a finding that a causal relationship exists between the employee's protected activity and the employer's adverse action against the employee. The Board has recently clarified *Wright Line* and stated

that the General Counsel does not meet their burden “by simply producing *any* evidence of the employer’s animus or hostility toward union or other protected activity.”

Tschiggfrie Properties, 368 NLRB No. 120, at 7 (Nov. 22, 2019) (emphasis original).

Tschiggfrie Properties goes on to state:

the General Counsel does not *invariably* sustain his burden by producing—in addition to evidence of the employee’s protected activity and the employer’s knowledge thereof—*any* evidence of the employer’s animus or hostility toward union or other protected activity. Instead, the evidence must be sufficient to establish that a causal relationship exists between the employee’s protected activity and the employer’s adverse action against the employee.

Id. at p. 8 (emphasis original).

Here, contrary to the holding in *Tschiggfrie Properties*, the General Counsel seeks to prove its case on the basis of the circumstantial evidence of timing, without any evidence of animus or hostility. (The hearing in this matter occurred on November 12, 2019, ten days before the Board issued *Tschiggfrie Properties*.)

2. **The Break Complaint**

There are three main reasons that the General Counsel failed to establish causation between Lazuli’s break request and LBB’s decision to terminate her employment.

First, the General Counsel failed to establish protected concerted activity with regard to Lazuli’s request for a break. Credibility disputes between Lazuli and Ford should be resolved in favor of Ford, as Lazuli’s testimony was frequently refuted by other General Counsel witnesses. With regard to the complaint about a request for a break, Ford testified that Lazuli approached him alone and asked about only her own break. Tr. 196:6-10. This was an individual request. Even if Lazuli and Black talked

amongst themselves about their consternation about not having a break (which Lazuli testified they could take by simply stating “Oh, hey, I’m going to take my break,” see Tr. 22:7-8), Ford was not present for that conversation and so would have no way of knowing whether Black had “specifically authorized” Lazuli to speak on her behalf. Moreover, Black made the same request for a break after Lazuli departed for the day. See Tr. 74:18-21 (Black testimony that “From then, Zaria left, and ... I walked up and had repeated a similar statement.”); Tr. 202:17-203:3 (Ford testimony that Black “pretty much asked the same question to Zaria -- the same thing that Zaria had asked. She had asked about her ten-minute break.”). This belies the suggestion that Lazuli had been speaking for both herself and Black, which would have made Black’s request redundant.

Second, even if the complaint about the break was protected concerted activity (it wasn’t), there is no evidence of hostility towards union or other protected activity. There was no evidence at hearing of any union activity or employer awareness of the existence of any union whatsoever at the time of all relevant events. To whatever extent that a request for a break (or a complaint that one has not received a break) is protected, the evidence showed that communications about breaks happen every day at LBB’s restaurants as employees and managers alike seek to balance breaks with the flow of customers. When Ford told Cook that employees had not taken breaks on March 2, Cook admonished Ford for failing in his oversight of that shift “that 10-minute breaks are necessary for every shift and that in the future he needs to make different maneuvers in order to adapt to being understaffed.” Tr. 221:9-10. Therefore, rather than LBB being hostile to the request for a break, it fully agreed that Lazuli should have received a break on March 2. Moreover, LBB told Lazuli that she was eligible for rehire:

Q Did you meet with Ms. Lazuli after this?

A Yeah, right after that.

Q Okay. And can you describe that interaction please?

A I described the -- what's on the termination document here, that it was an introductory period termination, it was non-disciplinary and that she was welcome to reapply in the future. She did not want to sign the document and I told her that was okay. And that was pretty much the extent of the meeting.

Tr. 234:5-13 (Lindell testimony). This undermines any suggestion of hostility towards Lazuli. Regardless, Lazuli never reapplied. Tr. 52:6-8 (Lazuli testimony).

Third, there is an *exact* comparator to Lazuli: another employee who is also a transgender female made the same complaint as Lazuli, to the same manager, on the same date, within ten minutes of the same time, but was neither disciplined, discharged, nor subjected to any other adverse employment action. That employee is Kayla Black, and she continues to work at LBB. Therefore, the General Counsel's own evidence discredits its theory and any possible inference of timing-based causation.

3. **The Unfair Scrutiny Complaint**

The General Counsel also seeks to establish its *prima facie* case on the basis of Lazuli's complaint that she was being subjected to unfair scrutiny. While this complaint was protected concerted activity, as the undisputed testimony was that she, Black, and Schlesinger approached Ford together, it was not the cause of any adverse employment action by LBB. However, there are four main reasons why the General Counsel has failed to establish its *prima facie* case.

First, there is again a nearly exact comparator to Lazuli. Within a month and a half prior to Lazuli's accusation, Black and Schlesinger approached Ford and accused him of unfairly scrutinizing another employee, Decker. Tr. 116:9-16. Decker

was employed for approximately nine months after this accusation, suffered no adverse actions by LBB for this accusation, and voluntarily resigned his employment to pursue other interests. Additionally, Black and Schlesinger participated in both complaints. There is no evidence that Decker, Black, or Schlesinger were ever subjected to adverse employment actions for participating in the complaints. Moreover, although LBB disagrees that Ford ever subjected Decker to any unfair scrutiny, Schlesinger's testimony was that Ford was responsive to the complaint about his treatment of Decker. *See* Tr. 118:12-120:12.

Second, it is undisputed that Ford's job as manager included training new employees. Schlesinger, the General Counsel's witness, testified that monitoring new employee performance is an essential part of allowing them to improve, and that it isn't fair to even call errors by new employees "mistakes" because they are still learning. Tr. 122:12-20. While it is common for people to dislike and bristle at being told what to do, it was evident from Ford's demeanor at the hearing that he does not take such friction personally. Moreover, if Ford was motivated to act to ensure that employees who made complaints about unfair scrutiny were fired, it would make far more sense for him to pursue discipline or discharge of Black or Schlesinger, who had been involved in both accusations of him subjecting other employees to unfair scrutiny. However neither Black nor Schlesinger were subjected to any adverse employment actions. Again, the General Counsel's own case discredits any suggestion of causation between the complaint and Lazuli's discharge.

Third, Lazuli's complaint also incorporated the suggestion that Ford is transphobic or otherwise hostile towards the queer community. However, both Black (a

transgender woman) and Schlesinger (who identifies as non-binary, Tr. 115:25-116:1) continue to work with Ford and have not sought a transfer to a different LBB location. Ford's ongoing ability to work with these co-workers undermines this suggestion, as does his credible sworn testimony that Lazuli's transgender status did not impact his treatment of her. See Tr. 201:8-202:7. Regardless, the employees involved did not consider Ford's conduct significant enough to make a complaint to anyone at LBB outside the store, as they were encouraged to do by LBB's handbook. See Exhibit R-1, pp 6-7 (LBB Handbook section titled "No Harassment").

Fourth, Cook—not Ford—was the decision-maker on Lazuli's termination. Ford merely reported to about what was happening at the store and responded to Cook's questions about Lazuli's poor job performance.

C. LBB Clearly had Legitimate, Non-discriminatory, and Non-retaliatory Reasons to Terminate Lazuli's Employment

In the unlikely event that the Administrative Law Judge concludes that the General Counsel has established a *prima facie* showing sufficient evidence to support the inference that protected conduct was a motivating factor in the employer's decision, the Administrative Law Judge must then consider whether the employer has demonstrated that the same action would have taken place even in the absence of the protected conduct.

Here, LBB firmly established that Lazuli would have been terminated regardless of her protected activity, if any.

First, Ford and Cook had several conversations about Lazuli's poor performance that predated any of the alleged protected activity. LBB has workplace policies in place to ensure safe and sanitary food preparation in compliance with Oregon

law. It also has an introductory period to allow it to evaluate whether a new employee understands and quickly develops proficiency at following those policies. Additionally, employee speed and customer service skills are evaluated during this period. Ford and Cook had spoken multiple times before regarding Lazuli's complaints. At the end of February 2019, Ford believed that Lazuli "was kind of on thin ice" and the termination of her employment seemed probable. Tr. 188:4-10. Ford worked directly with Lazuli for hours on March 2 and observed firsthand that she was not progressing. On that day, Ford observed that she was late, slow, unsanitary, and drew a customer complaint. This job performance was unimproved from her prior poor job performance, demonstrating that she was failing to progress and forcing Ford to recommend that her employment be terminated. See Tr. 209:7-9 (Ford testimony); Tr. 222:25-223:6 (Cook testimony).

Second, Lazuli's job performance was objectively poor. This is not a case where a manager alone determined that a particular employee was under-performing. To the contrary, other non-supervisory employees were so distressed by Lazuli's unsanitary behavior that they contacted Ford to report their concerns. See Tr. 186:3-20 (Ford testimony that before and after he received text messages from Manning, he had "multiple co-workers come up to me regarding Zaria's performance. Letting me know that she's like still being slow, not keeping up, being on her phone all the time. I've also talked to my general manager, Ben Cook.") Manning, a former employee with no vested interest in this matter, shared that Lazuli "was very resistant to take any direction, didn't wash her hands after using the restroom. I had to remind her a few times. And then she was often late, and usually had a bad attitude." Tr. 159:15-22. Manning felt that Lazuli's performance was bad to the point where Lazuli was creating "unfair" conditions for

other workers. Tr. 160:14-16. Manning observed Lazuli failing to wash her hands after leaving the restroom at least twice on a single shift. Tr. 164:12-15. Lazuli also refused safety instruction from Manning in violation of LBB's policies. Tr. 165:1-14. Manning had never made any other complaints to her manager about another employee, but Lazuli was so challenging to work with that she did so. Tr. 166:10-21. Manning's experience fully corroborates Ford's earlier and later observations about Lazuli's performance, discrediting any suggestion that Ford had somehow unfairly passed subjective judgment on Lazuli's job performance. Additionally, one of the problems with Lazuli's performance was her speed of work. Lazuli's pace of testimony at hearing—*i.e.*, she spoke very slowly—is entirely consistent with her demonstrating a lack of urgency while working in a fast-paced food service position.

Third, the comparator evidence demonstrates that Lazuli's job performance, rather than any animus towards protected activity, was the motivating factor in LBB's decision. The General Counsel's position appears to be that Lazuli's complaints frustrated Ford to the point where he scrutinized her job performance and manipulated the situation so that Cook would decide to terminate her employment. However, that theory fails to account for the ongoing employment of Black and Schlesinger. If Ford were offended by being accused of unfairly scrutinizing the employees that he was tasked to manage and took action on that basis, then Black or Schlesinger—not Lazuli—would be more logical targets for adverse employment actions. After all, both Black and Schlesinger accused Ford of unfair scrutiny not once, but twice. Likewise, Black had made the same complaint about her lack of a break. There is no evidence that Black or Schlesinger were subjected to any adverse employment actions

because of their complaints, and Ford had specifically told Cook about Black's participation in the complaint. *See* Tr. 208:18-21. The reason for this different treatment is that their job performance was acceptable but Lazuli's job performance was not. Poor job performance is the only reason that Lazuli's employment was terminated.

Fourth, Ford credibly disclaimed any improper motive. Ford's informal presentation at the hearing is entirely at odds with the General Counsel's attempt to portray him as a scheming, unscrupulous manager. He is transparently a laid-back, respectful individual who testified that other employees' transgender status was of no concern to him. *See* Tr. 201:8-202:7. Ford displayed no animus or inclination to retaliate and testified that neither complaint played a role in his decision to recommend that LBB terminate Lazuli's employment. Tr. 202:10-16. Likewise, LBB managers Oca, Lindell, and Cook testified that LBB makes employment decisions on the basis of performance factors and neither discriminates nor retaliates.

IV. CONCLUSION

Based on the foregoing, LBB respectfully submits that the General Counsel has failed to establish a *prima facie* case. If the Administrative Law Judge reaches the question, LBB has articulated a legitimate and non-discriminatory basis for Lazuli to be discharged. This case should be dismissed.

DATED: December 17, 2019.

BULLARD LAW

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CERTIFICATE OF SERVICE

I hereby certify that on December 17, 2019 I served the foregoing

RESPONDENT'S POST-HEARING BRIEF on:

Little Big Union/IWW
together@littlebigunion.org

Kristin White
National Labor Relations Board
1220 SW 3rd Ave., Suite 605
Portland, OR 97204
Kristin.White@nlrb.gov

- by **mailing** a true and correct copy to the last known address of each person listed. It was contained in a sealed envelope, with postage paid, addressed as stated above, and deposited with the U.S. Postal Service in Portland, Oregon.
- by causing a true and correct copy to be **hand-delivered** to the last known address of each person listed. It was contained in a sealed envelope and addressed as stated above.
- by causing a true and correct copy to be delivered **via overnight courier** to the last known address of each person listed. It was contained in a sealed envelope, with courier fees paid, and addressed as stated above.
- by **faxing** a true and correct copy to the last known facsimile number of each person listed, with confirmation of delivery. It was addressed as stated above.
- by **emailing** a true and correct copy to the last known email address of each person listed, with confirmation of delivery.
- by **electronic** means through the State Court's Electronic Case File system, which will send automatic notification of filing to each person listed above at their email address as recorded on the date of service in the eFiling system, if they are registered users or, if they are not, by serving a true and correct copy at the address listed above.

s/Dennis Westlind

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