

**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**

Ryan Connolly, Esq.,

for the General Counsel.

Dennis Westlind & Benjamin P. O’Glasser, Esqs. (Bullard Law),

for the Respondent Company.

DECISION

JEFFREY D. WEDEKIND, Administrative Law Judge. In late January 2019, Zaria Lazuli was hired by Little Big Burger as a fast-food worker at its Division Street location in Portland, Oregon. Her employment with the Company was short-lived, however. She was terminated just 5 weeks later, on March 7, less than halfway through her 90-day introductory or probationary period.

The General Counsel alleges that Lazuli was terminated because she and coworkers had twice recently complained to a manager about their terms and conditions of employment—first on March 1, when they accused the manager of monitoring Lazuli more closely because she was transgender, and again the following day, March 2, when they complained to him about not being given a mandatory 10-minute paid break during the shift. The General Counsel alleges that Lazuli’s termination therefore violated Section 8(a)(1) of the National Labor Relations Act.¹

The Company denies the allegation. It asserts that Lazuli’s prior complaints about transgender discrimination and a missed 10-minute break had nothing to do with her termination. Rather, Lazuli was terminated during her probationary period primarily because, despite frequent reminders and coaching by the manager, she repeatedly failed to comply with the Company’s handwashing policy and failed to improve her pace and performance.

¹ See the July 29, 2019 complaint, GC Exh. 1(c). The Board’s jurisdiction is undisputed and established by the record. The Company also does not dispute that the identified managers involved in monitoring or terminating Lazuli were its supervisors and agents within the meaning of the Act at all relevant times. See the Company’s Aug. 12 answer, GC Exh. 1(f).

A hearing to litigate these disputed issues was held on November 12, 2019. The General Counsel and the Company thereafter filed briefs on December 17.² As discussed below, the General Counsel failed to prove the alleged violation by a preponderance of the evidence.³

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I. THE RELEVANT FACTS

At the time of the relevant events, the Little Big Burger Division Street location employed approximately 10 fast-food workers to cover three daily shifts; an opening shift from 11 am–4 pm, a middle shift from noon to 8 pm, and a closing shift from 4–10 pm. There were also two managers, Paul Moulnar and Jalen Ford. They performed essentially the same work as the other employees (e.g., taking orders and making burgers and fries) but also trained new hires, monitored them and other employees to ensure they followed company policies and procedures, and managed the schedule and inventory. They also had the authority to verbally coach or counsel employees; however, only the district manager could issue written discipline or take other documented employment actions with the approval of the vice president of operations. (Tr. 16, 20–21, 58–59, 125, 132, 172–176, 182, 214–215, 228–229.)

Moulnar and the district manager, Ben Cook, interviewed Lazuli in middle or late January and she was hired shortly thereafter. Moulnar also performed the initial post-hire training of Lazuli, which consisted of going through a checklist of items on her first day of work. However, Lazuli was almost always scheduled to work with Ford rather than Moulnar thereafter. So, it fell primarily to Ford to monitor Lazuli’s performance and provide her with ongoing coaching and counseling where needed. (Tr. 21–22, 43, 47, 137, 177–178, 215; R. Exh. 3.)

Ford had only recently been made co-manager and had little or no previous managerial experience or training other than what he had received on the job and in high school. However, he had been working at Little Big Burger for over a year and was familiar with the Company’s fast-food service policies and procedures. One of the most important ones, which he was exceptionally vigilant in monitoring (“fixated on” according to Canaan Schlesinger, one of Lazuli’s coworkers), was the requirement that employees comply with state and county health codes and standards by washing their hands after using the restroom and before and after handling food. Several signs were posted over the restroom sink and the kitchen handwashing station instructing employees precisely when, where, how long, and how many times to wash their hands (e.g., twice after using the toilet—once in the restroom and again in the kitchen). And Ford reminded employees to comply with those instructions whenever he believed they had failed to do so. (Tr. 127–128, 134–141, 171–172; R. Exhs. 4–5.)

² The Charging Party, Little Big Union, was not the collective-bargaining representative of the Company’s employees during the relevant period and it did not participate in the hearing or file a posthearing brief.

³ Citations to the record are included to aid review and are not necessarily exclusive or exhaustive. In making credibility findings, all relevant factors have been considered, including the interests and demeanor of the witnesses; whether their testimony is corroborated or consistent with the documentary evidence and/or the established or admitted facts; inherent probabilities; and reasonable inferences that may be drawn from the record as a whole. See, e.g., *Daikichi Corp.*, 335 NLRB 622, 623 (2001), *enfd.* 56 Fed. Appx. 516 (D.C. Cir. 2003); and *New Breed Leasing Corp. v. NLRB*, 111 F.3d 1460, 1465 (9th Cir.), *cert. denied* 522 U.S. 948 (1997).

Ford began giving such reminders to Lazuli almost immediately. And he continued to do so on a regular and frequent basis. Lazuli worked three and sometimes four shifts per week, and Ford reminded her to wash her hands numerous times every shift (“probably more than 10 times a shift” according to Lazuli). He did so in various situations and most often when Lazuli was moving between working the register and handling food. (Tr. 15, 18–20, 23–27, 41–43, 102–104, 178.)

Ford also closely monitored Lazuli’s work performance generally. And he often corrected her or offered suggestions when he believed she was not working efficiently and keeping up with the pace of the line. This most frequently occurred when Lazuli was “building” burgers; he would step in and show her how to perform certain steps (such as folding the burger in the paper) correctly and faster. He did this multiple times, once or twice every shift she worked at that station. (Tr. 23–28, 42–43, 46–47, 64, 103–104, 177–180.)

Going into the third week, however, Ford was still not seeing much improvement with respect to either Lazuli’s handwashing practice or her performance and pace. Moreover, on February 13, Ford received a disturbing message from an employee who worked with Lazuli on the previous day’s closing shift. The employee, Juleanna Manning, had been working at another location in the district (Hawthorne Blvd.) for about 2 years and was a “key” (an employee who is entrusted with a key to open or close). As was not uncommon, she and another Hawthorne “key” (Chrissy) had decided to work at the Division Street location as well to get more hours. The February 12 closing shift was the first time they worked at that location, and the following is what Manning texted to Ford about the experience:

Hey Jalen, are you the store manager? Sorry I’m new to [D]ivision [Street] and not sure if I should talk to [District Manager Cook] about something or you? . . . It [is] just about our closing shift last night. It was really rough working with [Lazuli]. I am not trying to get her in trouble or anything maybe she just needs more training? But I had to tell her multiple times to wash her hands after using the bathroom. She spent 2 hours on prepping [two] things of cheddar and [one] onion. She was very [resistant] to take any direction from me or Chrissy. She refused to use cut gloves. She was also like 20 minutes late and disappeared on her phone a lot. It was just very challenging working with her last night. I just thought a manager should be aware.

Ford replied that he and Moulnar had tried to train Lazuli “but the smallest things aren’t clicking for her.” He told Manning that he had also reminded Lazuli “about washing her hands and not being on her phone on the line.” He said, “[I]f things continue not working out, we’re probably gonna have to let her go.” (R. Exh. 11; Tr. 158, 160, 165, 168–170, 177–186, 206, 210.)⁴

⁴ Manning subsequently found another job and was no longer employed by the Company at the time of the November 2019 hearing. However, she was called by the Company to testify and confirmed the events described in her February 13 text message. Manning testified that she had to tell Lazuli at least twice to wash her hands at the kitchen handwashing station after using the bathroom; that prepping the cheddar and onion should have taken only 15–20 minutes; that when she asked Lazuli to use cutting gloves, Lazuli responded, “I’m not in the third grade”; and that Lazuli went into the back prep area with her cell phone a lot. (Tr. 158–159, 162–167.)

Ford discussed his concerns about Lazuli’s performance with District Manager Cook at least once a week during their regular “check-ins.” Ford told Cook that things were not going well; that he had scheduled Lazuli to work with him as much as possible so he could guide her, but he was not seeing much improvement. He mentioned various issues, including those reported by Manning, but said he was particularly concerned about her repeated failure to wash her hands before or after handling food. Cook told Ford during each of their conversations to continue coaching Lazuli. However, by the end of February, with Lazuli still showing little or no improvement in response to coaching, Cook concluded she was probably not a good fit for the job and would eventually have to be terminated. (Tr. 187–188, 199, 204, 217–220.)

Lazuli, however, had a different view of the situation. She believed Ford’s coaching and suggestions were unnecessary and unwarranted; that most of the time he reminded her to wash her hands she had already done so at the handwashing station (which was near where Ford was typically standing), and she was never actually doing anything incorrectly when he interjected and coached her about building burgers correctly. She spoke to three of her coworkers—Canaan Schlesinger, Kayla Black, and Ian Decker—about this on several occasions beginning her second week on the job. They agreed that Ford should not be treating her that way. Schlesinger, suggested that they all speak with Ford as a group to make him aware of his conduct and give him a chance to change it. They agreed and began looking for an opportunity and planning what to say. (Tr. 23, 25, 32–33, 46, 65–66, 105.)⁵

⁵ There is no real dispute that Lazuli had such conversations with Schlesinger, Black, and Decker, and subsequent events corroborate them. However, Lazuli, Schlesinger, and Black gave inconsistent testimony regarding significant details. (Decker, who Schlesinger testified resigned from Little Big Burger about a month before the hearing, did not testify.) For example, Lazuli testified that Schlesinger told her that Ford had previously done the same things to other employees, including Black. Lazuli also testified that Decker specifically told her that she needed to be careful because the Company had a history of treating transgender people differently. See Tr. 30–34. (Although the Company objected to this testimony as hearsay, and the objections were either granted or the General Counsel disavowed reliance on the testimony for the truth of the matter asserted, the testimony has properly been considered in evaluating what was said during the conversations and/or credibility.) However, Black, who is herself transgender and transferred to Division Street from another location in January 2019, testified that when Lazuli asked the three of them if Ford treated them the same way, they told her that he did not; that he generally kept to himself and didn’t really monitor what they were doing. And Black made no mention whatsoever of any discussion between them about Ford’s treatment of Lazuli being related to her transgender status. See Tr. 34, 65–66, 70, 89. Nor did Schlesinger, who is non-binary. Schlesinger likewise did not corroborate Lazuli’s testimony that Schlesinger said Ford had done the same things to Black. Further, contrary to Black’s testimony, Schlesinger’s prehearing affidavit stated that Ford had “engaged in similar bullying” toward Decker (who Schlesinger testified is not transgender) by “ceaselessly reprimanding and correcting menial tasks,” and that a group of them, including Black, met and spoke with Ford about it in late January or early February 2019. As previously indicated, Schlesinger also testified that Ford was “fixated” on handwashing “generally,” not just with Lazuli. See Tr. 48, 53, 104–105, 115–120. See also fn. 7, *infra*.

The planned conversation with Ford eventually occurred on March 1, shortly before 4 pm, the end of the opening shift. Lazuli, Schlesinger, and Black went into the back storage room with Ford while Decker stayed out front to watch the line. Schlesinger, who had worked at Division Street the longest of the three, since June 2018, spoke first. Schlesinger told Ford that they just wanted to have a conversation with him and give Lazuli an opportunity to share her experience in the workplace so far.⁶ Schlesinger said that it was not an attack on him or his character, but just coworkers trying to help highlight some negative behavior that he may or may not be aware of, and asked him to listen and try to be receptive.

Schlesinger then gave Lazuli the floor. Lazuli told Ford she thought he was treating her differently than others and bullying her. She said that this wasn't the first time she had faced discrimination or harassment in a workplace because she was transgender. She said the prior experiences had been more direct and heinous, but that Ford was also behaving in a targeted manner, whether he knew it or not, and that subconscious personal biases play into that.

Black, who as noted above (fn. 5) transferred to Division Street from another location in January 2019 and is likewise transgender, then shared her own experience. She told Ford that he had been stoic and did not speak to her very much at all when she arrived.

Ford at that point interjected, saying he disagreed with everything they were saying. He denied that he treated Lazuli or anyone else differently because of their gender identity. He said he looked at everyone as just another human being and that he was monitoring and coaching Lazuli so much because she wasn't the best worker.

Schlesinger, however, told Ford that it was not the time for him to defend himself; that they were not looking to hear from him at that moment and wanted him to just listen.

⁶ Schlesinger, who as noted above is non-binary, prefers to be referred to using gender neutral “they/them/their” pronouns (Tr. 98). And, as reflected in the transcript, the parties and witnesses respected that preference at the hearing. I am likewise inclined to respect Schlesinger’s preference in this decision, just as I have by referring to Lazuli and Black with female pronouns. (Black, who like Lazuli is a trans woman, said that either “she” or “they” is fine. Tr. 55, 70, 89.) See, e.g., *Todd v. Lovecraft*, 2020 WL 60199, at *1 n. 1 (N.D. Cal. Jan. 6, 2020); *League of Women Voters of Florida, Inc. v. Detzner*, 314 F.Supp.3d 1205, 1211 & n. 4 (N.D. Fla. 2018); and *Doe v. Fedcap Rehabilitation Services, Inc.*, 2018 WL 2021588, at *1 (S.D. N.Y. April 27, 2018). See also *Farmer v. Haas*, 990 F.2d 319, 320 (7th Cir.), cert. denied 114 S.Ct. 438 (1993); and *Gordon v. Lizarraga*, 2020 WL 32335, at *5 (N.D. Cal. Jan. 2, 2020). But see *U.S. v. Varner*, 948 F.3d 250, 254–258 (5th Cir. 2020); and *A.T. v. Everett School District*, 300 F.Supp.3d 1243, 1247 n. 2 (W.D. Wash. Jan. 9, 2018). However, using singular “they/them/their” pronouns could be materially ambiguous and confusing in the context of describing a group conversation and where the alleged violation is unlawfully terminating an employee for engaging in protected *concerted* activity. One way to address this problem would be to include a parenthetical clarification after each use of a “they,” “them,” or “their” pronoun that references or includes Schlesinger. Another would be to simply structure the narrative and sentences so that it is unnecessary to refer to Schlesinger with a pronoun. I have chosen the latter option. Thus, all “they/them/their” pronouns in this decision, including in the sentence above to which this footnote is appended, are plural and refer to more than one person.

Schlesinger also reminded Ford that a group of them, including Black, had previously had a similar conversation with him in late January or early February about engaging in similar bullying behavior towards Decker. Schlesinger told Ford that his behavior was negatively impacting all of them and they were not happy with it.

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Ford replied that if he wasn't allowed to talk or disagree, he was done with the meeting, and left. Lazuli and Black then also clocked out and left. Schlesinger, who was working the middle shift, returned to work. Ford also subsequently returned to work about 20–30 minutes later but did not say anything further to Schlesinger about the subject.⁷

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The following day, Saturday March 2, both Lazuli and Black were again on the opening 11 am–4 pm shift and Decker was on the middle noon–8 pm shift. Moulnar was supposed to be the manager that day, but he was a no call/no show and Ford had to work instead. It turned out to be a very busy day, with approximately 50 percent more business than usual. And Lazuli again did not do well from Ford's perspective. First, she was 10–15 minutes late and indicated that she really didn't want to be there. Second, she was slow taking orders at the register and a customer complained in the middle of a rush that she was unable to repeat back the order and the food they received was completely wrong. Third, after he moved her to the grill, he noticed that she used her hands instead of a spatula to put raw meat on the grill and failed to wash her hands afterwards. (Tr. 37, 71–72, 183, 188–191, 197–199, 206–207.)

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Eventually, around 3:15 pm, things slowed down. So, Ford left to take a 30-minute meal break. Decker also took a 10-minute rest break at some point. Employees were given a paid 10-minute rest break for every 4 hours worked, and both a paid 30-minute meal break and a paid 10-minute rest break for every 6 or more hours worked. The managers sometimes helped employees determine the best time to take their rest break, but the employees did not have to ask permission to take it. They could take their rest break whenever they needed it and it looked like a good time to do so, which was usually about halfway through the shift. (R. Exh. 3, p. 2; Tr. 22, 37, 62, 72, 95–96.)⁸

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⁷ The foregoing summary of the March 1 conversation with Ford is based on the testimony of Lazuli (Tr. 34–36, 48), Black (Tr. 67–71, 87–88), Schlesinger (Tr. 106–109), and Ford himself (Tr. 201–202, 207). However, some details described by Lazuli or Black have been omitted because they were not corroborated and were inconsistent with the weight of the evidence. For example, Lazuli testified that Schlesinger began by telling Ford that he was treating Lazuli “discriminator[ily]” and that “it wasn't okay to single someone out because they're trans” (Tr. 35). However, none of the other witnesses testified that Schlesinger specifically indicated that Ford was treating Lazuli differently because she was transgender. Indeed, Schlesinger denied specifically “speak[ing] to [Lazuli's] experience on behalf of her” (Tr. 107). Similarly, Black testified that, after Lazuli spoke, Schlesinger described personally experiencing “similar discrimination” by Ford (Tr. 69–70). However, none of the other witnesses testified that Schlesinger said this. There are also other variances in the accounts of the conversation, but they are relatively minor or insignificant and have likewise been resolved applying the usual credibility factors. See fn. 3, above.

⁸ Lazuli testified that Ford left on his break without telling them and that he was gone for 45–60 minutes (Tr. 37). Black, however, testified that Ford took a 30-minute break. Further, although Black likewise initially testified that Ford left without telling anyone, she subsequently admitted that he said he would be “back in 30” when he left. (Tr. 72–73.)

While Ford was gone, Lazuli and Black discussed the fact that they had not gotten their own 10-minute rest break yet. And when Ford returned around 3:45–3:50 pm, they both separately spoke to him about it. Lazuli spoke to Ford first near the handwashing station, telling him that she didn't get her rest break. Ford walked her into the back room and apologized, saying he had not been able to get her a rest break because it was so busy. He then mentioned the various concerns he had with her work during the shift, including her late arrival, the customer's complaint, and not washing her hands after handling raw meat.

As it was almost 4 pm, Ford then told Lazuli she was free to go. However, Lazuli again brought up the missed break and asked if he wanted her to just sit in the storage room for 10 minutes before clocking out. Ford said no, she should just leave. Lazuli protested, insisting that she was legally entitled to a 10-minute rest break on the shift. She told Ford that he had two options, either give her the break or put in writing that she was denied her break. Ford said he would contact Cook, the district manager, and started texting him. However, he then instead asked if he could email a written statement to her. Lazuli said okay and clocked out and left.

After Lazuli was gone, Black walked into the back room and asked Ford about her own missed rest break. Like Lazuli, she asked him if he wanted her to just wait in the back for 10 minutes before clocking out. Ford apologized but said he couldn't because he had already told Lazuli no. However, like Lazuli, Black told Ford that it was a legal requirement. Black suggested that Ford could change her timesheet to show that she clocked out 10 minutes after she left. Ford at that point relented, saying Black had always been a good worker and because of that he would change her timesheet. Black asked Ford if he would do the same for Lazuli, but he would not confirm that.⁹ Black then left.¹⁰

⁹ Black testified that her timesheet was in fact changed (Tr. 75). The record does not reveal whether Lazuli's was. However, there is no allegation here that Ford unlawfully refused to provide or pay Lazuli for a paid 10-minute rest break on March 2.

¹⁰ The foregoing summary of the March 2 conversations is based on the testimony of Lazuli (Tr. 37–39, 48–51), Black (Tr. 72–77, 93–94), and Ford (Tr. 189–198, 203). There are again various problems with the testimony. For example, Black did not corroborate Lazuli's testimony that they discussed their missed break together before Ford returned. However, the record as a whole indicates that this likely occurred. There is also conflicting testimony about whether Black followed Lazuli and Ford into the back room and whether Lazuli spoke to Ford about both her missed break and Black's missed break. Both Lazuli and Black testified that Black followed Lazuli and Ford into the back room; that Lazuli asked Ford about both her missed break and Black's missed break; and that Ford said they both should just leave. However, Ford testified that Black remained out front when he and Lazuli went into the back; that Lazuli asked him only about her own missed break; and that he spoke to Lazuli only about her missed break. The record as a whole supports Ford's version. There is no evidence that Lazuli and Black agreed that Lazuli would speak to Ford on Black's behalf about her missed break. Indeed, there is no evidence that they even discussed raising the issue with Ford. Lazuli testified that they just complained to each other after Ford left on his break that he didn't give them their break before doing so. Further, there is no dispute that Black spoke to Ford separately about her own break after Lazuli left. Both Black and Ford testified that she did so. As indicated by the Company, it is unlikely Black would have separately asked Ford about her missed break as if Ford had never addressed it if Ford had in fact already addressed it in her presence. Further, while it appears

5 Ford subsequently called Cook and informed him about what had occurred that day. He told Cook about Moulnar’s no call/no show and how busy it was. He also told Cook about Lazuli’s continued poor pace and performance and handwashing practice. He let Cook know that he did not think Lazuli was going to work out in the position. Finally, he also told Cook about the missed rest breaks and that Lazuli and Black had raised the issue with him at the end of their shift. (Tr. 198–200, 208–209, 221–222.)¹¹

Black was aware that Ford had denied Lazuli’s request for a paid rest break, she likely could have overheard this from outside the doorway to the back room. Lazuli testified that the kitchen is “pretty small and narrow,” only about 25–30 feet long and 4 feet wide, and there is no evidence that the door to the back room, if there is one, was ever closed. Alternatively, Lazuli could have told Black on the way out. Although Lazuli testified that she did not speak to Black on the way out, this was not corroborated by Black, who was never asked.

¹¹ Ford’s testimony about his phone conversation with Cook regarding Lazuli’s deficiencies on March 2 was somewhat garbled. For example, although not clear, his testimony suggests that he described what happened in detail, including the customer complaint about her. See Tr. 198–199. However, Cook testified that Ford just summarized what happened without going into specifics. For example, Cook testified that he did not recall Ford mentioning a specific customer complaint about Lazuli. (Tr. 221–222).

Ford also gave garbled testimony about informing Cook of his March 1 conversation with Lazuli, Schlesinger, and Black. See Tr. 207 (“Q. [W]hen you talked to Ben Cook on March 2nd, did you mention that meeting? A. Yes, I have. A. Okay. And what did you tell him about it? A. I let him know that I had a conversation with [Lazuli] and multiple other coworkers about them feeling like I am targeting [Lazuli] and feeling like I am trans-phobic. Q. Okay. And what did he say, if anything? A. What did Ben say? Q. Yeah. A. I mean, it’s—he had pretty much paraphrased that it’s just kind of not really part of the work environment as in like—like this doesn’t need to be like issued as in like—. Q. Do you recall what he said? A. I don’t recall exactly what he said, no.”). Cook, however, denied that Ford informed him prior to Lazuli’s termination that he had been confronted by Lazuli and others about discriminatory treatment (Tr. 226). The two other managers who were subsequently involved with Lazuli’s termination—Operations Vice President Adrian Oca and then-District Manager Emily Lindell (who herself “identif[ies] as part of the queer community here in Portland”)—also denied any knowledge of it (Tr. 143, 231–236). Further, Ford had at least two reasons not to inform Cook of the March 1 conversation at the time. First, Schlesinger had told him that they just wanted to make him aware of how his conduct was perceived and Lazuli did not threaten to file a formal discrimination charge. Second, if he brought it to Cook’s attention, the Company might have felt obligated to open an investigation. See Lindell’s testimony, Tr. 231 (indicating that she would have opened an investigation into such an allegation and likely terminated the manager if it was proven true.)

Ford also testified that Cook asked him during the March 2 call what he thought they should do about Lazuli, and that he “just let [Cook] know, like hey, I mean, my personal recommendation is that we don’t, you know, keep her anymore.” (Tr. 200). Cook, on the other hand, testified that he did not ask Ford for a recommendation on that call. However, Cook confirmed that Ford’s “overall outlook on [Lazuli] was not positive.” (Tr. 222.)

As reflected above, I have generally given Cook’s testimony greater weight applying the usual credibility factors.

Cook responded that he understood how breaks could be missed when it is busy but that Ford needed to make sure breaks were provided in the future. Regarding Lazuli’s continued poor performance and pace and handwashing practice, Cook indicated that he would discuss it with the management team. (Tr. 200, 221.)

Cook subsequently informed Adrian Oca, the Vice President of Operations, of Ford’s reports about Lazuli. Based on those reports, Cook recommended that Lazuli be terminated during her introductory probationary period. Oca, whose philosophy is “hire slowly and fire quickly” if an employee is not working out, agreed. (Tr. 145–155, 223.)¹²

Cook went to Division Street to inform Lazuli of her termination on March 7, her next scheduled shift. Emily Lindell, who as noted above (fn. 11) was also a district manager at the time, went with him. While they were waiting in the back for Lazuli to arrive, Schlesinger walked in and asked if they were there to fire Lazuli. Lindell said yes and asked for some privacy. Schlesinger thereupon left but cautioned them on the way out that the situation was complicated; that there was discrimination and mistreatment going on there by Ford and charges were going to be filed if Lazuli was fired. Cook, who assumed Schlesinger was referring to Ford’s refusal to give Lazuli a rest break on her previous shift, replied that that had nothing to do with why they were there. (Tr. 110–111, 224–225, 233–234. See also fn. 11, supra.)

Lazuli arrived shortly after and they told her that she was being let go. Lindell said it was not because of anything she did wrong; rather, as indicated on the termination notice, it was just a nondisciplinary introductory-period termination of her at-will employment and she was eligible for rehire in the future. Lindell then asked Lazuli to sign the termination form. However, Lazuli refused to do so and left. As she was walking out, she remarked that she wasn’t surprised she was being terminated “because Little Big Burger doesn’t like to give employees their breaks.” (Tr. 40, 234; R. Exh. 10.)¹³

II. LEGAL ANALYSIS

The parties agree that the proper framework for analyzing whether Lazuli’s termination violated Section 8(a)(1) of the Act is set forth in *Wright Line*, 251 NLRB 1083, 1089 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982). Under that framework, the General Counsel must prove by a preponderance of the direct and/or circumstantial evidence that

¹² Oca, who was the Company’s designated representative and exempt from the sequestration order, was called by the Company as its first witness. He testified that he also spoke with Ford, possibly on the same call by speakerphone while Cook was still present. However, this was not subsequently confirmed by either Cook or Ford, who were never questioned by counsel about it.

¹³ Lazuli testified that she told Cook and Lindell that she was being fired both “because I had talked to [Ford] about discrimination and because I insisted on my right [to] a break.” However, Lindell testified that Lazuli only made the above-quoted remark about breaks. I have credited Lindell over Lazuli primarily for two reasons. First, as previously noted, Lazuli’s testimony about other significant matters was contradicted by or inconsistent with the testimony of other witnesses and the weight of the evidence. Second, Lindell, who now works at another company, presented as a highly credible witness with no substantial motive to color her testimony in the Company’s favor. See also fn. 11, above.

the employee’s protected concerted activity was a substantial or motivating factor in taking the adverse employment action, i.e., that a causal relationship existed between that activity and the adverse action. This necessarily includes, but is not limited to, establishing that the employee engaged in protected concerted activity, that the employer knew or suspected it, and that the employer had animus against such activity. If the General Counsel makes a sufficient showing of causation, the burden shifts to the employer to establish by a preponderance of the evidence that it would have taken the same adverse action against the employee even absent the protected concerted activity. See *Tschiggfrie Properties, Ltd.*, 368 NLRB No. 120, slip op. at 5–8 (2019).¹⁴

As discussed below, the General Counsel failed to carry the burden of proof under this analysis with respect to either Lazuli’s activity on March 1 or her activity on March 2.

A. Lazuli’s Activity on March 1.

There is no real dispute that Lazuli was engaged in protected concerted activity on March 1 when, along with Schlesinger and Black, she spoke with Ford about his treatment of her. Although the Company’s answer to the General Counsel’s complaint denies that Lazuli was engaged in protected concerted activity on March 1, the Company’s posthearing brief (p. 1) does not dispute it. In any event, as indicated above, the record clearly establishes that Lazuli, Schlesinger, and Black presented a group concern to Ford on March 1 regarding his treatment of Lazuli. Accordingly, they were engage[d] in . . . concerted activities for the purpose of . . . mutual aid or protection” within the meaning of Section 7 of the Act. See *NLRB v. City Disposal Systems, Inc.*, 465 U.S. 822, 830 (1984) (“The term ‘concerted activit[y]’ is not defined in the Act but it clearly enough embraces the activities of employees who have joined together in order to achieve common goals.”); and *NLRB v. J. Weingarten, Inc.*, 420 U.S. 251, 260–261 (1975) (concerted activity by employees may be for “mutual aid and protection” even if only one of them has an immediate stake in the outcome).

Further, given that Schlesinger and Black accompanied and spoke up for Lazuli on March 1, Ford obviously knew that his treatment of her was a group concern. Normally, in the absence of contrary evidence, Ford’s knowledge would properly be imputed to Cook and Oca, who made the decision to terminate Lazuli. See *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92, slip op. at 4 (2016) (“[I]t is well established that the Board imputes a manager’s or supervisor’s knowledge of an employee’s protected concerted activities to the decisionmaker, unless the employer affirmatively establishes a basis for negating such imputation.”), *enfd.* 707 Fed. Appx. 610 (11th Cir. 2017). However, as noted above (fn. 11), a preponderance of the record evidence here indicates that Ford did not inform Cook or Oca or anyone else in management about the March 1 conversation before Lazuli was terminated.

Nevertheless, although Cook and Oca did not themselves know about Lazuli’s March 1 protected concerted activity, their decision to terminate her was based entirely on Ford’s reports about her lack of improvement and likely unfitness for the position. Thus, if the General Counsel established that Ford had animus against that activity and submitted negative reports about her at least in part because of it, the termination would properly be found unlawful.

¹⁴ This analysis applies in both 8(a)(3) discrimination cases and 8(a)(1) retaliation cases turning on employer motive. *Wright Line*, 251 NLRB at 1089. See also *Tortillas Don Chavas*, 361 NLRB 101 (2014); and *Signature Flight Support*, 333 NLRB 1250 (2001).

See *Acme Bus Corp.*, 357 NLRB 902, 903 n. 12 (2011), and cases cited there. However, the General Counsel failed to do so. As discussed above, the evidence shows that Ford was regularly submitting negative reports about Lazuli’s performance and pace and handwashing practice before March 1. And they were not based only on his own observations; Ford received an especially negative text message about Lazuli from Manning, an experienced employee and “key,” on February 13.

Further, there is no direct evidence of animus or a retaliatory motive. Although Ford disagreed with Lazuli’s and Black’s suggestion on March 1 that he might subconsciously be targeting Lazuli because she was transgender, there is no evidence that he made any threats or other coercive statements.

Finally, there is also insufficient circumstantial evidence. Although the close timing between Lazuli’s protected activity and her termination is obviously suspicious, and would normally be strong circumstantial evidence of a retaliatory motive, it is insufficient here to prove the alleged violation. The termination came on the heels, not just of Lazuli’s March 1 protected activity, but also of her particularly poor performance on her March 2 shift.¹⁵ Further, the Company had not tolerated Lazuli’s deficiencies for a lengthy period prior to her March 1 protected concerted activity. She had been employed for only about 5 weeks, had worked a total of only about 12–15 shifts, and was still within her introductory/ probationary period.¹⁶

B. Lazuli’s Activity on March 2.

Unlike Lazuli’s activity on March 1, the Company disputes that Lazuli was engaged in protected concerted activity on March 2 when she asked Ford near the end of the shift about not having received a paid rest break. And this presents a closer question. As noted above (fn. 10), Lazuli and Black did not specifically discuss raising the issue with Ford, and Lazuli spoke to Ford alone and only about her own missed paid rest break. However, Lazuli and Black had discussed Ford’s failure to give them a rest break before leaving on his meal break. Further, they both seriatim raised the issue with Ford when he returned. And Black spoke to Ford about both her own missed paid rest break and Ford’s denial of Lazuli’s request for a paid rest break. Thus, the totality of the circumstances indicates that Lazuli brought a “truly group complaint” to Ford regarding the missed paid rest break and that Ford (and Cook based on Ford’s report) knew or

¹⁵ The General Counsel argues that Ford’s testimony about Lazuli’s poor performance during the March 2 shift should be discredited because it was not corroborated by any documentary evidence. However, there is no evidence that Ford or other managers had a practice of submitting written reports to Cook or that Cook had a practice of documenting his “check-ins” with Ford or other managers. Further, Ford’s testimony was not controverted by either Lazuli or Black.

¹⁶ Cf. *ODS Chauffeured Transportation*, 367 NLRB No. 87, slip op. at 17 (2019) (finding animus where the employer terminated the employee within a few days after his protected activity and had tolerated his alleged bad work behavior for years). The General Counsel also argues that the Company gave shifting explanations for terminating Lazuli. However, the record does not provide substantial support for that argument. Consistent with the Company’s answer to the complaint, the hearing testimony indicated that Lazuli was terminated primarily because of Ford’s reports about her poor performance and pace and failure to wash her hands despite repeated coaching and numerous reminders.

