PIER SIXTY, LLC *and* Hernan Perez and Evelyn Gonzalez. Cases 02–CA–068612 and 02–CA–070797

March 31, 2014

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS JOHNSON AND MCFERRAN

On April 18, 2013, Administrative Law Judge Lauren Esposito issued the attached decision. The Respondent and the General Counsel filed exceptions, supporting briefs, and corresponding answering briefs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to affirm the judge's rulings, findings,[1] and conclusions except as modified in this Decision and Order, and to adopt the recommended Order as modified.[2]

For the reasons stated by the judge, we agree with her findings that the Respondent violated Section 8(a)(1) by: (1) unlawfully threatening employees with the loss of current benefits, job loss and discharge, and job loss due to lost business, and informing employees that bargaining would start from scratch, and (2) disparately applying a "no talk" rule.

We also agree with the judge, for the reasons she states, and as set forth below, that the Respondent violated Section 8(a)(3) and (1) by discharging Hernan Perez because of his protected, concerted comments made in a posting on social media.

Facts

The Respondent operates a catering service company in Manhattan, New York. Beginning in January 2011, a number of service employees expressed interest in union representation, in part because of concerns that management repeatedly treated them disrespectfully and in an undignified manner. Indeed, as found by the judge, what employees perceived as management's hostile and degrading treatment was one of the precipitating concerns driving the organizing campaign that culminated in an October 27, 2011 election.[3]

In March, the employees presented a petition concerning their ongoing complaints about management mistreatment to Director of Banquet Services Jeffrey Stillwell. The petition included complaints that the Respondent's managers and captains "take their job frustration [out on] the staff" and "don't treat the staff with respect."

On October 25, 2 days before the election, 13-year employee Hernan Perez was working as a server at a fundraising event in the Respondent's Lighthouse venue. During cocktail service, as Perez and two other servers were silently butlering drinks, Assistant Director of Banquets Robert McSweeney approached them and said, in a loud voice, while pointing to the arriving guests, "Turn your head that way and stop chitchatting." Shortly thereafter, while Perez, Evelyn Gonzalez, and Endy Lora were waiting for the signal from the captain to clear the plates from the appetizer course, McSweeney rushed to them, swung his arms to indicate that they should spread out, and said, in a raised, harsh tone, "Spread out, move, move." After the employees complied, McSweeney, in a louder voice, audible to guests, ordered the employees to spread out more. McSweeney was one of the managers specifically identified by employees as treating employees disrespectfully.

Upset with the manner in which McSweeney had addressed servers during cocktail and dinner service, Perez told Gonzalez, who was the head of the employees' organizing effort, that he was "sick and tired of this," that McSweeney did not know how to talk to employees, and that he would talk to McSweeney. Gonzalez urged Perez to stay strong, as the election was 2 days away, and encouraged him to take a break to calm down. Following Gonzalez' advice, Perez took a break, and proceeded to the bathroom and then outside the Respondent's facility. There, Perez vented his frustration with McSweeney's treatment of the servers by posting from his iPhone the following message on his personal Facebook page:

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We shall modify the judge's recommended Order and substitute a new notice in accordance with our recent decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall further modify the notice in accordance with *Durham School Services*, 360 NLRB No. 85 (2014).

The Respondent's argument that the amended complaint is barred because the Board lacked a quorum when it was issued by the General Counsel is without merit. *Benjamin H. Realty Corp.*, 361 NLRB No. 103 (2014); *Durham School Services, LP*, 361 NLRB No. 66 (2014).

[3] Evelyn Gonzalez Union petitioned for a unit of servers, captains, bartenders, and coat checkers in the Respondent's banquet department. A majority of votes were cast in favor of union representation, and on November 4, the Union was certified as the exclusive collective-bargaining representative.

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!

Perez' post was visible to his Facebook "friends," which included some coworkers, and to others who visited his personal Facebook page. Perez deleted the post on October 28, the day after the election.

On October 26, Senior Purchasing Manager Carol Gerwell notified Human Resources Director Dawn Bergman about Perez' comments. Bergman viewed the post on Gerwell's office computer and printed a copy. On October 31, Bergman spoke with McSweeney about Perez' Facebook posting. McSweeney confirmed that he had seen Perez' comments and told her that nothing out of the ordinary had occurred during the October 25 dinner service. Following an investigation, Bergman and then-General Manager Douglas Giordano discharged Perez on November 9, explaining that Perez' October 25 Facebook comments had violated company policy. However, when requested, the managers declined to provide the policy or explain the basis for the termination.

As more fully set forth in the judge's decision, vulgar language is rife in the Respondent's workplace, among managers and employees alike. For example, the Respondent's executive chef, Phil DeMaiolo, cursed at employees daily, screaming profanities such as "motherfucker" and asking employees questions like "Are you guys fucking stupid?" Stewarding Supervisor Felix Acosta similarly directed vulgar language at dishwashing employees, screaming such epithets as "asshole" and asking questions like "Why are you fucking guys slow?" McSweeney himself directed comparable profanities toward employees. Former General Manager Giordano called Chef Francisco a "fucking little Mexican" and a "motherfucker" who should "eat shit," and Francisco countered with, "Fuck you, motherfucker, what are you going to do?" And although the dissent characterizes Perez' Facebook comments as "fraught with insulting and obscene vulgarities," the judge recognized them as remarks that were "a daily occurrence in [the] Respondent's workplace, and did not engender any disciplinary response."

Analysis

We agree with the judge that Perez' Facebook comments, directed at McSweeney's asserted mistreatment of employees, and seeking redress through the upcoming union election, constituted protected, concerted activity and union activity. As stated by the judge, "Perez' Facebook comments were part of a sequence of events involving the employees' attempts to protest and ameliorate what they saw as rude and demeaning treatment on the part of Respondent's managers, including McSweeney." Toward that end, Perez' Facebook posting protested such mistreatment and exhorted employees to "Vote YES for the UNION."

We also agree with the judge that Perez' comments were not so egregious as to exceed the Act's protection. In doing so, we do not rely on the judge's application of the four-factor test in *Atlantic Steel Co.*, 245 NLRB 814 (1979), given that, here, the comments in question initially were made available to other employees and others in a nonwork setting and did not occur during a conversation with a supervisor or management representative. See generally *Triple Play Sports Bar & Grille*, 361 NLRB No. 31, slip op. at 3 (2014) ("as a general matter, the *Atlantic Steel* framework is not well suited to address issues . . . involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties"). Rather, in the absence of exceptions to its application, we adopt the judge's alternative rationale to find that Perez' activity did not lose its protected character under the totality of the circumstances. See, e.g., *Richmond District Neighborhood Center*, 361 NLRB No. 74, slip op. at 2 fn. 6 (2014) (in the absence of exceptions, the Board, without deciding the appropriateness of the judge's test for analyzing private Facebook conversations, examined the egregiousness of the conduct under all the circumstances).

In evaluating Perez' posting under the totality of the circumstances, the judge considered the following factors: (1) whether the record contained any evidence of the Respondent's antiunion hostility; (2) whether the Respondent provoked Perez' conduct; (3) whether Perez' conduct was impulsive or deliberate; (4) the location of Perez' Facebook post; (5) the subject matter of the post; (6) the nature of the post; (7) whether the Respondent considered language similar to that used by Perez to be offensive; (8) whether the employer maintained a specific rule prohibiting the language at issue; and (9) whether the discipline imposed upon Perez was typical of that imposed for similar violations or disproportionate to his offense. We find that an objective review of the evidence under the foregoing factors establishes that none of them weighs in favor of finding that Perez' comments were so egregious as to take them outside the protection of the Act.

The first three factors do not weigh in favor of finding that Perez' comments lost the Act's protection. The Respondent demonstrated its hostility toward employees' union activity (the first factor) when it committed multiple unfair labor practices in the weeks leading up to the election, including its disparate enforcement of its "no

talk" rule to prevent employees from discussing the Union. Perez clearly found McSweeney's October 25 commands disrespectful and posted his Facebook comments in response to McSweeney's remarks (the second factor),[4] and Perez' impulsive reaction (the third factor) to McSweeney's commands reflected his exasperated frustration and stress after months of concertedly protesting disrespectful treatment by managers—activity protected by the Act.[5]

The location and subject matter of Perez' post (factors four and five) also do not weigh in favor of finding that Perez' comments lost the protection of the Act. He posted his comments while alone, on break, and outside the Respondent's facility.[6] There is no evidence that his comments interrupted the Respondent's work environment or its relationship with its customers.[7] Further, his comments echoed employees' previous complaints about management's disrespectful treatment of service employees and encouraged employees to vote in favor of union representation.[8]

Regarding factors six and seven, the overwhelming evidence establishes that, while distasteful, the Respondent tolerated the widespread use of profanity in the workplace, including the words "fuck" and "motherfucker." Considered in this setting, Perez' use of those words in his Facebook post would not cause him to lose the protection of the Act.[9] Nor was Perez' reference to McSweeney's family beyond the Act's protection. We agree with the judge that Perez' comments were not a slur against McSweeney's family but, rather, "an epithet directed to McSweeney himself." As such, Perez' reference to McSweeney's family served to intensify his criticism of McSweeney just as former General Manager Giordano's implicit reference to an employee's family, when he called Francisco a "motherfucker" and "fucking little Mexican," intensified his insult of the employee.[10] Unlike our dissenting colleague, we do not view Perez' use of this profanity to be qualitatively different from profanity regularly tolerated by the Respondent.

Finally, evidence of the Respondent's policies and practices relating to the discipline of employees who use the type of language that Perez used in his Facebook post (factors eight and nine) does not persuade us that Perez' Facebook comments were unprotected. As the judge found, the Respondent's "Other Forms of Harassment" policy, which it cited as the basis for discharging Perez,

[4] The absence of a finding that McSweeney's October 25 conduct itself constituted an unfair labor practice does not compel the conclusion that Perez' conduct was either unprovoked or unprotected. See, e.g., *Consumers Power Co.*, 282 NLRB 130, 132 (1986) (employee engaged in protected activity did not lose the protection of the Act when he raised his fists in response to a manager's gesture that was neither alleged nor found to be an unfair labor practice); *Traverse City Osteopathic Hospital*, 260 NLRB 1061, 1061–1062 (1982) (employee's profane outburst did not cause her to lose the Act's protection where provoked by another employee's intemperate and profane comments that were neither alleged nor found to be an unfair labor practice), enfd. 711 F.2d 1059 (6th Cir. 1983); accord: *Battle's Transportation, Inc.*, 362 NLRB No. 17, slip op. at 1 fn. 4, 9–10 (2015) (chief operating officer's statement to the charging party to "shut up," although neither alleged nor found to be an unfair labor practice, was "sufficient provocation" in an *Atlantic Steel* analysis).

[5] See *Consumers Power Co.*, supra at 132 ("disputes over wages, hours, and working conditions are among the disputes most likely to engender ill feelings and strong responses"); *Union Carbide Corp*., 171 NLRB 1651, 1651 fn. 1 (1968) ("Where . . . the conduct in issue is closely intertwined with protected activity, the protection is not lost unless the impropriety is egregious. . . . A frank, and not always complimentary, exchange of views must be expected during the heat of an organizing campaign.").

[6] See generally *Restaurant Horikawa*, 260 NLRB 197, 197–198 (1982) (employee who protested employees' working conditions by distributing handbills outside the respondent's restaurant was engaged in protected, concerted activity; protection of the Act was lost only after the employee and other demonstrators took their demonstration inside the restaurant).

[7] The fact that Perez' Facebook post was made available not only to his "friends" on the social media site, but also to others who visited his personal Facebook page, does not necessarily weigh in favor of finding that his comments lost the protection of the Act, especially in the absence of evidence that the post caused disruption to the Respondent's operations. See *Sutherland Lumber Co.*, 176 NLRB 1011, 1020 (1969) (employee's use of profanity while engaged in protected activity did not cause him to lose the Act's protection where his comments did not disrupt the respondent's business), enfd. 452 F.2d 67 (7th Cir. 1971).

[8] See *Cement Transport, Inc.*, 200 NLRB 841, 845–846 (1972) (employee's repeated criticism of employees' working conditions and his participation in an organizing campaign did not lose the protection of the Act "simply because he failed to comport with the [r]espondent's standards of behavior"), enfd. 490 F.2d 1024 (6th Cir. 1974), cert. denied 419 U.S. 828 (1974).

[9] See *Traverse City Osteopathic Hospital*, supra at 1061 (employee's use of profanity while engaged in protected activity did not cause her to lose the Act's protection where the use of profanity at the respondent's facility was not uncommon and had been tolerated in the past); *Coors Container Co.*, 238 NLRB 1312, 1320 (1978) (employee engaged in protected activity did not lose the Act's protection by calling the respondent's guards "mother-fuckers" where the phrase was commonly used at the respondent's facility, one of the guards was not disturbed by the employee using that word to describe him, and there was no evidence that any employee had been discharged solely for using obscenities), enfd. 628 F.2d 1283 (10th Cir. 1980).

[10] In finding that Perez' conduct lost the protection of the Act, our dissenting colleague agrees with the subjective opinion of Human Resources Director Bergman that Perez' conduct was "over the top." Bergman's subjective opinion, however, is "not dispositive in determining whether [Perez] forfeited [his] statutory rights." *Kiewit Power Constructors Co.*, 355 NLRB 708, 711 (2010), enfd. 652 F.3d 22 (D.C. Cir. 2011); see *Severance Tool Industries*, 301 NLRB 1166, 1170 (1991) (employee's "disrespectful, rude, and defiant demeanor and the use of a vulgar word" while engaged in protected activity did not cause him to lose the Act's protection, notwithstanding the respondent's characterization of the employee's conduct as "insubordinate, belligerent, and threatening"), enfd. mem 953 F.2d 1384 (6th Cir. 1992).

neither prohibits vulgar or offensive language in general, nor did the Respondent allege that Perez' Facebook comments were directed at any protected classification listed in that policy.[11] Further, since 2005, the Respondent has issued only five written warnings to employees who had used obscene language,[12] and there is no evidence that the Respondent has ever discharged any employee solely for the use of such language.[13]

Although we do not condone Perez' use of obscene and vulgar language in his online statements about his manager, we agree with the judge that the particular facts and circumstances presented in this case weigh in favor of finding that Perez' conduct did not lose the Act's protection. Accordingly, we affirm the judge's finding that the Respondent violated Section 8(a)(3) and (1) by discharging Perez because of his protected concerted and union activity.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Pier Sixty, LLC, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Insert the following as paragraph 2(c) and reletter the subsequent paragraphs.

"(c) Compensate Hernan Perez for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters for Perez."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. March 31, 2015

Mark Gaston Pearce, Chairman

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER JOHNSON, dissenting in part.

Contrary to my colleagues, I find that Perez' vulgar and obscene Facebook comments lost the Act's protection. Therefore, I would dismiss the allegation that Perez' discharge violated Section 8(a)(3) and (1).[1]

As more fully set forth in the judge's decision, the Respondent provides catering services for events at Manhattan's Chelsea Piers and employed Hernan Perez as a banquet server. While supervising a catered event, Manager Robert McSweeney told Perez and two other employees standing near each other to "spread out." This otherwise innocuous instruction upset Perez, who viewed it as another example of management's ongoing rude treatment of employees.[2] Seeing that Perez was upset,

[11] The Respondent's "Other Forms of Harassment" policy prohibits harassment "on the basis of age, race, religion, color, national origin, citizenship, disability, marital status, familial status, sexual orientation, alienage, liability for services in the U.S. Armed Forces, or any other classification protected by Federal, State or Local laws," and provides as examples of harassment "unwelcome slurs, threats, derogatory comments or gestures, joking, teasing, or other similar verbal, written or physical conduct directed towards an individual because of one of these protected classifications."

[12] The judge found that the Respondent has issued five written warnings since 2005, and that, unlike Perez, three of the five employees who had received these warnings also engaged in insubordinate conduct by refusing to comply with a supervisor's directive.

[13] We do not agree with our colleague's contention that Perez' comments amounted to unprotected insubordination. Cf. *Richmond District Neighborhood Center*, 361 NLRB No. 74 (finding that employees' comments on Facebook that pervasively advocated insubordination were objectively so egregious as to lose the Act's protection). In this regard, we note that Perez requested permission to take a break, made the Facebook comments during his break, and then returned to his station. At no time did Perez refuse to follow a directive or confront his management team in a manner that could be characterized as disruptive or insubordinate. Moreover, as found by the judge, the Respondent's human resources director asserted that the Facebook posting was the *sole* reason for Perez' discharge; she considered it to be harassment because she viewed it as egregious, inappropriate, disrespectful, and perhaps defamatory. There is no evidence or even a claim that insubordination was a reason for the discharge. Cf. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1328 (2005) (employee's use of vulgar and profane name-calling and insubordinate statements directly to a supervisor weighed against retaining the Act's protection).

[1] I concur with my colleagues in adopting the judge's findings regarding the independent 8(a)(1) allegations. As to the finding that the Respondent violated Sec. 8(a)(1) when Director of Banquets Stillwell told employees that, if the Union won the election, the Respondent would lose business and the employees would lose work, I have considered that the Respondent did not argue that Stillwell's statements were privileged opinions pursuant to Sec. 8(c) and that there is no evidence that the Union sought the restrictive work rules that Stillwell implied might cause customers to disfavor Respondent's business.

[2] The General Counsel does not allege that McSweeney's "spread out" instruction violated the Act. I would not disturb the judge's credibility-based 8(a)(1) finding that on multiple occasions after the petition was filed and before his "spread out" instruction, McSweeney had disparately enforced a "no talk" rule. Accordingly, I agree with the judge's initial inference that it was reasonable for Perez to associate McSweeney's "spread out" instruction with his prior unlawful instruction to cease talking in groups and that Perez' conduct in posting related comments on Facebook fell within the res gestae of ongoing, protected discussion about the perceived rudeness of management. As discussed below, however, I part company with the judge's conclusion that Perez' *response* to that perception—the substance of the Facebook posting—was either reasonable or protected. I cannot believe that Perez' profane, personally-directed tirade, going after his supervisor

coworker and union leader Evelyn Gonzalez told Perez that she would talk to McSweeney and advised Perez to take a break and calm down. Perez took a break, but rather than follow Gonzalez' advice to calm down, he pulled out his phone, opened Facebook, and posted the following invective:

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!!! Fuck his mother and his entire fucking family!!!!
>
> What a LOSER!!!! Vote YES for the UNION!!!!!!!.

Perez knew that of all of his Facebook friends, including 10 coworkers, could see the post.[3] There is no dispute that the post referred to McSweeney,[4] and responsive comments indicated that some of Perez' coworkers recognized the reference. This incident occurred 2 days before a scheduled Board election in which the Evelyn Gonzalez Union prevailed.

In my view, under the totality of the circumstances, the Respondent was entitled to discipline Perez for posting this rant, and the General Counsel did not establish that Perez was terminated for union or protected activity. *Honda of America Mfg*., 334 NLRB 746, 747–749 (2001). In condoning Perez' offensive online rant, which was fraught with insulting and obscene vulgarities directed toward his manager and his manager's mother and family, my colleagues recast an outrageous, individualized griping episode as protected activity. I cannot join in concluding that such blatantly uncivil and opprobrious behavior is within the Act's protection.[5] See my dissents in *Plaza Auto Center, Inc.*, 360 NLRB No. 117, slip op. at 15 (2014) (disagreeing with a majority view of the permissible range of employee conduct toward management that appears to permit employees to curse, denigrate, and defy their managers with impunity, so long as they also engage in otherwise protected conduct), and *Jimmy John's*, 361 NLRB No. 27, slip op. at 10 (2014) (arguing that the Board inappropriately permits employees an unlimited right to publicly disparage their employer).

The judge's analysis of the totality of the circumstances included a consideration of the *Atlantic Steel* factors, as well as other relevant factors. My colleagues convert this analysis into what is, in effect, an *Atlantic Steel* test on steroids that is even more susceptible to manipulation based on "agency whim"[6] than the 4-factor *Atlantic Steel* test. In any event, I find that several factors that my colleagues and the judge find support retention of the Act's protection actually weigh against it under all of the circumstances. These include that the very words used were objectively vulgar and obscene and not subject to alternative interpretation or colloquial acceptability; the statements were an ad hominem attack on a specific manager showing a level of disrespect that reaches insubordination, whether or not the Respondent specifically characterized it as such; the posting was not "impulsive" in the same sense generally seen in Board cases;[7] the Respondent showed that it disciplined employees for excessive vulgarity and insubordination; and, finally, although the Respondent committed other unfair labor practices, none can be shown to have provoked Perez' Facebook comment. That said, the most compelling fact is the nature of Perez' comments—what he actually said to other employees and the public about his manager, and therefore, about the Respondent.

The language Perez chose to post was not merely obscenity used as curse words or name-calling. The phrases *NASTY MOTHER F—er* and *F—ck his mother and his entire f—ing family* are qualitatively different from the use of obscenity that the Respondent appears to have tolerated in this workplace. Perez' statements were both epithets directed at McSweeney and a slur against his family that also constituted a vicious attack on them.

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and his supervisor's mother and family, was what the drafters of the Act intended to protect.

[3] Moreover, the record indicates that Perez' posting was available publicly, even if he thought it was only available privately.

[4] During the Respondent's investigation of the posting, Perez initially denied the comments were about McSweeney; he later recanted.

[5] I strongly disagree with the judge's mischaracterization of Board law that "it is well-settled that the use of the word 'fuck' and its variants, including 'motherfucker,' is insufficient to remove otherwise protected activity from the purview of Section 7." The Board considers offensive language or conduct in context, and does not render the use of particular expletives protected.

[6] See *LeMoyne-Owen College v. NLRB*, 357 F.3d 55, at 61 (D.C. Cir. 2004).

[7] The extreme response of Perez to this otherwise unremarkable workplace directive from a manager during worktime cannot be shown to have been provoked by an unfair labor practice or otherwise justified by the circumstances. Therefore, I do not consider the "impulsiveness" of this comment to weigh in favor of finding it protected. Although the Act permits some leeway in accommodating impulsive statements in the context of labor disputes, here, there is no indication that Perez' "impulsive" action was influenced by the labor dispute, as opposed to being simply either his choice not to control himself or his inability to do so. Although the record does not fully establish how much time passed, it was certainly more than a few minutes. Perez returned to work, spoke to Gonzalez, asked for permission to take a break, took a 5 to 10 minute bathroom break, and *only then*, went outside the facility, accessed his Facebook account and typed the message. In typing the message, Perez put in the time, thought, and coordination necessary to use capitalization and punctuation. In my view, Perez engaged in a deliberate (albeit hot-headed) act, not the kind of impulsivity the Board sometimes excuses during a vibrant, heated labor discourse. Moreover, Perez left the posting on Facebook for 3 days, further demonstrating his purposefulness. Even if the initial posting could be considered impulsive under the circumstances, maintaining it over time was not.

Even conceding a lack of evidence that Perez intended to engage in or threaten actual violence against McSweeney or his family, the posting reflects a level of animus and aggression directed toward McSweeney personally that goes well beyond the contrasting statements in the record that the employer tolerated and that are also distasteful, e.g., *Are you guys f—ing stupid?*; *why are you f—ing guys slow?*; and someone being called a *f—ing little Mexican*. Moreover, none of the examples offered by the General Counsel as evidence of the regular use of vulgar language in the workplace referred to a targeted person's family members.

Human Resources Director Dawn Bergman testified that, despite the use of obscenity in the workplace, the language used by Perez in his Facebook posting was different. Specifically, she described it as "over the top" and quite apart from expressing an expletive when you drop something on your foot or saying to someone, "what the hell are you doing?" She found references to McSweeney's family particularly offensive. In my view, Bergman's perspective is perceptive, accurate, and *objectively* spot on. Some statements are indeed "over the top," unacceptably opprobrious, and undeserving of the Act's protection. The Respondent lawfully discharged Perez based on his comments, which were qualitatively different from the tolerated workplace banter. Not only were Perez' remarks more directly and personally offensive, but they were broadcast via Facebook to coworkers and nonemployee "friends," a broader audience than those employees and managers within earshot of the tolerated workplace profanity.

We live and work in a civilized society, or at least that is our claimed aspiration. The challenge in the modern workplace is to bring people of diverse beliefs, backgrounds, and cultures together to work alongside each other to accomplish shared, productive goals. Civility becomes the one common bond that can hold us together in these circumstances. Reflecting this underlying truth, moreover, legal and ethical obligations make employers responsible for maintaining safe work environments that are free of unlawful harassment.[8] Given all this, employers are entitled to expect that employees will coexist treating each other with some minimum level of common decency.[9] Personally directed and insulting statements like Perez' Facebook posting about McSweeney, his mother, and his family, typically cause irreparable damage to working relationships. It serves no discernible purpose for the Board to stretch beyond reason to protect beyond-the-pale behavior that happens to overlap with protected activity. It certainly does not serve the goal of labor peace. Therefore, I find that Perez' comments lost the Act's protection, and that the Respondent's discharge of him for his opprobrious Facebook posting was lawful. I dissent from my colleagues' contrary conclusion, and would dismiss the allegation.

Dated, Washington, D.C. March 31, 2015

Harry I. Johnson, III, Member

[8] See *Plaza Auto Center Inc*., above, slip op. at 16 fn. 21, citing Stone, *Floor to Ceiling: How Setbacks and Challenges to the Anti-Bullying Movement Pose Challenges to Employers Who Wish to Ban Bullying,* 22 Temp. Pol. & Civ. Rts. L. Rev. 355, 373–376 (2013) and related discussion.

[9] Here, I disagree with the proposition that some tolerance of some types of profanity must then require universal tolerance of all profanity.

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in activities on behalf of the Evelyn Gonzalez Union (EGU), or other protected concerted activities.

WE WILL NOT threaten you with discharge in retaliation for your support for or activities on behalf of EGU.

WE WILL NOT tell you that "bargaining will start from scratch" in an unlawful manner.

WE WILL NOT threaten you with the loss of business in retaliation for your support for or activities on behalf of EGU.

WE WILL NOT threaten you with the loss of benefits in retaliation for your support for or activities on behalf of EGU.

WE WILL NOT apply our "no talk" rule to prohibit conversations about EGU during worktime, when we permit employees to talk about other nonwork related matters.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days of the date of the Board's Order, offer Hernan Perez full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Hernan Perez whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Hernan Perez 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 for Hernan Perez.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Hernan Perez, and WE WILL, within 3 days thereafter, notify Perez in writing that this has been done and that the discharge will not be used against him in any way.

PIER SIXTY, LLC

The Board's decision can be found at www.nlrb.gov/case/02-CA-068612 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Eric Brooks, Esq., for the Acting General Counsel.
Thomas R. Gibbons, Esq. (Jackson Lewis, LLP), for the Respondent.
Hernan Perez, for the Charging Party.
Evelyn Gonzalez, for the Charging Party.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based upon a charge in Case 2–CA–068612, filed on November 9, 2011, by Hernan Perez, and upon a charge in Case 2–CA–070797, filed on December 15, 2011, and amended on January 19, and February 6, 2012 by Evelyn Gonzalez, an amended complaint, and notice of hearing issued on August 24, 2012. The amended complaint alleges that Pier Sixty, LLC (Pier Sixty or Respondent), violated Section 8(a)(1) and (3) of the Act by discharging Perez in retaliation for his protected concerted activities and activities on behalf of the Evelyn Gonzalez Union (the EGU or the Union), and that Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge, the loss of benefits, the loss of business, and the loss of its "open door policy" if the employees chose the Union as their collective-bargaining representative. The complaint further alleges that Respondent violated Section 8(a)(1) by informing employees that bargaining with the Union would "start from scratch," and by disparately enforcing its "no talk" rule to prohibit discussions regarding the Union. Respondent filed an answer denying the complaint's material allegations.

This case was tried before me on October 16, 17, 18, and 19, and on November 19 and 20, 2012, in New York, New York.

FINDINGS OF FACT

I. JURISDICTION

Respondent has an office and principal place of business at the Chelsea Piers, Pier 62, Suite 300, New York, New York, and is engaged in the business of catering. Respondent admits and I find that at all material times it has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits and I find that at all material times the Evelyn Gonzalez Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Respondent's Operations

Respondent provides food and beverage catering services for weddings, corporate and fundraising events, and private parties in Manhattan's Chelsea Piers. Respondent provides services in two venues at the Piers—the Pier Sixty venue, which can accommodate 300 to 1000 guests, and the Lighthouse venue, which can accommodate 100 to 400 guests. Respondent employs a total of 310 employees, including culinary and pastry departments, set-up staff, its banquet department (comprised of servers, coat check employees, and wait captains), stewarding (employees who clean the back of the house and wash dishes), sales, human resources, accounting, purchasing, and concierge employees. The instant case involves employees and managers in Respondent's banquet department.

James Kirsch and Roland Betts are principals in Respondent's business. Jeffrey Stillwell is Respondent's director of banquet services, and is responsible for all fronts of the house staff and operations. Four managers report directly to Stillwell—Robert McSweeney, assistant director of banquets, Chris Martino, a banquet administrator, Richard Martin, a banquet

manager, and Paul Macias, an event manager. Douglas Giordano was Respondent's general manager at the time of the events at issue in this case; Giordano is no longer employed by the company. Luisa Marciano is the corporate director of human resources for Abigail Kirsch Catering, which is an owner of Respondent, and has provided human resources consulting services for Respondent for over 11 years. Dawn Bergman has been Respondent's director of human resources for over 10 years. Respondent admitted in its answer and I find that at all material times Kirsch, Bates, Stillwell, McSweeney, Martino, Martin, Macias, Giordano, Marciano, and Bergman were supervisors within the meaning of Section 2(11) of the Act, and agents acting on its behalf. Stillwell, Marciano, Bergman, McSweeney, Martino, and Martin testified for Respondent at the hearing. Hernan Perez testified for the Acting General Counsel (the General Counsel) at the hearing, as did Evelyn Gonzalez, who leads the EGU and is currently employed as a banquet server. Banquet servers Endy Lora, Robert Ramirez, and Esther Martinez also testified for the General Counsel at the hearing.

B. The Activities of Respondent's Employees and the Union's Certification

Although this case primarily involves events surrounding a petition filed by the EGU and a subsequent representation election, the evidence establishes that the Respondent's servers, led by Evelyn Gonzalez, engaged in a number of activities regarding their working conditions prior to invoking the Board's representation election processes. Gonzalez testified that she initially learned in January 2011 that a number of staff were interested in union representation, and had contacted Local 6, UNITE HERE, which had informed them that it only represented hotel and motel workers. Gonzalez then spoke to approximately 30 employees, including Hernan Perez, regarding issues involving their working conditions, and subsequently met with Jeffrey Stillwell. Gonzalez informed Stillwell of several complaints on the part of the service staff, primarily inequitable assignment of work, and disrespectful, undignified treatment of servers on the part of Respondent's managers. According to Gonzalez, Stillwell was unresponsive, so she consulted with the employees again, and prepared a lengthy list of their complaints, which she provided to Stillwell in March 2011.[1] The problems encompassed by the list include a general lack of respect shown to servers by management, inequitable assignment of tasks, hours, and scheduling, inadequate flexibility with respect to schedule changes, lack of documentation in the human resources complaint process, unfair annual reviews, and poor quality of the staff meal. Two to 3 weeks later, Gonzalez met with Stillwell and Dawn Bergman, and described the employees' concerns in further detail. According to Gonzalez, Stillwell responded that the complaints were limited to a small group of employees, and Gonzalez emphasized that she was raising issues identified by the regular servers. They discussed the manner in which complaints were brought to management, and Gonzalez suggested that the company hire a headwaiter to communicate server concerns, have regular meetings with the staff, and establish a system for the servers to make anonymous complaints.

Subsequently, Gonzalez met with Stillwell and Doug Giordano to discuss a separate complaint she received that Rich Martin had referred to the service staff as "animals" during an event that Gonzalez had worked.[2] Gonzalez testified that she told Giordano that the service staff was having problems on the floor because management treated them in a disrespectful and demeaning manner, resulting in the list of complaints she had presented to Stillwell. Gonzalez also described an incident where Bob McSweeney had told a server that he would throw her out of the building. Stillwell suggested that Martin had been joking, and Giordano said that he would look into the incident involving McSweeney. After Gonzalez met with him, Giordano held several meetings with the service staff, ostensibly to hear their complaints. However, the servers were apparently not willing to discuss their concerns directly with Giordano, and management thus began distributing papers for the staff to submit written statements.

At some point during these events, Gonzalez, Perez, and other servers began meeting with Local 100, UNITE HERE, in order to discuss organizing to have that union certified as their collective-bargaining representative. Local 100 provided the servers with union authorization cards, which they began distributing and signing. Perez testified that he attended approximately five meetings with Local 100, spoke to other servers about the benefits of joining the union, and collected signatures on union authorization cards, which he provided to Gonzalez.

Gonzalez testified that approximately 1 week after the employees began collecting authorization cards for Local 100, Giordano and Stillwell came in during a "family meal," a meal for employees which takes place prior to setting up for an event. According to Gonzalez, Giordano told the employees that he had discovered that they were collecting union cards, and that he wanted to remind the employees that once they signed these cards they would never be able to get them back. Giordano further stated that once the employees brought a union in, they would lose the company's "open door policy," because the staff would not be able to speak with management without a union representative present. Giordano said that servers were going to attempt to bring one other to the bathroom to sign union cards, and that the employees needed to "watch out" for what they would be asked to sign. Gonzalez testified that the next day, Stillwell, Giordano, and Bergman attended another family meal, where Giordano reiterated these statements. Giordano also said that management had attempted to reach out to the service staff to discuss their issues. An employee protested that there was no open door policy at the company and the problems identified by the staff had not been rectified, and Bergman responded that management had attempted to address the issues raised by the servers by holding meetings and allowing for the submission of anonymous comments.

[1] This list was also eventually provided to Dawn Bergman.

[2] Server Esther Martinez testified that in or around the fall of 2011, at the end of an event, she heard Martin tell a captain to "go get all of the animals to sign out," referring to the employees working the event that night.

Perez testified that he also attended a meeting during the set-up for an event in approximately June 2011, with Giordano, Stillwell, Bergman, McSweeney, Paul Macias, and all of the employees working that evening. Perez testified that Giordano told the employees that he had heard that a group of servers were collecting signatures on a "voting card." Giordano said that in fact the card required the servers to give up their rights. Giordano suggested that employees who had signed cards attempt to retrieve them, and told the employees that if they had signed a card, they would be penalized in the event that there was a strike and they opted not to participate. Giordano also stated that the company's open door policy would be eliminated if a union were brought in.[3]

Gonzalez testified that the organizing on behalf of Local 100 did not proceed, and she eventually learned that the employees could form an independent union. Gonzalez consulted with other employees regarding this option, and Perez testified that he collected a second group of signatures for the Evelyn Gonzalez Union. Gonzalez filed a petition on behalf of the EGU for a representation election on September 22, 2011, and an election was conducted on October 26, 2011.[4] The majority of votes were cast for the Union, which was certified on November 4 as the exclusive collective-bargaining representative of the following unit of employees:

> All full-time, part-time, and on-call servers, all full-time and part-time captains, all full-time, part-time, and on-call bartenders, and coat check employees in the banquet department of the Employer located at Chelsea Piers, New York, NY.

C. Respondent's Activities Pertaining to the EGU Organizing and Election

After the petition was filed and before the election took place—from September 22 to October 26—Respondent's managers held a number of meetings with its service staff to discuss the election and persuade the bargaining unit employees to vote against union representation. These meetings began several days after the petition was filed, and the last was held a few days prior to the election. The meetings took place at either Pier Sixty or the Lighthouse, about an hour prior to the family meal, and attendance was mandatory for all service staff scheduled to work the particular event. According to Bergman, Respondent scheduled a different manager to make a presentation to the employees each week during the 4 weeks prior to the election. Bergman testified that during the 1st week, Doug Giordano spoke to the employees, and during the 2nd week Luisa Marciano did so. During the 3rd week, Owners James Kirsch and Roland Betts spoke at the meetings, and during the 4th and final week Bergman and Jeffrey Stillwell made presentations. Bergman testified that because different employees were assigned to work different events on different evenings, each of the presentations was given multiple times during the particular week for which it was scheduled, to ensure that as many employees as possible heard it. Gonzalez, Perez, and Server Endy Lora all testified that they attended about six of these preelection meetings, and servers Robert Ramirez and Esther Martinez also testified regarding the managers' remarks.

1. Statements made by Doug Giordano

Gonzalez, Perez, Lora, Ramirez, and Martinez all testified regarding statements made by Giordano at the meetings conducted by Respondent soon after the petition was filed. Gonzalez, Perez, and Lora testified that Giordano told the employees that he wanted to make them aware that Gonzalez had filed the petition. Giordano told the employees that they should carefully consider whether they wanted Gonzalez to represent them, because she had no experience in collective-bargaining negotiations, whereas Betts, Kirsch and the other owners all had experience in business and were very good negotiators. Giordano also stated that the Union was only a business that Gonzalez intended to cash in on, because if the Union were certified the employees would have to pay union dues to her.

Giordano also discussed Respondent's open door policy at the meetings. For a number of years, Respondent's policy was that employees could discuss their work-related problems and concerns with management on an individual basis. Gonzalez and Lora testified that this policy had existed throughout the entire period of their employment. Gonzalez, Perez, Lora, Ramirez, and Martinez all testified that during virtually every one of his meetings after the petition was filed, Giordano stated that if the Union prevailed in the election the employees would lose the open door policy, because Respondent's managers would need a representative of the Union present to speak with them.

Perez also testified that Giordano spoke about strikes at several of the meetings that he attended. Perez testified that at a meeting on September 27, Giordano told the employees that they needed to think about what they were getting into with the Union, because they would have to pay dues and participate in a strike if one was called. According to Perez, at another meeting Giordano stated that if a strike was called the Union would penalize employees who did not participate. Perez, Ramirez, and Martinez also testified that Giordano stated that employees who went on strike would lose their jobs, and would only be able to return to work by seniority.

In addition, during at least one of Giordano's meetings an employee named Yamina Collins asked what would happen to employees who did not want to be part of the Union if the Union was certified as their collective-bargaining representative. Gonzalez, Ramirez, and Martinez testified that Giordano responded that employees who did not want to join the Union would have to leave their jobs, and that he would have to discharge them, even if he did not want to do so. Perez and Lora testified that Giordano responded that servers that did not join the Union if the Union were certified had no option, and could not continue to work for Respondent.

Finally, Giordano discussed benefits and collective bargaining during his meetings with the employees. According to Perez, Giordano told the employees that if the Union obtained a wage increase during negotiations, the company would take away the employees' medical benefits in response. Perez testified that Giordano described the "give or take" of negotiations by telling the employees that if the company gave something to

[3] None of the foregoing conduct on Giordano's part is alleged by the General Counsel to have violated the Act.

[4] All subsequent dates are in 2011, unless otherwise indicated.

the Union during negotiations, it would take something else away. Lora testified that Giordano told the employees that in terms of current benefits other than the open door policy, "we will have to start all over from the beginning from scratch" in negotiations. Ramirez testified that Giordano told the employees that if the Union won the election they would lose benefits such as their 401(k) plan, gym privileges,[5] and tuition reimbursement. Martinez testified that Giordano told the employees that if the Union won the election the current medical and dental benefits would be eliminated.

Dawn Bergman and Luisa Marciano testified for Respondent regarding Giordano's meetings with the service staff.[6] Bergman testified that she was present during some, but not all, of the meetings conducted by Giordano. Bergman testified that Giordano brought notes to the meeting that he referred to while speaking, but did not read his notes word for word.[7] Bergman stated that Giordano began the meetings she attended by informing the employees that a petition had been filed on behalf of the EGU, and told the employees that Respondent's managers would be meeting with them over the coming weeks. According to Bergman, Giordano said that Gonzalez had no experience running a union, and that if the Union was certified collective bargaining would occur. Bergman testified that Giordano discussed his employment at a unionized hotel, and described his discomfort with crossing a picket line when the hotel's employees went on strike during collective bargaining. Giordano also said that employees "end up getting replaced" while on strike so that a business can continue to operate. According to Bergman, Giordano told the employees that in collective bargaining all benefits are negotiated, so that some benefits might be gained and others might be lost. Giordano also commented on the open door policy, telling the employees that when a union was certified there was no direct, one-on-one communication between management and the employees.

Bergman and Marciano also testified regarding Giordano's response to Yamina Collins' question regarding the status of employees who did not want to join the Union if the Union was certified. Bergman testified that she remembered Collins asking the question, but could not recall Giordano or Marciano's response.[8] Marciano testified that she recalled Collins asking during one of the meetings run by Giordano what would happen if the Union won the election and some of the service staff did not want to join.[9] Specifically, Collins asked whether employees who did not want to join the Union would have to do so. Marciano testified that she interrupted and said that she would respond to Collins' question. Marciano stated that she said that the options for employees who did not want to join the Union would be contingent upon the contract language negotiated between the Union and Respondent. Marciano stated that she told the employees that if the parties' contract required that the bargaining unit employees join the Union, the employees would have to do so or leave their employment. Marciano testified that Giordano never said that if the Union was brought in employees who did not want to join it would be fired.[10]

2. Statements made by Jeffrey Stillwell

Gonzalez, Perez, Lora, and Ramirez all testified regarding the statements made by Stillwell at his meetings with the employees. They recalled, consistent with Bergman's testimony, that Stillwell's meetings occurred within days of the election. Gonzalez, Perez, Lora, and Ramirez testified that during Stillwell's remarks, he told the employees that the business was a family, and that they should vote against the Union, because he was very concerned that a union would have a negative effect on the business. Stillwell elaborated that the business had been built on its reputation for customer service. However, Stillwell said that if a union represented the employees, Respondent would not be able to provide the same level of service, because the company would not be able to assign the employees additional duties, such as putting brochures or menus on the chairs for guests prior to an event. In addition, according to Stillwell, a union would prohibit the employees from working with other departments in order to, for example, plate food or stack furniture. Stillwell said that customers would go elsewhere due to the company's inability to provide the same level of service if the Union were certified, resulting in a decline in business. Stillwell continued that if the company lost business in this manner, it would not have work for the employees.

In addition to the remarks described above, Ramirez testified that Stillwell told the employees that if the Union were certified, benefits such as the 401(k) plan, the gym facility, and tuition reimbursement would be eliminated.

Stillwell and Bergman also testified regarding Stillwell's remarks at the meetings immediately prior to the election.[11] Bergman could not recall the exact statements made by Stillwell during the meetings that she attended, but testified that the substance of Stillwell's remarks involved the pride that the company took in its service and the possibility of the employees' losing certain benefits during collective bargaining. Stillwell testified that he began his presentation by thanking the employees for maintaining the high level of service to customers, and for not jeopardizing or letting the business suffer during the preelection period. Stillwell stated that he told the em-

[5] Pier Sixty employees are entitled to use the facilities at the Chelsea Piers Sports Complex at a reduced monthly rate.

[6] Giordano did not testify at the hearing.

[7] Ramirez also testified that Giordano had papers with him during the first of the meetings he attended. Giordano's notes focus on Gonzalez's inexperience in union affairs, particularly collective-bargaining negotiations, and mention the possibility of a strike and of changes in negotiated benefits, but without the level of detail described in the testimony regarding his meetings.

[8] Bergman testified that Collins spoke during a number of meetings.

[9] Marciano testified that she was present at most, but not all, of the meetings conducted by Respondent prior to the election.

[10] On rebuttal, Gonzalez disputed Marciano's account. Gonzalez testified that at the meeting with Giordano which she attended, Giordano finished his remarks, as described above, before Marciano spoke, and was not in fact interrupted by Marciano. Gonzalez testified that she could not recall what Marciano said after Giordano was finished speaking. Perez and Lora were also questioned regarding the issue, and could not recall any mention of contract language pertaining to a closed or open shop when Giordano responded to Collins' question.

[11] Bergman also spoke during these meetings, and addressed the mechanics of the voting process.

ployees that if the Union won the election, everything would be negotiated, and the employees could end up with better or worse wages and benefits overall, because nothing was guaranteed. In particular, Stillwell said that because the Union would have a smaller number of health plan participants than Chelsea Piers, it would not have the leverage necessary to obtain a comparable health insurance policy. As a result, in the negotiating process there was a chance that the employees could end up with a less generous policy, or the policy could stay the same. According to Stillwell, he told the employees that he was concerned with maintaining the high level of service the company provided. Stillwell stated that he had worked with a company where the employees were represented by a union, and that with union representation "lots of rules that come into play" that can instill a "not my job sort of mentality," which would prevent employees "from doing certain tasks," ultimately resulting in inferior service. Stillwell stated that he may have used examples of specific tasks to illustrate this point, such as working on hors d'oeuvres in the kitchen, stacking chairs, and moving a glass rack. Stillwell denied, however, making any prediction as to the impact of such inferior service on the company's business overall. Stillwell also stated that he told the employees that if a union were to become involved the employees would lose the opportunity for "one-on-one type of communication" with management regarding requests for leave, and that management could be restricted by strict guidelines or union rules from granting such requests.

3. Statements made by Luisa Marciano

Gonzalez, Perez, Lora, Ramirez, and Martinez testified regarding statements made by Marciano at the preelection meetings, in addition to her remarks at the meetings were Giordano spoke. Like the other managers, Marciano addressed employee benefits and the collective-bargaining process. Gonzalez, Lora, and Martinez testified that Marciano told the employees that during the negotiating process all employee terms and conditions of employment would be negotiated "from the beginning," and that the employees might lose benefits, that there were no guarantees. Perez testified that Marciano spoke about Gonzalez, telling the employees that she was inexperienced and could not run a union. Marciano then calculated the amount of dues that the employees would be paying Gonzalez using a flip chart. According to Perez, Marciano distributed a list of benefits that Pier Sixty provided to its employees. After she did so, Perez asked her whether Respondent's employees were employees at will, and Marciano said yes. Perez then asked whether the benefits the company currently offered could be taken away at any time,[12] and Marciano said that was the case. Perez went on to ask whether benefits provided for under a union contract could be taken away, and Marciano responded that they could not, "but what makes you think that this place is going to be union?" Marciano went on to ask employees who had been employed by the company for 10 years (identified by Paul Macias) whether any benefits had been taken away, and Perez responded that the medical benefits had been changed three or four times. Perez also testified that Marciano read from papers during her presentation regarding negotiations, and stated that during bargaining the employees could end up with wages and benefits that were either better or worse than what they currently received.

According to Perez, Ramirez, and Martinez, Marciano also addressed the employment status of employees in the event that they participated in a strike. Perez, Ramirez, and Martinez testified that Marciano told the employees that if they went out on strike they would lose their jobs, and it would take awhile for them to be reinstated based upon seniority. Ramirez and Martinez testified that Marciano stated that during a strike, the company could continue to run the business with replacement employees, and the striking employees would be placed on a preferential hiring list to return to work. However, Perez testified that he did not hear Marciano mention a list, or discuss using temporary employees to continue the company's operations during a strike. Finally, according to Ramirez and Martinez, Marciano also reiterated during her meetings that if the Union won the election the employees would lose the company's open door policy, and would not be able to speak with managers on a "one-on-one" basis.

Bergman and Marciano testified for Respondent regarding Marciano's statements at these meetings. Bergman testified that she was present for all of Marciano's meetings with the employees.[13] According to Bergman and Marciano, Marciano began the meetings by stating that she would be reading from a prepared speech, to ensure that she got everything right. Bergman then distributed documents to the employees consisting of a list of benefits currently provided by the company, and quotes from a decision of the Board and of the United States Court of Appeals for the Sixth Circuit, stating, "Collective bargaining is **potentially hazardous** for employees and. . . . As a result of such negotiations, employees might possibly wind up with **less benefits** after unionization than before,"[14] and "Just as surely as an employer may increase benefits, in bargaining, he may take them away."[15]

Marciano testified that she read the prepared statement verbatim, including the remarks about strikes, which state as follows:

- When and if a union calls a strike, it most dramatically impacts staff. Simply stated, those on an economic strike don't get paid or benefits. They also don't get unemployment for the first 7 weeks of the strike. We all know how tough it is out there and I can't see how anyone can be thinking that they want to be in that type of situation.

[12] Gonzalez also testified that she recalled Perez asking this question at a meeting, but could not recall how the managers present responded. Ramirez testified that during a meeting he attended, Perez asked why management was putting the union down, because it could be something good for the company. According to Ramirez, Macias told Perez in response, "[Y]ou guys have your meeting outside, so why speak now in front of the staff."

[13] Marciano stated that she gave the presentation including her prepared statement at three different meetings.

[14] *Coach & Equipment Sales Corp.*, 228 NLRB 440, 441 (1977) (emphasis added).

[15] *Pittsburgh Plate Glass, Chemical Division v. NLRB*, 427 F.2d 936, 947 (1970).

- Also, if people walk out on an economic strike, Pier 60 would have a right to permanently replace them. That means we can bring in other people to do the work.
- Now none of this sounds good but, if we had events scheduled, we would need to bring in other people because we simply cannot leave our clients without service. After all, if we do that, we put the whole business at risk and we just would not let that happen.
- If and when the strike ended and associates who chose to partake in that strike asked to return to work, we would not be required to take them back if we don't have open slots. Instead, they would be put on what is called a "preferential hire or waiting list" and recalled in seniority order if and when slots open up. Those Associates are NOT fired, but they could be on that waiting list a long time waiting for spots to become available.

Marciano confirmed that after she completed her remarks, Perez asked whether the benefits listed on the sheet Bergman had distributed were guaranteed. Marciano responded that they were not guaranteed, but had been provided by Respondent for many years. Perez stated that if the benefits were not guaranteed they could be taken away, and Marciano asked him whether any of the benefits had been taken away during his employment. According to Marciano, Perez responded that if the employees had a union, the benefits would be guaranteed. She stated that she responded that everything was up for negotiations, and nothing was guaranteed. Marciano also confirmed that during this meeting she told Perez in response to his question that the employees were employees at will.

4. Statements made by James Kirsch and Roland Betts

Gonzalez, Perez, Lora, and Martinez testified regarding statements made by Respondent's Owners James Kirsch and Roland Betts during one of the final meetings they attended prior to the election. All four testified that during his remarks Kirsch told the employees that if the union won the election the open door policy would be eliminated, and they would no longer be able to talk to managers on an individual basis. According to Perez and Martinez, Kirsch told the employees that they could possibly lose their medical, dental, and other benefits by bringing in the union, through the "give and take" process of collective bargaining. Lora also testified that Kirsch told the employees that all of the "great benefits" the employees enjoyed, including the 401(k) plan, medical benefits, and vacations, would be subject to a negotiating process where the parties would "sit down" and "start from the scratch," with no guarantees.[16]

Lora and Martinez also testified regarding Betts' remarks at the preelection meetings. According to Lora and Martinez, Betts told the employees that the company's open door policy would be eliminated if the Union won the election. Lora testified that Betts stated that Respondent provided superior benefits to those offered by other companies, including its 401(k) plan, and that if the Union won the election the parties would "start from scratch" or from the beginning in negotiations, with no guarantees. Martinez testified that Betts also told the employees that they could lose their medical and dental benefits through the negotiations process, in that they could end up with either more or fewer benefits overall as a result.

Bergman and Marciano testified for Respondent regarding Kirsch's and Betts' remarks at these final meetings, but only Marciano addressed the substance of Kirsch's and Betts' remarks.[17] According to Marciano, Kirsch told the employees that in collective bargaining negotiations employees sometimes get more, sometimes get less, and sometimes end up with the same benefits. Kirsch said that by contrast, without the Union the employees knew what benefits they had. Marciano testified that Betts basically reiterated Kirsch's statements regarding negotiations. Both Kirsch and Betts told the employees that the company was a family, and that without the Union management was able to speak to the employees without a third party present.

5. Statements made by Richard Martin and Chris Martino

Ramirez testified that on the day of the meeting he attended with Kirsch and Betts, Richard Martin approached him about an hour after he began work. Ramirez stated that he was performing his set-up assignment at that time, arranging coffee trays, when Martin said that he wanted to talk to him. According to Ramirez, Martin asked whether he wanted to talk about something that happened during the meeting with Kirsch and Betts, and Ramirez said no. Martin told Ramirez that he wanted to go upstairs and talk, and led Ramirez upstairs to a small hallway on the way to the men's locker room. Martin then asked Ramirez again whether he had any questions. Ramirez said that a part-time employee had brought up an important point in the meeting with Kirsch and Betts, complaining that the part-time employees did not receive enough hours or work days. Martin responded that during the meeting, Kirsch had told the employees that the company did a lot for them, and provided counseling for managers, meaning McSweeney. Ramirez responded that he was aware of that. He said that Martin was one of the best managers in the company, and that many of the employees spoke highly of him. Martin then told Ramirez that if the Union was voted in, he and Ramirez would not be able to have similar conversations, because the open door policy would be taken away.

According to Ramirez, Chris Martino approached them at that point. Martino asked Ramirez whether there was anything he wanted to discuss. Ramirez asked how the schedule, which Martino typically prepared, was looking for the next month. Martino responded that he was not sure, but that if the Union was voted in they would have to start from scratch. Ramirez

[16] On cross-examination, Lora was also asked whether Kirsch and Betts told the employees that they could end up with more or less as a result of the negotiating process. Lora responded, "Not everybody said that," and testified that he could not recall the exact words Kirsch and Betts used when discussing negotiations, other than "we will start from scratch." (Tr. 386.)

[17] Kirsch and Betts did not testify at the hearing.

testified that this entire sequence of events was approximately 10 to 15 minutes long.

Martin and Martino were both questioned regarding these discussions. Martin testified that he recalled having a conversation with Ramirez, and asking him whether he had any questions about the union process, during the time of the organizing campaign. However, he could not recall the time or location of the conversation, and could not recall anything else that was said. Nor could he recall observing Martino speak to Ramirez. Martino testified that he was responsible for scheduling employees, including Ramirez, but could not recall any conversation with Ramirez and Martin around the time of the meetings with Kirsch and Betts. Martino stated that he spoke to employees regarding the Union, but could not recall which employees he spoke to or what was said. He denied telling employees that bargaining would start from scratch, stating that he would not have used that phrase.

D. Respondent's Practices Regarding Servers' Conversations During Worktime

Gonzalez, Perez, Lora, Ramirez, and Martinez all testified that prior to the filing of the petition, servers were generally permitted to talk to one another regarding nonwork issues during worktime when guests were not present. Gonzalez, Perez, Lora, Ramirez, and Martinez all testified that while performing their set-up assignments prior to the beginning of an event, in the kitchen, and after guests left for the night, employees discussed their personal affairs, entertainment, sports, and the news, in addition to work-related issues. These conversations took place several times each day in areas where guests were not present, including the back of the house near the coffee station, the kitchen, and the apron outside of the facility. According to Gonzalez, Perez, Lora, Ramirez, and Martinez, managers, including Stillwell, McSweeney, Macias, and Martin, heard these conversations and occasionally participated. For example, Martinez testified that she had discussed topics such as vacations, pets, and car troubles with McSweeney, Macias, Martin, and Stillwell during her shift on a number of occasions, and Ramirez testified that Giordano discussed baseball and tattoos with members of the service staff. Lora testified that he was speaking with a coworker regarding Thanksgiving dinner during set-up for an event in November 2010, when Macias joined the conversation to discuss his own Thanksgiving meal. The employees testified that these conversations could last 5 or 10 minutes. Gonzalez, Perez, and Martinez testified that prior to September 2011, they had never been told by a manager that employees should not speak to one another if there were no guests in the area.[18] McSweeney testified that he breaks up small groups of employees conversing with one another on the floor when guests are present "all the time." When guests are not present, he testified that he would "possibly" do so in the event that employees were "just standing there not getting any work done."

According to Gonzalez, Perez, Lora, Ramirez, and Martinez, after the petition was filed on September 22, McSweeney began prohibiting them from speaking with one another during periods of worktime when guests were not present. Gonzalez and Perez testified that one afternoon soon after the petition was filed, they were discussing a trip to Puerto Rico with Lora in the Saugerties Room of the Lighthouse, preparing to go to the kitchen after finishing their set-up assignments. Gonzalez, Perez, and Lora said that as they were talking, McSweeney walked by and said to Gonzalez, "[T]ake your meetings outside," in what they described as an uncharacteristically harsh manner. According to Gonzalez and Perez, other servers who had completed their set-up assignments were standing around the bar and buffets chatting, but McSweeney did not speak with them. Gonzalez left Perez and Lora and approached McSweeney, telling him that the employees were discussing a trip to Puerto Rico, and asking whether he wanted to join them. According to Gonzalez, McSweeney looked at her but did not say anything. McSweeney testified that he did not recall this conversation, but was generally concerned that employees' discussions of the Union and the upcoming election would interfere with their work.

Gonzalez, Perez, Ramirez, and Martinez described a similar incident with McSweeney approximately 2 weeks prior to the election. On that occasion, they were setting up the dessert buffet in the Pier Sixty venue's Olympic Room with about 12 to 15 other servers, while the guests were in another room finishing their dinner. The servers were apparently waiting for linens and other equipment to arrive so that they could be set up at the dessert buffet, and were standing in several small groups, chatting with one another. According to Gonzalez, Martinez and Lora, as Gonzalez, Perez, Lora, and servers Jonathan Rosario and Danny were speaking, McSweeney approached Gonzalez, and said in a harsh manner, "[B]reak up the group. We don't want people talking in groups." Perez and Ramirez testified that McSweeney said, "this is what I'm talking about—talking," and told the servers to stop speaking with one another. Perez, Martinez, and Ramirez testified that Gonzalez attempted to explain to McSweeney that the servers were waiting for linens for the buffet. According to Gonzalez and Martinez, Gonzalez asked McSweeney whether he was harassing them, and McSweeney responded, "I don't care how you take it. Take it however you want to take it." Gonzalez told McSweeney that she was taking it in that way, and that she was "going to do something about it." McSweeney said, "[D]o whatever you have to do," and walked away. Martinez testified that she then heard McSweeney call one of the captains on his radio, who confirmed that the servers in the Olympic Room were waiting

[18] Lora testified that on a few occasions during his 7 years with the company, he had heard a manager tell employees to cut down on the talking and get the work done while they were setting up a bar or tables, without guests present. The evidence establishes that Perez was informed that he had a propensity for "excessive chatting with fellow associates on the floor when doing his assignments or doing set up" during his annual performance evaluation dated February 25. Perez also received a written warning on March 1 for an incident involving "chatting" with another employee "for more than a reasonable amount of time" and "ignoring his assigned bussing duties" during an event, but it is not clear from the warning whether guests were present. Perez testified that he refused to sign the warning because there were no guests present at the time.

for further instructions from the chef. McSweeney testified that he could not recall this incident.

In addition, Perez testified that after the petition was filed, McSweeney told the employees during briefings about the events after the family meal that he did not want to see anyone talking in groups of two, three, or four. Perez further testified that during the week before the election, while picking up knives to set up his tables, he greeted another server wiping the silver, and asked the server what was going on. According to Perez, McSweeney pulled him over, and told him, "I just said in the meeting I don't want to see people talking." Perez said that had only asked the server how he was doing while retrieving silver for his table, and McSweeney told him that if he did it again he would be sent home. In addition, Perez testified that Macias spoke to him almost every day during the weeks prior to the election, accusing him of "having your little secret meeting." McSweeney did not testify regarding these specific incidents.

E. The Discharge of Hernan Perez

1. Events preceding Perez' Facebook posting

Hernan Perez began working for Respondent as a server on August 25, 1998, and worked full-time as a server and bartender until he was discharged on November 9, 2011. His responsibilities as a server included arranging tables and performing other set-up assignments, serving food and drinks, bussing tables as assigned, and breaking down the room after an event by clearing linens and stacking chairs. As a bartender, he was responsible for mixing and serving drinks.

Gonzalez, Perez, Lora, Ramirez, and Martinez all testified regarding the manner in which the service staff coordinates service of guests during an event. Generally, when guests are entering a room in which the servers are standing, the servers are expected to face the guests as they come in. Servers are assigned to teams which cover specific groups of five to six tables in order to serve food and clear those tables during an event.[19] Each server on the team is assigned one specific table for which they are responsible, and each team contains a "lead" server, who has no specific assigned table but provides back-up coverage for all of the team's tables when, for example, a server with a specifically assigned table needs assistance or is on a break. Servers serve each course and clear the tables in a specified order as a team, after receiving hand signals from the captain indicating that it is time to do so. While waiting for these signals, the servers on the team stand together in a group near their assigned tables. In between the service and clearing of particular courses, while the guests are eating or watching a program, the servers are expected to stand close enough to observe assigned tables, in case a guest needs anything. However, they are not to stand not immediately adjacent to their assigned table, and must not position themselves in a manner that would obstruct the guests' view of the program. The pace of work fluctuates during an event, and generally servers are less continuously busy during corporate and fundraising events, which tend to have structured programs such as speeches and presentations, than during social events such as weddings. In order to take a break, a server informs the captain, and the other servers on the team proceed to cover the table while the server taking a break is away. Perez, Ramirez, and Martinez testified that if a server's break is too long, the captain will seek them out and inform them that they should return to their tables.

The manager with overall responsibility for the event primarily interacts with the client and the captains, in order to ensure that the event is unfolding in the manner envisioned by the client. Managers use radios to contact captains as necessary, and move around the entire area, both the dining room and the kitchen, in order to ensure that everything is proceeding smoothly.

On October 25, Perez was working a fundraising event for the Andrew Glover Youth Program, which took place in the Lighthouse. Perez testified that during the cocktail hour, from 6 to 7 p.m., he was standing in the gallery area butlering drinks with two other employees. According to Perez, he and his coworkers were facing the guests, who were entering the gallery area for cocktails, and were not speaking to one another. Perez testified that McSweeney stood about 12 to 15 feet away, observing him for about a minute. McSweeney then walked quickly toward him, and said, "Turn your head that way and stop chit-chatting," in a loud voice, while pointing his arm in the direction of the arriving guests. McSweeney then left, but Perez was upset, because he felt that McSweeney had addressed him in a derogatory manner.[20]

After the cocktail hour, the guests proceeded to the Navesink, Montauk, and Barnegat Rooms for dinner and the fund raising program. Gonzalez, Perez, and Lora were assigned table 22 or 23 in the Montauk Room, table 25 in the Navesink Room, and table 24 in the Montauk Room, respectively, during the event.[21] Although these areas are referred to as "rooms," there are no walls between them. Because the rooms are on different levels, there are steps down from the Barnegat Room to the Montauk Room, and from the Montauk Room to the Navesink Room, the lowest of the three.

At approximately 7 p.m., the guests at the event were seated at the tables, appetizers had been served, and the program for the event had begun. Gonzalez, Perez, Lora, and two other servers were standing near tables 22 and 23, directly in front of a curtain which formed a wall between the Montauk Room and the hallway. According to Gonzalez, Perez and Lora, the servers were facing the guests, watching the tables and waiting for a signal from the captain to clear the tables after the appetizer course. Perez testified that he saw McSweeney standing in the corner of the Barnegat Room watching them for about a minute. Gonzalez, Perez, and Lora testified that suddenly McSweeney rushed up to Gonzalez and opened up his arms, indicating that the servers should spread out. According to

[19] These assignments are made during the meeting of the staff and managers immediately after the family meal. During this meeting, the manager with overall responsibility for the event discusses everything scheduled to occur, including the menu and program, and distributes a diagram showing the configuration of stations, tables, and equipment in the venue involved.

[20] McSweeney did not testify regarding this incident.

[21] These table numbers refer to the plan of the Lighthouse prepared for the Andrew Glover Youth Program event on October 25, in evidence as GC Exh. 4.

Gonzalez, Perez, and Lora, McSweeney then said, "Spread out, move, move" in a harsh tone of voice. Although the servers moved apart along the curtain, McSweeney said, "I said spread out," or "Spread out more," in a louder voice, and the servers moved further apart. Lora testified that after he moved away, McSweeney continued to speak to Gonzalez and Perez. Gonzalez and Perez testified that a guest at table 23 turned to look at the servers and McSweeney after he raised his voice.

McSweeney testified that this incident occurred not after the appetizers had been served, but a few moments after the dining area (the Navesink, Montauk, and Barnegat Rooms) had been opened, and the guests had begun to enter. McSweeney testified that in the Montauk Room he observed Perez "huddled together" with Gonzalez, Lora, and possibly other servers as well. According to McSweeney, he asked the group to separate. He then walked away, returned, and noticed that they were still huddled together, so he asked them to separate again. One of the servers moved away, but Perez did not, so McSweeney told Perez that he was nowhere near his table, and asked him to move closer to it.

Perez testified that after McSweeney left the area, he and Lora asked Gonzalez whether she was alright. Gonzalez responded that she had to confront McSweeney, because he spoke to her in an inappropriate manner. Gonzalez testified that she went to check on Perez and Lora, because she believed that they had been upset by McSweeney. Gonzalez told Perez and Lora that they needed to be strong and hold on, because the election was 2 days away. According to Gonzalez, Perez responded, "I am sick and tired of this. I don't like the way he talks to us. He doesn't know how to talk to us. I'm going to talk to him." Gonzalez told Perez that he was too upset to speak to McSweeney at that point, and said that she would talk to McSweeney herself. Gonzalez advised Perez to take a break in order to calm himself down. Gonzalez testified that she saw McSweeney alone near the kitchen entrance some time later, and told him that he needed to learn how to talk to the staff. McSweeney did not respond, and Gonzalez left.[22]

Perez testified that he observed Gonzalez speaking to McSweeney. At this point the program was going on, and according to the schedule which had been described to the employees at the beginning of the shift, the program would continue for another half hour. Perez testified that he felt mistreated and harassed, and needed a break to calm down, so he went to the kitchen and informed one of the captains that he was going to take a break. After using the bathroom, Perez went outside of the building to the apron area. Very angry, he got out his iPhone, went onto his personal Facebook page, and posted, "Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!! Fuck his mother and his entire fucking family!!!! What a LOSER!!!! Vote YES for the UNION!!!!!!!"[23] He then returned to the building, where the program was still going on. About 10 minutes after he returned, the servers cleared the appetizers, and the event continued along its normal course.

Perez testified that when he checked his Facebook page the next day, other individuals had posted comments after his initial remarks regarding McSweeney. The first comment after Perez' original posting was from Pier Sixty server Crystal Arnold, who stated, "respect is a two way street." After Arnold's comment, Martinez posted that respect goes both ways, but when someone disrespects you all of the time, you end up losing respect for them. In addition, Ramirez posted that McSweeney "did the nasty with a waitress," and a former Pier Sixty employee named Tommy responded, "Who, Sharon?" Perez then responded to Ramirez and Tommy by posting that they shouldn't involve other people, and should not comment about them. Martinez also wrote that if Ramirez and Tommy did not know what they were talking about and should not comment. Perez testified that on the day after the election he took down his initial post regarding McSweeney and all of the comments following it, as well as other comments he had posted encouraging others to vote for the Union.

2. Respondent's investigation and Perez' discharge

Dawn Bergman testified that she learned of Perez' Facebook posting regarding McSweeney on October 26, from Senior Purchasing Manager Carol Gerwell, who was able to view the comments on Perez' Facebook page on her computer in the office. Bergman read the Facebook posting on Gerwell's office computer, printed out Perez' original comment (according to Bergman, the comments made by individuals other than Perez could not be printed out), and consulted with Marciano and Respondent's attorney.[24] Because the union election was imminent they took no further action at that time.

On October 31, Bergman spoke to McSweeney, who told her that he had also seen Perez' Facebook posting. Bergman asked McSweeney whether anything out of the ordinary had occurred on October 25 to precipitate Perez' comment, and McSweeney said no. McSweeney told Bergman that because Perez and a few other servers were clustered together in an area far away from Perez' table, he told the servers to "please disperse," and "Go back to your table." Bergman asked McSweeney to prepare a written memo regarding his interaction with the servers. McSweeney's memo states that at approximately 7 p.m. he observed Perez, Lora, and Gonzalez "standing in very close proximity to each other" in the Montauk Room, despite Re-

[22] McSweeney provided an identical account of their interaction during his testimony.

[23] Perez testified that his Facebook page was set so that it could only be viewed by individuals with whom he had become "friends" on Facebook, and not anyone else who visited the site. Perez testified that at the time he had about 10 Facebook "friends" who were employees of Pier Sixty, and no "friends" who were managers or customers. Ramirez and Martinez testified that they were able to view Perez's posting later because they are "friends" of Perez on Facebook and receive Perez' postings on a live feed, meaning that they need not search the Internet for Perez' Facebook page, but automatically receive his new postings.

[24] Marciano testified that she was also able to view and print out Perez's Facebook page and his comment regarding McSweeney after discussing it with Bergman, even though she is not a "friend" of Perez'. Marciano also obtained access to and printed out materials from Perez's Facebook page during the hearing in this matter, but this evidence is not probative as to the Facebook privacy settings Perez had implemented as of the fall of 2011, and what materials on his Facebook page could be viewed by individuals who were not Facebook "friends" of his at that time.

spondent's policy "not to have servers standing in clusters." As a result, McSweeney told the servers, "Let's break this up please, we can't all be standing together," but they only took a "very small step away from each other" and were "still all very close." McSweeney therefore said, "That's not good enough," and told them to separate further. McSweeney also stated that Perez was not "anywhere near his table," and as a result he told Perez to "please go stand" nearer to it. Gonzalez, Perez, and Lora then moved away from each other, and McSweeney left.

Bergman and Giordano then met with Perez to discuss the Facebook posting. When shown the Facebook posting during this meeting, Perez denied that the "Bob" he mentioned was McSweeney, contending that he had made the comment about a different "Bob" that did not work at Pier Sixty. Bergman testified that she asked Perez why he did not clear that up after the individuals responding to his comment mentioned McSweeney, stating, for example, that he "did the nasty with some waitress." Perez countered that he did respond, by saying that people should not comment. Bergman asked Perez why he wrote "Vote Yes for the Union," if the comment preceding that statement was not about McSweeney, and Perez said that he could write whatever he wanted about the Union. Bergman testified that when she questioned Perez about the encounter with McSweeney earlier the evening of October 25, Perez claimed that the incident had occurred 2 weeks previously. Bergman asked Perez to provide her with information to identify the "Bob" that Perez claimed to be writing about, by, for example, showing her the text he was responding to regarding "Bob" or the call log containing "Bob's" number, and Perez declined to do so. Bergman then told Perez that the company needed to conduct an investigation, and that Perez would be suspended pending the results, as his posting involved "potentially a harassment situation."

Perez admitted that during this meeting with Bergman he falsely denied that his Facebook posting was about McSweeney, and claimed that he was making the comments about a different "Bob." Perez also testified that he declined to provide information to identify the "Bob" who was the subject of his posting. Perez further admitted that he told Bergman and Giordano that any incident between McSweeney and himself took place about 2 weeks prior to the meeting, and not on October 25. Perez testified that he told these falsehoods because he was afraid of being fired, and because he was not under oath when he met with Bergman and Giordano. Perez stated that during the meeting, he told Bergman that he supported the Union, and voted for the Union in the representation election. Perez testified that he asked Bergman whether there was something wrong with that. According to Perez, Bergman responded that he could write whatever he wanted about the Union on Facebook. After the meeting, Giordano directed Perez to clean out his locker, and told him that he could not return to Chelsea Piers.

Bergman proceeded to meet with various employees who were present on October 25, and/or participated in the Facebook discussion, including Gonzalez, Lora, Ramirez, Martinez, Crystal Arnold, and other employees. According to Bergman, this was her general practice in evaluating incidents which could potentially result in discipline. Although Ramirez and Martinez denied that the "Bob" mentioned in the Facebook discussion was McSweeney,[25] Bergman concluded that Perez' initial posting was in fact about McSweeney. Bergman then spoke with Giordano and the company's owners, and ultimately decided to discharge Perez for harassment.[26] Bergman testified that she made the decision to discharge Perez based upon the egregiousness of his language, which was inappropriate for the workplace, disrespectful, and potentially defamatory, and the fact that Perez did not take the posting down immediately.[27] Bergman testified that at the time that she made the decision to discharge Perez, she had learned from Stillwell and Giordano, who had met with Gonzalez, that Perez was upset by McSweeney's comments to him prior to his Facebook posting. However, she testified that she considered McSweeney to be "doing his job" by telling the servers to "separate and go back to their area," and not provoking them in any way. Bergman also testified that she concluded that even if Perez had been provoked in some way into making the comment in the first place, his failing to take it down immediately was unacceptable.

Subsequently, on November 8, Bergman called Perez and asked him to come in the next day. On November 9, Perez and Gonzalez met with Bergman and Giordano. Giordano stated that Respondent had decided to discharge Perez, and Bergman provided him with written information regarding his benefits. Gonzalez asked Giordano for a reason why Perez was being discharged, and Bergman said that he had violated company policy. Gonzalez asked for a copy of the policy and a written statement as to the reasons for Perez' discharge, and Bergman and Giordano declined to provide them.

III. ANALYSIS AND CONCLUSIONS

A. Statements Allegedly Violating Section 8(a)(1)

1. General considerations regarding witness credibility

I generally credit the testimony of Evelyn Gonzalez, Endy Lora, Robert Ramirez, and Esther Martinez regarding the statements of Respondent's managers during the meetings prior to the election. These servers are still employed by Respondent, and the Board has found that such testimony may therefore be considered particularly reliable in that it is potentially adverse to their own pecuniary interests. *Covanta Bristol, Inc.*, 356 NLRB No. 46 at p. 8 (2010); *Flexsteel Industries*, 316 NLRB 745 (1995), affd. 83 F.3d 419 (5th Cir. 1996). However,

[25] Ramirez and Martinez testified that Perez asked them to do so. Perez apparently admitted that the posting was about McSweeney, and not another "Bob," during a hearing regarding his application for unemployment insurance benefits. Ramirez was not disciplined for his conjecture during the Facebook discussion that McSweeney had "done the nasty" with another server.

[26] Respondent maintains a policy prohibiting "Sexual Harassment" and "Other Forms of Harassment." The latter includes harassment based upon age, race, religion, color, national origin, citizenship, disability, marital status, familial status, sexual orientation, alienage, liability for service in the Armed Forces, or "any other classification protected by Federal, State, or Local laws." Respondent contended in its response to Perez' claim for unemployment insurance benefits that Perez was discharged for violating its harassment policy.

[27] Bergman testified that the previous warning issued to Perez did not play a role in her decision to discharge him, and that he was discharged on the basis of the Facebook comments alone.

in considering their testimony with respect to the specific statements made by Respondents' managers, as discussed below, I have also taken into account factors which might affect that testimony's reliability. For example, while I found Evelyn Gonzalez to be a generally credible, thoughtful, and straightforward witness, I have also considered her role as the leader of the EGU in assessing the probative value of her testimony. I have also considered the contradiction between portions of Robert Ramirez' testimony and his affidavit provided during the investigation, and have given his testimony lesser weight with respect to these specific issues. While I found him to be somewhat hyperbolic overall, I have generally credited the testimony of Hernan Perez regarding the meetings he attended, to the extent that it is not directly contradicted by the testimony of other witnesses.

In certain situations, as discussed in further detail below, the testimony of the General Counsel's witnesses regarding the statements of Respondent's managers was not effectively contradicted by the testimony of Respondent's witnesses due to, for example, a lack of recollection. As a result, I have credited the testimony of the General Counsel's witnesses in these circumstances, unless an independent reason exists for declining to do so. See, e.g., *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detailed positive testimony).

In assessing the probative value of the testimony overall, I have also considered the manner in which the preelection meetings with Respondent's managers were conducted. The evidence establishes that Respondent formulated a schedule for different managers to make presentations to the employees prior to the election, so that Giordano spoke with the employees during the 1st week, Marciano during the 2nd week, Kirsch and Betts during the 3rd week, and Bergman and Stillwell during the 4th week. The evidence demonstrates that the same manager gave their presentation on several occasions during the week that they were scheduled to meet with employees, as different employees were present on different evenings, depending upon the events they worked. The record also establishes that in some cases witnesses called by Respondent to testify about the remarks of a particular manager did not attend every meeting during which that manager spoke. Given the number of meetings involved, and the fact that servers often attended different meetings, as they were scheduled to work events on different days, it is entirely possible in certain cases that the employees testified regarding meetings that none of Respondent's witnesses attended. I am also mindful of the fact that different employee witnesses may have attended different meetings conducted by the same manager.

Respondent argues that the General Counsel's witnesses were less than credible overall, because on direct examination they often did not provide a complete context for the specific, allegedly unlawful statements of Respondent's managers. Respondent contends that the General Counsel's witnesses therefore did not provide a complete and detailed account of the managers' statements on direct examination. Respondent also asserts that when the context for the managers' statements was elicited on cross-examination, the statements alleged in the amended complaint as violations of Section 8(a)(1) were revealed to consist of lawful campaigning. Given the number of meetings involving discussions with Respondent's managers that the servers attended prior to the election, I do not find that their failure to provide an extensive context for the specific remarks they described during their testimony is fundamentally detrimental to their overall credibility. However, when determining whether the statements made by Respondents' managers were in fact unlawfully coercive, I have evaluated the entire context for the specific statements which allegedly violated Section 8(a)(1), regardless of whether it was elicited on direct or cross-examination.

2. Alleged threats by Giordano, Martin, and Kirsch regarding the loss of Respondent's "open door" policy (Complaint pars. 6(a), (g), and (i))

The evidence establishes that Giordano threatened employees with the loss of Respondent's "open door" policy in the event that the Union won the election. Gonzalez, Perez, Lora, Ramirez, and Martinez all testified that Giordano told the employees in virtually every meeting he held prior to the election that if the Union prevailed in the election the employees would lose the open door policy, because management would not be able to speak to them without a Union representative present. Bergman also testified that in the meetings she attended, Giordano told the employees that if a Union represented them they would have no opportunity for direct, one-on-one communication with management. Similarly, Gonzalez, Perez, Lora, and Martinez testified that Kirsch told the employees that if the Union won the election the open door policy would be eliminated, and employees would no longer be able to approach managers on an individual basis. Marciano also testified that Kirsch told the employees that without a union, managers could speak with them on an individual basis. As a result, I find that Giordano and Kirsch told employees during their meetings that the employees would lose the open door policy if the Union was certified.

The evidence also establishes that Martin threatened Ramirez with the loss of Respondent's open door policy. Ramirez testified that during a conversation initiated by Martin soon before the election, he commented that Martin was one of the company's best managers. Martin told Ramirez in response that if the union won the election they would not be able to speak individually, because the open door policy would be taken away. Martin testified that all he could recall of this conversation was asking Ramirez whether he had any questions regarding the representation election process, which does not effectively rebut Ramirez's testimony. As a result, I find that Martin informed Ramirez that if the Union was successful in the election the company's open door policy would be eliminated.

It is well-settled, however, that a statement that employees will not be able to interact individually with management after a union's certification is permissible, in that it "simply explicates one of the changes which occur between employers and employees when a statutory representative is selected." *Tri-Cast, Inc.*, 274 NLRB 377 (1985); see also *Dish Network Corp.*, 358 NLRB No. 29, at pp. 1–4 (2012) (Member Block, concurring). As the General Counsel contends, in *Guardian*

Automotive Trim, Inc., 337 NLRB 412, 418–419 (2002), the administrative law judge, affirmed by the Board, found that the employer violated Section 8(a)(1) by "telling employees that an open door policy ends with unionization" during meetings which included other unlawful statements, such as threats to withhold an employee bonus and eliminate air conditioning. However, in that case, as the General Counsel notes, Respondent did not file exceptions to the ALJ's decision, and the Board stated that "we adopt the judge's decision pro forma." *Guardian Automotive Trim, Inc.*, 337 NLRB at 412 fn. 1. As a result, *Guardian Automotive Trim* is not precedential authority for the proposition that the threat to eliminate an open door policy violates Section 8(a)(1) of the Act, even if combined with other unlawful statements on the employer's part. I therefore find that Respondent did not violate Section 8(a)(1) of the Act by threatening employees with the loss of its open door policy if the Union won the election, and shall recommend dismissal of paragraphs 6(a), (g), and (i) of the amended complaint.

3. Alleged threats by Giordano, Stillwell, Kirsch, and Bates regarding the loss of benefits, and Martino's statement that bargaining would "start from scratch" (Complaint pars. 6(b), (d), (f), (j), and (k))

The Board has characterized employer statements during an organizing campaign that bargaining will "start from scratch" as "dangerous phrases," involving "the seed of a threat that the employer will become punitively intransigent in the event that the union wins the election." *BP Amoco Chemical-Chocolate Bayou*, 351 NLRB 614, 617 (2007) (internal quotations omitted). Such statements violate Section 8(a)(1) when, in their overall context, they "effectively threaten employees with the loss of existing benefits," and create the impression that the employees may in the end receive only "what the Union can induce the employer to restore." Id.; see also *Taylor-Dunn Mfg. Co.*, 252 NLRB 799, 800 (1980), enfd. 679 F.2d 900 (9th Cir. 1982). When, however, statements simply describe the ordinary "give and take" of the bargaining process, they generally constitute permissible employer speech. *BP Amoco Chemical*, 351 NLRB at 617–618; see also *Wild Oats Markets, Inc.*, 344 NLRB 717, 717–718 (2005); *Noah's Bay Area Bagels, LLC*, 331 NLRB 188, 188–189 (2000). The Board also considers whether employer statements regarding bargaining arise "in direct response to union promises," and are unaccompanied by other unfair labor practices, in order to determine whether they constitute legitimate campaigning. *BP Amoco Chemical*, 351 NLRB at 617; *Noah's Bay Area Bagels, LLC*, 331 NLRB at 188–189. Statements regarding the loss of existing employee benefits are similarly evaluated in terms of whether they are more reasonably construed as "a direct result of selecting the Union," as opposed to "a possible outcome of good-faith bargaining." *BP Amoco Chemical*, 351 NLRB at 617; *Noah's Bay Area Bagels, LLC*, 331 NLRB at 188.

Here, there is no evidence that any statements on the part of Respondent's managers regarding employee benefits and the collective-bargaining process arose in response to specific promises made by Gonzalez or the EGU. Instead, they were part of the managers' prepared presentations during the meetings arranged by Respondent prior to the election. In addition, the evidence establishes that Respondent committed other violations of Section 8(a)(1) during this series of meetings, sometimes during meetings led by the same manager, as discussed below.

Turning to the specific statements at issue, the credible evidence overall establishes that Giordano unlawfully threatened employees with the loss of benefits during the preelection meetings he conducted. Perez, Lora, Ramirez, and Martinez all testified that Giordano told the employees that they would lose current benefits, including their 401(k) plan, gym privileges, tuition reimbursement, and medical and dental benefits, if the Union was certified, or, as Lora testified, that "we will have to start all over from the beginning from scratch." Although Perez testified that Giordano referred to the "give and take" of negotiations, according to Perez he did so by stating that if the Union obtained higher wage rates for employees, Respondent would "take away your medical benefits." Overall, I find the testimony of the General Counsel's witnesses, some of which are current employees, to be more reliable than Bergman's contention that Giordano only told them that the employees might "gain some things" or "lose some things" in the context of collective bargaining, because there were "no guarantees." Bergman testified that she only attended Giordano's meetings "for a while," and stated, more generally, that the meetings she did attend, "kind of run together" in her memory. (Tr. 593, 598.) As a result, Giordano's statements in the preelection meetings did not sufficiently attribute any loss in benefits to the ordinary workings of a good-faith collective-bargaining process. They were instead unlawful threats predicating the loss of the employees' current benefits on their selection of the Union, as alleged in paragraph 6(b) of the amended complaint.

The evidence overall does not establish, however, that Stillwell threatened employees with the loss of benefits such as the 401(k) plan, use of the gym facilities at a reduced price, and Respondent's tuition reimbursement program. Ramirez was the only employee who testified regarding such a statement on Stillwell's part. While Ramirez testified on direct examination that Stillwell told the employees that these benefits would be "taken away" if the Union won the election, in his affidavit he stated that Stillwell told the employees that "everything is negotiated," and that "after negotiations" the employees might end up with lower wages or fewer benefits than they currently had. (Tr. 428–430, 469.) Although Ramirez testified on redirect examination that his direct testimony, and not his affidavit, was the more accurate description of Stillwell's remarks, he provided no explanation for the discrepancy between them. (Tr. 486–487.) The version contained in Ramirez's affidavit, which was provided at a time closer to the events which it describes than his testimony, is roughly consistent with Stillwell's description of his statements—that everything would be negotiated, nothing was guaranteed, and the employees could end up with better or worse wages and benefits as a result of the negotiating process. Such statements constitute permissible employer campaigning. *Flexsteel Industries*, 311 NLRB 257 (1993) (employer lawfully told employees that "present benefits could be lost," by describing "the give and take of bargaining"); *Bi-Lo*, 303 NLRB 749, 749–750 (1991), enfd. 985 F.2d 123 (4th Cir. 1992). As a result, the evidence overall does not

establish that Stillwell unlawfully threatened employees with the loss of benefits, and I shall recommend that paragraph 6(d) of the amended complaint be dismissed

Similarly, the evidence does not establish that Kirsch and Betts threatened employees with the loss of benefits during their presentations. While Perez and Martinez testified that Kirsch told the employees that they could lose benefits if the union won the election, they stated on cross-examination that Kirsch attributed any changes in terms and conditions of employment to the "give and take" of collective-bargaining negotiations. Lora testified that during the meeting he attended, Kirsch and Betts told the employees that all of the "great benefits" they enjoyed, including their 401(k) plan, medical benefits and vacations, would have to be negotiated, and that the parties would "start from scratch," or from the beginning. However, Lora also testified on cross-examination that Kirsch and Betts both told the employees that their benefits would be subject to the negotiating process, and that there would be no guarantees. (Tr. 385–386.) In addition, Lora admitted that he could not remember the exact language used by Kirsch and Betts.[28] (Tr. 386.) Overall, I find that Lora's testimony, consistent with that of Marciano as well as Perez and Martinez, establishes that Kirsch and Betts' couched statements regarding the loss of benefits in references to the negotiating process, such that they constituted permissible campaigning. *Albany Medical Center*, 341 NLRB 1258, 1264 (2004) (statement that "bargaining would be from scratch" permissible in the context of statements regarding the concept and process of collective bargaining). As a result, the evidence does not establish that Kirsch and Betts violated Section 8(a)(1) by threatening employees with the loss of benefits, and I shall recommend that paragraphs 6(j) and (k) of the amended complaint be dismissed.

Finally, the evidence establishes that Martino threatened Ramirez with the loss of benefits during their conversation the day that Ramirez attended the meeting with Kirsch and Betts. I credit Ramirez's testimony that when he asked Martino how the schedule was looking for the next month, Martino responded that he was not sure, but that if the Union won the election they would have to start from scratch. Martino stated during his testimony that he was responsible for scheduling employees, including Ramirez, and that he spoke to employees about the Union prior to the election. However, he had no recollection of the conversation with Ramirez, so that Ramirez's testimony in this regard is effectively unrebutted. Martino's comments to Ramirez do not include any mention of a good-faith collective-bargaining process, and fairness in scheduling and assignment of work hours was one of the concerns raised by the employees in their petition and meetings with management the earlier in the year. As a result, I find that Martino's statement to Ramirez impermissibly conveyed the impression that Ramirez would receive less desirable schedule and work hour assignments if the Union won the election. Martino's remarks therefore constituted a threat of the loss of benefits in violation of Section 8(a)(1), as alleged in paragraph 6(f) of the amended complaint.

4. Alleged threats of discharge by Giordano and Marciano (Complaint pars. 6(c) and (h))

The General Counsel contends that Respondent unlawfully threatened employees with discharge in two different meeting contexts—during Giordano's remarks in response to a question raised by employee Yamina Collins, and during comments made by Giordano and Marciano regarding the status of employees who participated in a strike. Gonzalez, Perez, Lora, Ramirez, and Martinez all testified that when Collins asked what would happen to employees who did not want to be a part of the Union if the Union was certified, Giordano responded that employees who did not want to join the Union would lose their jobs. Gonzalez, Ramirez, and Martinez testified that Giordano said that he would have to discharge such employees. Perez and Lora stated that Giordano told the employees that if they did not join the Union, they could not continue to work for Respondent.

The evidence establishes that Giordano's statements in this respect constituted a threat of discharge in violation of Section 8(a)(1). While case law considering the legal import of such a remark is sparse, the Board has sometimes held that misstatements of the law regarding employee and contractual union security obligations do not violate Section 8(a)(1). For example, in *New Process Co.*, 290 NLRB 704, 707 (1988), enfd. 872 F.2d 413 (3d Cir. 1989), the Board held that the employer did not violate Section 8(a)(1) by telling employees that the union would likely seek a contract provision conditioning continued employment on membership, so that an employee who lost their membership could lose their job. The Board reasoned that although the statement misrepresented the law, it did not constitute a threat of job loss, as discharge was explicitly predicated on the union's termination of the employee's membership, a circumstance beyond the employer's control. *New Process Co.*, 290 NLRB at 707. In *Daniel Construction Co.*, 257 NLRB 1276 (1981), enfd. 732 F.2d 139 (1st Cir. 1984), the Board found that an employer's statement that an employee would be required to join the union if the union won an election contained "no express threat that the employer by its own action would impose dire consequences . . . on the employees," and was therefore a "misstatement of law" as opposed to a threat violating Section 8(a)(1). In other cases, however, the Board has held that misstatements of the law regarding union security provisions and the possible discharge of employees constitute unlawful threats. See *Overnite Transportation Co.*, 334 NLRB 1074, 1112 (2001) (statement that a union security provision could "possibly cost you your *job*" if employer was "forced to fire" employees "delinquent in . . . dues payments" unlawful, in that union security clause would be unenforceable in the State

[28] When asked whether Kirsch and Betts told employees that they might end up with more or less overall as a result of collective-bargaining negotiations, Lora responded, "Not everybody said that." (Tr. 386.) I found Lora to be a credible and straightforward witness who generally testified to the best of his recollection, and made a spontaneous effort to correct his own testimony when he believed it to be in error. (Tr. 393–394.) I find based upon Lora's overall credibility and the care he took with his testimony that if he had specifically remembered Kirsch and Betts' comments in this regard, he would have indicated as much. I therefore find this aspect of his testimony not probative as to whether or not Kirsch and Betts more specifically described the "give and take" of collective bargaining during their presentations, at least at the meeting Lora attended.

where employees worked); *SMI of Westchester, Inc.*, 271 NLRB 1508, 1524 (1984) (manager's statement that he would, upon the union's request, discharge employees who did not complete union membership applications unlawful, in that union-security agreements may not compel membership, as opposed to dues payments); see also *United Stanford Employees, Local 680 (Leland Stanford Junior University)*, 232 NLRB 326 (1977), enfd. 601 F.2d 980 (9th Cir. 1979) (union violated Section 8(b)(1)(A) by implying to employees that if they did not maintain full membership they would lose their jobs).

The evidence here establishes that Giordano's statements explicitly threatened employees with discharge or the loss of their jobs, and did not construe the Union, or a contractual union-security provision, as intervening conditions which would remove the decision to take such adverse action from Respondent's control. On the contrary, Gonzalez, Perez, and Lora were adamant when questioned on cross-examination that Giordano did not discuss a union-security provision, a closed as opposed to an open shop, or even a union contract, in the context of his remarks.[29] (Tr. 136–137, 268–270, 387–390.) While Gonzalez testified that Giordano told them that Respondent would have to discharge the employees who did not join the union, "even if they didn't want to," he provided no explanation of how Respondent would be forced to do so. (Tr. 61–62.) Although Marciano contended that she interrupted Giordano when he made these remarks and explained to the employees that such union security issues were contingent upon contract language (Tr. 818–819), none of the other witnesses questioned about this could recall her doing so. Some stated that Marciano spoke after Giordano finished answering Collins' question, but none could recall the specific substance of her remarks. As a result, I find that the evidence overall establishes that Giordano violated Section 8(a)(1) by unlawfully threatening employees with discharge during his comments in response to Collins' question, as alleged in paragraph 6(c) of the amended complaint.

The evidence also establishes that Giordano threatened employees with discharge by informing employees that if they went on strike they would be discharged, in violation of Section 8(a)(1). It is well-settled that an employer may inform employees that they are subject to permanent replacement in the event of an economic strike. See, e.g., *Connecticut Humane Society*, 358 NLRB No. 31, 34 (2012), citing *Eagle Comtronics, Inc.*, 263 NLRB 515, 516 (1982); see also *Laidlaw Corp.*, 171 NLRB 1366 (1969), enfd. 414 F.2d 99 (7th Cir. 1969). In addition, an employer need not fully explicate employees' rights in the event of an economic strike, so long as its statements are consistent with the law and unaccompanied by other threats of retaliation for choosing union representation. *River's Bend Health & Rehabilitation Services*, 350 NLRB 184, 184–186 (2007) (statement that hiring replacements during economic strike "puts each striker's continued job status in jeopardy" permissibly consistent with *Laidlaw* rights); *Unifirst Corp.*, 335 NLRB 706 (2001). Where, by contrast, employer statements convey to employees that in the event of an economic strike their employment will be terminated, or are otherwise contrary to employees' *Laidlaw* rights, they constitute unlawful threats of discharge. *Connecticut Humane Society*, 358 NLRB No. 31, 34 (statement that "some employees could even find themselves without a job when the strike is over" impermissibly linked strike participation with job loss); *Gelita USA, Inc.*, 352 NLRB 406, 406–407, 408–410 (2008), 356 NLRB No. 70 (2011) (three member panel) (statement that economic strikers "would have no job protection if replaced" unlawful). In assessing the import of a statement describing employees' *Laidlaw* rights in the event of an economic strike, the Board also considers whether such a statement is accompanied by other threats or conduct violating Section 8(a)(1). *River's Bend Health & Rehabilitation Services*, 350 NLRB at 185; *Unifirst Corp.*, 335 NLRB at 707.

The evidence establishes that Giordano's remarks to the employees were unlawful pursuant to this standard. Perez, Ramirez, and Martinez all testified that Giordano told them that employees who participated in a strike called by the Union would lose their jobs. Although Giordano apparently also mentioned employees' returning to work in seniority order, Martinez testified that Giordano told the employees that strikers would be "discharged, because it was considered walking out, and if they was to take anyone else, it would be starting with seniority." (Tr. 544.)[30] Perez similarly testified that Giordano told the employees that if "you go out on a strike . . . you will lose your job," and that "in order for you to come back to work it will be done by seniority." (Tr. 179.) I find this testimony to be effectively unrebutted. Bergman testified that although she could recall Giordano discussing his experiences as an employee at a hotel where a strike had taken place, she could not remember any explanation of strike replacements. (Tr. 676–677.) In any event, the evidence establishes that Bergman did not attend all of the meetings between Giordano and the employees. Marciano generally confined her testimony to her own comments to employees addressing economic strikes and the employees' *Laidlaw* rights. As a result, I credit the employees' description of Giordano's statements, and find that Giordano impermissibly conveyed the impression that the employees would be discharged if they participated in an economic strike, in a manner inconsistent with the employees' *Laidlaw* rights.[31] As a result, the evidence establishes that Giordano threatened employees with discharge in violation of Section 8(a)(1) of the Act, as alleged in paragraph 6(c) of the amended complaint.

By contrast, I conclude that Marciano's comments regarding the possibility of the employees' being replaced during an economic strike were consistent with the principles articulated in *Laidlaw*, and as such did not violate Section 8(a)(1). I credit Marciano's testimony that she read her prepared speech regarding these issues verbatim. Some of the comments contained in Marciano's speech were echoed by Martinez during her cross-examination, such as the statement that during an economic

[29] Bergman testified that she could not recall Giordano's response to Collins' question.

[30] Martinez was adamant regarding Giordano's use of the word "discharged." (Tr. 544.)

[31] I also note that Giordano threatened employees with the loss of benefits in violation of Sec. 8(a)(1) during his meetings with employees. Any ambiguity in his statements regarding the employees' status in the event of an economic strike is therefore appropriately resolved against Respondent. *Unifirst Corp.*, 335 NLRB at 707.

strike the company can continue to operate its business, possibly using replacement employees, and that as a result there would be a list to return to work as openings occurred. I generally found Martinez to be a candid and convincing witness, and find her corroboration of Marciano's prepared statement more probative in this regard than Perez' contention that Marciano told the employees that if they went on strike they would lose their jobs. Marciano's prepared remarks specifically discussed a preferential hiring list for employees returning from a strike, and emphasized that employees who participate in an economic strike "are NOT fired" (emphasis in original).[32] In addition, the evidence does not indicate that Marciano's statements regarding the employees' *Laidlaw* rights were accompanied by any other threats or unlawful conduct. As a result, the evidence overall does not substantiate the amended complaint's allegation that Marciano threatened employees with discharge, and I will recommend that paragraph 6(h) be dismissed.

5. Alleged threats regarding the loss of business (Stillwell) (Complaint par. 6(e))

The Board evaluates predictions of job loss as a result of union representation under the standard articulated in *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). Under *Gissel Packing Co.*, such statements are not permissible campaigning under Section 8(c) unless they are "carefully phrased on the basis of objective fact to convey the employer's belief as to demonstrably probable consequences beyond the employer's control." *UPS Supply Chain Solutions*, 357 NLRB No. 106, at p. 3 (2011), citing *NLRB v. Gissel Packing Co.*, 395 U.S. at 618. As a result, a "lawful prediction" regarding the loss of jobs or business must be supported by an "objective, factual basis," such as contracts or communications with customers. See *UPS Supply Chain Solutions*, 357 NLRB No. 106, at p. 3; *Tradeware Incineration*, 336 NLRB 902, 907–908 (2001).

Applying this standard, the evidence here establishes that Respondent violated Section 8(a)(1) when Stillwell threatened employees with the loss of business, and the attendant loss of jobs, during the meetings prior to the election. Gonzalez, Perez, Lora, and Ramirez all testified that during the meetings they attended, Stillwell told them that if the Union represented the employees, the company could not maintain the standard of customer service upon which it had built its business and reputation. I credit their testimony that Stillwell told them that if the company were prevented by the Union from providing the same level of service, customers would go elsewhere, resulting in a negative impact on the business, and ultimately a lack of work for the employees. I do not credit Stillwell's assertion that he only spoke about union rules and a "not my job sort of mentality" affecting service, without stating that this phenomenon would detrimentally affect Respondent's business, or the employees' work. There was simply no other reason for him to discuss the purported negative impact on service of union representation without the logical conclusion that business would suffer as a result, and since the bargaining unit servers are assigned work only when events are booked by customers, a decline in business necessarily affects the amount of work available to them. In addition, Stillwell prefaced his remarks regarding a possible decline in standards of service with the contention that Respondent built its business and reputation upon precisely this attribute, reinforcing the conclusion that business would suffer if Respondent's level of service deteriorated as a result of the Union. Consequently, I find based upon the testimony that Stillwell predicted that because of the inferior standard of service that union representation would engender, Respondent would lose business, and the employees would lose work.

Furthermore, there is no evidence of an objective, let alone documentary, basis for Stillwell's prediction. Even if, as Gonzalez testified,[33] Stillwell stated that work rules and restrictions arising under a union contract would lower the standard of service Respondent was able to provide, Stillwell provided no objective basis for his assumption that the Union would make such demands or achieve such results in bargaining. See *North Atlantic Medical Center*, 329 NLRB 85, 93 (1999), enfd. 237 F.3d 62 (1st Cir. 2001) (no basis for manager's assumption that the union would strike, jeopardizing employer's business and employees' jobs, if certified). Nor did Stillwell provide any objective basis for his statements that customers would cease to use Respondent's services if the Union prevailed in the election. See *UPS Supply Chain Solutions*, 357 NLRB No. 106, at p. 3 (supervisor's predictions of job loss based on client contracts that required employer to remain nonunion unsupported by objective evidence, where sole contract allegedly containing such a provision was not offered into evidence, and no other relevant contract was identified); *Tradeware Incineration*, 336 NLRB at 907–908 (the General Manager unlawfully threatened that employer's parent company might not view employer as appropriate for long-term investment, and customers might not perceive employer as a secure long-term business option, where assertions were unsupported by specific evidence of parent company's reticence and customer dissatisfaction). As a result, Respondent failed to provide any objective evidence to support Stillwell's contentions, and Stillwell's comments in this regard constituted an unlawful threat of the loss of business, as alleged in paragraph 6(e) of the amended complaint.

B. Alleged Disparate Application of Respondent's "No Talk" Rule

It is well-settled that an employer may prohibit discussions regarding union matters "during periods when the employees are supposed to be actively working," if the employees are also prohibited from discussing other subjects "not associated or connected with the employees' work tasks." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006), quoting *Jensen Enterprises*, 339 NLRB 877, 878 (2003); see also *Sam's Club*, 349 NLRB 1007, 1009 (2007). However, if employees are permitted to discuss other matters unrelated to work during worktime, an employer violates Section 8(a)(1) by prohibiting similar discussion of union-related issues. *Sam's Club*, 349 NLRB at

[32] I note that Perez testified that Marciano told the employees that "in order for you guys to get reinstated it's going to take a while . . . and it's going to be by seniority," which is consonant with Marciano's remarks regarding the use of a preferential hiring list. (Tr. 183.)

[33] Perez and Lora testified that in the meetings they attended, Stillwell did not mention work rules or other contractual obligations.

1009; *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52. Generally, in order to determine whether employer communications to employees violate Section 8(a)(1), the Board applies an "objective standard," evaluating "whether the remark tends to interfere with the free exercise of employee rights," without considering "the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB at 52, quoting *Miller Electric Pump & Plumbing*, 334 NLRB 824 (2001).

The evidence here establishes that Respondent violated Section 8(a)(1) by prohibiting employees from discussing the Union on worktime, when they were permitted to and did in fact discuss other nonwork-related matters. I credit the testimony of Gonzalez, Perez, Lora, Ramirez, and Martinez that employees were permitted to talk to one another regarding nonwork issues, such as sports, entertainment, the news, and their personal affairs, on worktime when guests were not present. I further credit their testimony that managers such as Stillwell, McSweeney, Macias, and Martin heard these conversations and sometimes joined them, and that the employees discussed nonwork matters with managers individually as well. I credit Gonzalez and Martinez's testimony that prior to the filing of the petition, they had never been told by a manager that employees should not converse during worktime when no guests were present. Although Perez was admonished for speaking with coworkers in February and March 2011, the evaluation and written warning chastising him refer to "excessive chatting," and "chatting" for "more than a reasonable amount of time" while "ignoring his assigned bussing duties." As a result, these documents imply that discussion of nonwork matters among employees was permitted, so long as it did not interfere with their actual work performance.[34] This is consistent with McSweeney's testimony that unless guests were present, he would only consider directing employees speaking in groups to disperse if they were "just standing there not getting any work done." The evidence therefore establishes that Respondent had a general practice of permitting employees to discuss matters unrelated to work when guests were not present, and when such conversations did not interfere with their work. See *Austal USA, LLC*, 356 NLRB No. 65, slip op. at p. 1, 39 (2010) (prohibition of discussion regarding union unlawful, where "employees are only disciplined if the discussion of the nonwork-related topics interferes with their work performance"); *ITT Industries*, 331 NLRB 4 (2000), enfd. in relevant part 251 F.3d 995 (D.C. Cir. 2001) (employer permitted discussions of issues unrelated to work "as long as it did not interfere with production").

The evidence further establishes that after the petition was filed, McSweeney prohibited employees from speaking with one another at times when no guests were present. I credit Gonzalez, Perez, and Lora's testimony that soon after the petition was filed, as they were discussing a vacation trip while finishing their set-up assignments, McSweeney told them to "take your meetings outside." I similarly credit the testimony of Gonzalez, Perez, Ramirez, and Martinez that 2 weeks prior to the election, while they were setting up a dessert buffet in a room devoid of guests, McSweeney told them, "break up the group. . . . We don't want people talking in groups," and told the servers to stop speaking to one another. McSweeney testified that he could not recall either of these incidents, so the testimony of the General Counsel's witnesses is effectively unrebutted. Consequently, I credit the testimony of Gonzalez and Perez that on both occasions McSweeney ignored other groups of servers in the area who were also chatting.

In addition, the record establishes that Respondent's managers were specifically interested in prohibiting discussions relating to the Union. For example, the evidence indicates that McSweeney singled out Gonzalez and the employees speaking with her for admonishment, despite the other groups of servers engaged in similar conduct at the time. McSweeney's injunction to "take your meetings outside" clearly referred to the employees' organizing activities. I also credit Perez' testimony that Macias, during the weeks preceding the election, repeatedly accused him of "having your little secret meeting," another reference to the employees' union activities.[35] In fact, McSweeney testified that he was specifically concerned with the employees' discussions of the Union and election during the preelection period. Although McSweeney testified that his heightened concern was based on a belief that discussions of the Union would have a detrimental impact on the servers' work performance, he did not provide any basis for such an assumption. In fact, Stillwell thanked the employees during his meetings with them for maintaining a consistently high level of service during the weeks preceding the election. Indeed, it was apparent from Gonzalez's testimony at the hearing that she was committed to Respondent's providing an elevated level of service to its customers, and was proud of the servers' work in that regard. As a result, the evidence does not support a contention that McSweeney's concern with an impact on Respondent's services was legitimate.

For all of the foregoing reasons, the evidence establishes that Respondent enforced its "no talk" rule in a disparate manner by prohibiting employees from speaking with one another during worktime after the filing of the petition for a representation election, when it had routinely permitted discussion of other nonwork-related topics. Respondent's disparate enforcement of the "no talk" rule therefore violated Section 8(a)(1) of the Act, as alleged in paragraph 7 of the amended complaint.

C. Respondent Discharged Hernan Perez in Retaliation for his Union and Protected Concerted Activities, in Violation of Section 8(a)(1) and (3) of the Act

1. The Parties' contentions and the applicable law

The General Counsel argues that Perez' October 25 Facebook posting was protected by the Act, in that it constituted both protected concerted activity and activity on behalf of the EGU. As discussed above, Perez' Facebook comments consisted of the following:

[34] In addition, it is not clear from the written warning whether guests were present while Perez was allegedly chatting excessively with coworkers. Perez claimed that there were no guests present, and refused to sign the warning on that basis.

[35] Macias did not testify at the hearing.

> Bob is such a NASTY MOTHER FUCKER don't know how to talk to people!!!!!!!
> Fuck his mother and his entire fucking family!!!!
> What a LOSER!!!!
> Vote YES for the UNION!!!!!!!

The General Counsel argues that the posting constituted protected concerted activity, in that it was one of an ongoing series of concerted actions on the part of the servers regarding what they perceived as rude, demeaning, and derogatory treatment by Respondent's managers, including McSweeney. The General Counsel also contends that the posting constituted activity on behalf of the EGU, in that it explicitly stated, "Vote Yes for the Union." The General Counsel further argues that Respondent was aware that the posting constituted protected concerted activity, in that Respondent's managers were generally aware of the servers' complaints, which had been related to Bergman, both earlier in the year and in the immediate context of the events which occurred on October 25. Applying the analysis articulated by the Board in *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979), the General Counsel argues that given the location and subject matter of the Facebook posting, the nature of Perez' "outburst," and the extent to which the outburst was provoked by Respondent's conduct, Perez' Facebook posting remained protected activity. The General Counsel further argues that a totality of the circumstances analysis also demonstrates that Perez' Facebook posting remained protected. *Fresnius USA Mfg.*, 358 NLRB No. 138, slip op. at p. 7–8 (2012). The General Counsel contends that because there is no dispute that Perez' Facebook posting was the basis for his discharge, his discharge violated Section 8(a)(1) and (3) of the Act.

Respondent argues that it lawfully discharged Perez based upon his Facebook posting, because the posting was unprotected "online griping" that did not address a term and condition of employment. Respondent further argues that under the *Atlantic Steel Co.* analysis, Perez' Facebook posting lost the protection of the Act. Respondent argues that as a result it legitimately discharged Perez for his Facebook posting, and did not violate Section 8(a)(1) and (3).

2. Perez' Facebook posting constituted protected concerted activity, and protected activity on behalf of the EGU

The evidence establishes that Perez was engaged in both Union and protected concerted activity within the meaning of Section 7 of the Act when he posted his remarks regarding McSweeney on October 25. Section 7 of the Act provides that "employees shall have the right to self organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Concerted activity directed toward supervisory conduct, such as "rude, belligerent, and overbearing behavior" which directly affects the employees' work, constitutes protected activity under the Act. *Arrow Electric Co.*, 323 NLRB 968, 970 (1997), enfd. 155 F.3d 762 (6th Cir. 1998).

The evidence here establishes that Perez' Facebook comments were part of a sequence of events involving the employees' attempts to protest and ameliorate what they saw as rude and demeaning treatment on the part of Respondent's managers, including McSweeney. Indeed, it is not unreasonable to conclude from the record here that what the employees considered to be hostile and degrading treatment by managers was one of the principal concerns engendering their organizing activities. For example, the petition regarding employee complaints Gonzalez presented to Stillwell in March 2011 includes a number of issues involving managers' treatment of servers, such as, "Managers and captain[s] don't treat the staff with respect," "Managers and captains take their job frustration [out] with the staff," and "Managers and captains make the staff feel that the server position is lower." (GC Exh. 3.) Subsequently, Gonzalez conveyed a complaint that Martin had referred to the service staff as "animals" to Stillwell and Giordano, and told them that the servers had an ongoing problem with the lack of respect shown to them by managers. Lora also testified that he complained to Stillwell and Giordano after McSweeney referred to him as "stupid," a complaint also made by employee Lysette Roman based upon a separate incident. In the weeks prior to the election, McSweeney had twice directed groups of employees which included both Gonzalez and Perez to disperse, once using language which clearly referred to their union activities, in a manner which the employees involved considered to be harsh and inappropriate.

Evaluated in this context, Perez' Facebook posting on October 25 constituted part of an ongoing sequence of events related to the servers' dissatisfaction with the manner in which they were treated by Respondent's managers. Gonzalez, Perez, and Lora all testified that on October 25 McSweeney directed them to "spread out" twice, in a harsh and progressively louder tone of voice.[36] McSweeney's conduct was sufficiently similar to previous incidents the servers considered objectionable that Gonzalez took a moment to tell him, in words similar to the inoffensive portion of Perez' Facebook post, that he "needed to learn how to talk to the staff."[37] There is no real dispute that McSweeney's statements to Gonzalez, Perez, and Lora precipitated Perez' Facebook posting. In addition, because several other servers were "friends" with Perez on Facebook, Perez could anticipate that other employees, also concerned regarding demeaning treatment by managers, would see it.[38] It is well-settled that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at p. 2 (2011), quoting *Meyers Industries*, 281 NLRB 882, 887 (1986), enfd. sub nom. *Prill v NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *KNTV, Inc.*, 319 NLRB 447, 450 (1995) ("Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action"). The specific medium in

[36] I credit Gonzalez and Perez' testimony that McSweeney's volume and tone was such that it attracted the attention of a guest at a nearby table.

[37] Perez posted that McSweeney did not "know how to talk to people."

[38] Perez clearly intended other servers to see the posting, as he exhorted them to "Vote YES for the UNION."

which the discussion takes place is irrelevant to its concerted nature. See *Hispanics United of Buffalo, Inc.*, 359 NLRB No. 37, slip op. at p. 1–3 (Facebook discussion of employee's complaints regarding work performance of fellow employees concerted activity); *Timekeeping Systems, Inc.*, 323 NLRB 244, 247 (1995) (email regarding vacation policy from employees to fellow employees and management concerted activity). As a result, I find that Perez' Facebook posting was part of an ongoing sequence of events involving servers' complaints regarding the manner in which they were treated by Respondent's managers, and was therefore protected concerted activity. See e.g., *Tampa Tribune*, 351 NLRB 1324, 1325 (2007), enf. denied 560 F.3d 181 (4th Cir. 2009) (single conversation concerted when "part of an ongoing collective dialogue" between employer and employees and a "logical outgrowth" of prior concerted activity); *Circle K Corp.*, 305 NLRB 932, 933–934 (1991), enfd. 989 F.2d 498 (6th Cir. 1993) ("invitation to group action" concerted activity regardless of its outcome).

For all of the foregoing reasons, I find that Perez' Facebook posting constituted protected concerted activity within the meaning of Section 7 of the Act. Because the posting explicitly encouraged viewers to "Vote YES for the UNION," I find that it also constituted activity on behalf of the EGU.

3. Perez' Facebook posting did not lose its protected character under the *Atlantic Steel* analysis

I conclude based upon the evidence overall that Perez' Facebook comments were not sufficiently egregious as to lose the protection of the Act under *Atlantic Steel* and its progeny. The *Atlantic Steel* analysis requires the consideration of four factors: (i) the place of the discussion; (ii) the discussion's subject matter; (iii) the nature of the outburst on the part of the employee; and (iv) whether the outburst was provoked by the employer's unfair labor practices. See, e.g., *Plaza Auto Center, Inc.*, 355 NLRB 493, 494 (2010), remanded 664 F.3d 286 (9th Cir. 2011), citing *Atlantic Steel*, 245 NLRB at 816. These four criteria are intended to permit "some latitude for impulsive conduct by employees" during protected concerted activity, while acknowledging the employer's "legitimate need to maintain order." *Plaza Auto Center, Inc.*, 355 NLRB 493, 494. As the Board has stated, the protections of Section 7 must "take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 130, 131, 132 (1986). Therefore, statements during otherwise protected activity lose the Act's protection only where they are "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008), quoting *Dreis & Krump Mfg. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976).

a. The location of the discussion

The first of the *Atlantic Steel* factors—the place of the discussion—militates in favor of a finding that Perez' comments did not lose the protection of the Act. The comments were contained in a Facebook posting, and not made during a face-to-face discussion at the workplace, so there is no possibility that the discussion would have immediately disrupted Respondent's work environment. *Fresnius USA Mfg.*, 358 NLRB No. 138, slip op. at p. 5 (comments distributed via newsletter in the employee breakroom "unlikely to disrupt production"); *Datwyler Rubber & Plastics*, 351 NLRB 669, 670 (2007) (outburst during a meeting in the employee breakroom not disruptive to work processes). Indeed, the evidence establishes that Perez posted his comments on the apron outside of the facility while on a break, with no other employees participating at the time. Nor was there was any direct confrontational challenge to any particular manager's authority in the workplace. Furthermore, there is no evidence that Perez' comments interfered with or disrupted Respondent's relationships with its customers, or that customers even saw them.[39]

Respondent argues that the first component of the *Atlantic Steel* analysis militates against protection, in that Perez intended to undermine McSweeney's authority by "holding him out to ridicule" in front of other employees on a public Facebook page. However, it is clear from the cases discussed above that in evaluating this factor, the Board is concerned with the immediate, contemporaneous disruption of workplace discipline, managerial authority, and customer service caused by the employee outburst in question. See *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 5; *Datwyler Rubber & Plastics*, 351 NLRB at 670; *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 6. The evidence here does not establish that Perez' Facebook comments caused any such immediate disruption to Respondent's workplace. In addition, while the evidence establishes that, as Respondent contends, access to Perez' Facebook page was not solely limited to Perez' Facebook "friends," the fact remains that the Facebook page where Perez posted his comments was his own, and not Respondent's. In addition, as discussed above there is no evidence in the record that Perez' comments disrupted Respondent's business activities or customer relationships.

For all of the foregoing reasons, the first component of the *Atlantic Steel* analysis, the location of the discussion, militates in favor of a finding that Perez' Facebook comments did not lose their protected character.

b. The subject matter of the discussion

The second of the *Atlantic Steel* factors—the subject matter of the discussion—strongly supports a conclusion that Perez' Facebook comments remained protected. As discussed in Section III(C)(2), above, the evidence establishes a significant background of servers' activities challenging rude and demeaning treatment by Respondent's managers. Gonzalez and Lora, in addition to Perez, were offended by McSweeney's conduct on October 25. They believed that McSweeney singled out Gonzalez because of her union activities, as he had in the past, and were also upset with the manner in which McSweeney

[39] In other cases, the Board has held that without evidence of disruption to customers, even their presence during brief episodes of impulsive behavior in the midst of otherwise protected activity is insufficient to remove the activity from the protection of Section 7. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 6 (2011); *Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008).

spoke to them. Perez' Facebook comments were a direct response to McSweeney's statements to the three employees earlier that evening, and his assertion that McSweeney "don't know how to talk to people," echoed Gonzalez's statement to McSweeney that he "needed to learn how to talk to the staff." As a result, I find that Perez' Facebook comments protested, and communicated to other employees, what he, Gonzalez, and Lora considered to be degrading and inappropriate treatment on McSweeney's part, an instance of the managerial conduct which Respondent's employees had been objecting to for some time. As a result, as discussed in Section III(C)(2), I conclude that Perez' Facebook comments constituted protected concerted activity. Because Perez' Facebook comments also included, "Vote YES for the UNION," they also constitute activity on the Union's behalf. The subject matter of Perez' discussion therefore militates strongly in favor of a finding that his comments remained protected.

c. The nature of the outburst

The third of the *Atlantic Steel* factors involves the nature of the outburst itself. While Perez' comments referring to McSweeney as a "nasty motherfucker" and declaring, "Fuck his mother and his whole fucking family," include obscenities and are offensive, given the evidence overall I do not find that this component of the analysis removes Perez' comments from the Act's protection.

First of all, it is well-settled that the use of the word "fuck" and its variants, including the term "motherfucker," is insufficient to remove otherwise protected activity from the purview of Section 7. See *Plaza Auto Center*, NLRB 493, 494–497 (2010) (employee's activity remained protected, despite reference to owner as a "fucking motherfucker," "fucking crook," and "asshole," as "a single verbal outburst of insulting profanity does not exceed the bounds of the Act's protection"); *Tampa Tribune*, 351 NLRB at 1324–1325 (employee called company vice president a "stupid fucking moron"); see also *Alcoa, Inc.*, 352 NLRB 1222, 1225–1226 (2008) (employee referred to supervisor as an "egotistical fucker"); *Burle Industries*, 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a "fucking asshole"). In addition, Perez' Facebook comments were not made directly to McSweeney, and did not involve any insubordination, or physically threatening or intimidating conduct.[40] See *Plaza Auto Center*, 355 NLRB 493, at 495–496 (nature of outburst "not so opprobrious" as to deprive employee of statutory protection where no evidence of physical harm or threatening conduct); *Tampa Tribune*, 351 NLRB at 1326 (employee's outburst remained protected where not directed at manager and unaccompanied by physical conduct, threats, or confrontational behavior).

In addition, the evidence establishes that profanity was regularly used by Respondent's employees and managers when guests were out of earshot, such as during the set-up period before the guests' arrival, in the kitchen, and in the locker room, without disciplinary consequences. See *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 6 (considering routine workplace use of profanity and crude speech as a context for evaluating the nature of an employees' allegedly offensive outburst during otherwise protected activity). I credit the testimony of Gonzalez, Perez, Lora, Ramirez, and Martinez, that Executive Chef Phil DeMaiolo cursed at employees on a daily basis, screaming phrases such as "What the fuck are you doing?," "Motherfucker," "Are you guys fucking stupid?" "Stop fucking talking like that," and "You should ask what the fuck you're picking up." Bergman testified that DeMaiolo supervises 40 employees, is a department head, and sits on Respondent's steering committee.[41] I further credit the testimony of Perez, Ramirez, and Martinez that stewarding supervisor Felix Acosta, who directs the work of the dishwashers, also screamed profanities at the servers, such as "What the fuck is this?," "Why are you fucking guys slow?," "What the fuck are you guys doing?" and "Asshole." I credit Perez and Martinez's testimony that McSweeney had used profanity, telling an employee, "Stop fucking around or I'm going to send you home," and occasionally using "fuck" and "shit," and I credit as well their testimony that Macias and Martin used similar expletives on a more frequent basis. I also credit Ramirez' testimony that Giordano and Chef Francisco had a profanity-charged confrontation in the locker room in early 2012, wherein Giordano called Francisco a "fucking little Mexican," and a "motherfucker" who should "eat shit," which Francisco countered with, "Fuck you, motherfucker, what are you going to do?" The evidence establishes that despite the daily use of such profanity, Respondent has only issued discipline to employees involving the use of inappropriate language on five occasions since 2005, and three of these incidents also involved the refusal to comply with a supervisor's directive.[42] This evidence indicates that the use of profanity not dissimilar from Perez' Facebook remarks was a daily occurrence in Respondent's workplace, and did not engender any disciplinary response.

Respondent argues that Perez' statement "Fuck his mother and his entire fucking family" is distinguishable from a passing epithet uttered in frustration. Respondent contends that the statement is, as Bergman testified, "extreme" in that it is a more

[40] In *DaimlerChrysler Corp.*, cited by Respondent, the employee approached his supervisor in an "intimidating" manner before loudly telling the supervisor "fuck this shit," and the employer had previously disciplined the employee's coworker for using profanity toward him. 344 NLRB 1324, 1328–1330 (2005).

[41] While Bergman testified that she was unaware of DeMaiolo's propensity for profane language, the evidence establishes that banquet managers, such as McSweeney, were present during DeMaiolo's obscene remarks to the servers on any number of occasions and knew that DeMaiolo spoke to employees in this manner.

[42] Bergman testified that in May 2007, employee Gregg Robinson was issued a counseling for telling a temporary worker that someone might want to "put a foot up her ass." In addition, the evidence establishes that in June 2005, employee Joey Gonzalez received a counseling for "berating" another employee in the kitchen, and refusing to leave the area when directed to do so by his supervisor, and that in December 2008, employee Ernie Spanakos was issued a counseling for telling another employee that she was "acting stupid" and "retarded." In November 2007, employee Juliana Lockin was issued a counseling for refusing to leave the floor after being directed to do so by her manager, and in May 2008, Lockin was suspended for 3 days and issued a final warning for eating during an event without prior supervisory approval, and refusing to remain at the workplace to discuss the issue with her supervisor after the event ended.

"personal" insult involving McSweeney's family members.[43] However, the common meaning of these statements is generally understood as an expression of hostility toward the person being insulted, and is not considered to be a literal attack on or threat against that person's family members. Given the remainder of the Facebook post providing a context for the statement—the characterization of McSweeney as a "nasty mother fucker" and a "loser" who "don't know how to talk to people," and the exhortation "Vote YES for the UNION"—the statement is more plausibly interpreted as an epithet directed to McSweeney himself, as opposed to a slur against his family. The Board has previously considered the colloquial meaning and context for statements in order to determine their nature and import. See *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 6 ("Warehouse workers, R.I.P." not threatening given lack of physical or threatening conduct associated with statement); *Kiewit Power*, 355 NLRB 708, 710 (2010) (employee's claim that "it was going to get ugly," and that supervisor "better bring [his] boxing gloves" ambiguous absent intimidating conduct); *Leasco, Inc.*, 289 NLRB 549 fn. 1 (1988) (employee assertion that "if you're taking my truck, I'm kicking your ass right now" a nonthreatening "colloquialism"). In addition, Respondent's contention that employees and managers did not use obscenities in a personal manner is undermined by the evidence described above, such as DeMaiolo's asking servers "Are you guys fucking stupid?," Acosta's statement "Why are you fucking guys slow?," and Giordano's referring to Francisco as a "fucking little Mexican." Overall, while Perez' Facebook comment regarding McSweeney may have differed from these statements on the part of Respondent's managers in intensity, it was not a qualitative departure from what was tolerated by Respondent in the workplace on a daily basis.

For all of the foregoing reasons, the third component of the *Atlantic Steel* analysis militates in favor of a finding that Perez' activity remained protected.

d. Whether the outburst was provoked

Finally, I find that the fourth component of the *Atlantic Steel* analysis, whether the employee's outburst was provoked by some conduct of Respondent's, weighs slightly against a finding that Perez' activity remained protected. The Board has held in the context of the *Atlantic Steel* analysis that employer conduct provoking an intemperate remark need not be explicitly alleged as an unfair labor practice, so long as the conduct in question evinces an intent to interfere with protected rights. *Network Dynamics Cabling, Inc.*, 351 NLRB 1423, 1427–1429 (2007) (employee outburst provoked by manager's admonishment that he cease engaging in union activity); *Overnite Transportation*, 343 NLRB 1431, 1437–1438 (2004) (supervisor provoked union steward's intemperate remarks by refusing to discuss employee discharges, where steward was lawfully seeking information relevant to possible grievances).

The evidence here establishes that Perez made his Facebook comments directly in response to McSweeney's interaction with him, Gonzalez, and Lora earlier that evening. I credit Perez' testimony, corroborated by Gonzalez, that he was extremely upset by the encounter with McSweeney, took a break to calm himself and, during this break, posted his comments on Facebook. I also credit Gonzalez, Perez, and Lora's testimony that McSweeney approached them forcefully and spoke to them in a harsh tone of voice. I further credit their testimony that they associated McSweeney's conduct with previous incidents of disrespectful and demeaning treatment, an ongoing issue between the servers and management. Indeed, the servers were sufficiently upset by McSweeney's conduct that Gonzalez confronted him about it later, telling him that he needed to learn how to speak to the staff. Finally, as discussed above, during the month prior to this incident, McSweeney unlawfully applied the "no-talk" rule on two occasions to Gonzalez and Perez, at one point telling them "take your meetings outside," an obvious reference to the organizing on behalf of EGU.

Ultimately, however, the evidence is insufficient to establish that McSweeney's conduct during the incident which precipitated Perez' Facebook comments involved an intent to interfere with protected rights in the manner at issue in previous Board decisions. Because guests were present at the time that McSweeney directed Gonzalez, Perez, Lora, and the other servers to "spread out," his conduct did not constitute a disparate enforcement of Respondent's "no talk" rule, and is not alleged as such.[44] By contrast, as discussed above, in *Network Dynamics Cabling, Inc.*, the intemperate remarks at issue were provoked by a supervisor's demand that the employee cease engaging in union activity. 351 NLRB at 1427–1429. Similarly, in *Overnite Transportation*, the Board found that the supervisor provoked the outburst in question by refusing to provide the employee steward with information to which he was legally entitled. 343 NLRB at 1437–1438. Furthermore, the situations addressed by the Board in *Starbucks Coffee Co.* and *Felix Industries*, cited by the General Counsel, are not analogous to the circumstances at issue here. *Starbucks Coffee Co.*, 354 NLRB No. 99 (2009), 355 NLRB 636 (2010) (three member panel); *Felix Industries*, 331 NLRB 144 (2000), remanded 251 F.3d

[43] Bergman also asserted during her testimony that she considered Perez' Facebook posting potentially "defamatory." Respondent makes no legal argument in support of this claim, and as such I will not evaluate Perez's Facebook comments under case law involving defamation. *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. United Plant Guard Workers*, 383 U.S. 53 (1966). Bergman also testified that Perez' Facebook posting could constitute "harassment," and Respondent apparently contended at the hearing regarding Perez' entitlement to unemployment benefits that Perez was discharged for violating its harassment policy. However, I find that Respondent's policy prohibiting harassment is not pertinent to Perez' Facebook comments. The policy prohibits harassment based upon protected classifications established in Federal, State, and local laws prohibiting employment discrimination. The policy addresses "unwelcome slurs, threats, derogatory comments or gestures, joking, teasing, or other similar verbal, written or physical conduct" to the extent that it is "directed towards an individual because of one of these protected classifications." Respondent does not argue that any such invidious motivation is at issue here.

[44] While Gonzalez stated that she had never been told to "spread out" or stop speaking to other employees, Martinez testified that McSweeney had instructed her to do so when guests were present during an event, so that McSweeney's conduct in this regard was not unprecedented.

1051 (D.C. Cir. 2001), opinion after remand 339 NLRB 195 (2003). In *Starbucks Coffee Co.*, the outburst was provoked by supervisory conduct had been alleged as an unfair labor practice in a complaint recently issued by the NLRB Regional Office, which later settled prior to a hearing. 354 NLRB No. 99, slip op. at 33. In *Felix Industries*, the Board noted that the provocative conduct "likely would have been found to be an unfair labor practice had it been alleged." 331 NLRB at 145. Here, however, the evidence establishes that McSweeney's conduct which precipitated Perez' posting, while perhaps interpersonally rude and therefore relevant to the employees' ongoing protected concerted and union activity, was never construed as unlawful, or as an interference with the employees' Section 7 rights. As a result, the evidence establishes that Perez' comments were not provoked within the meaning of the *Atlantic Steel* analysis, and this factor weighs slightly against Perez' activity retaining its protected character. See *Tampa Tribune*, 351 NLRB at 1326 (fourth *Atlantic Steel* factor weighs "slightly against" continued protection where outburst was provoked by "lawful communications").

Overall, the evidence establishes that the first, second, and third components of the *Atlantic Steel* analysis weigh in favor of a conclusion that Perez' Facebook posting retained its protected character, the second factor militating strongly in favor of a finding that Perez' activity remained protected. I find that the fourth component of the analysis weighs slightly against continued protection. As a result, overall the *Atlantic Steel* factors engender the conclusion that Perez' Facebook posting did not lose the protection of the Act. Therefore, by discharging Perez because of his Facebook posting, Respondent violated Section 8(a)(1) and (3) of the Act.

4. Perez' Facebook posting retained its protected nature under a totality of the circumstances analysis

Finally, the evidence establishes that Perez' activity did not lose its protected character under the totality of the circumstances analysis, incorporating but not specifically addressing the *Atlantic Steel* factors, which the Board has occasionally used to evaluate statements made by one employee to another. See, e.g., *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 7–8; *Honda of America Mfg.,* 334 NLRB 746, 747–749 (2001). The totality of the circumstances approach includes, in addition to the elements of the *Atlantic Steel* analysis, considerations such as: (i) whether the employer maintained a specific rule prohibiting the language used by the employee; (ii) whether the employer generally considered language such as that used by the employee to be offensive; (iii) whether the employee's statement was impulsive or deliberate; (iv) whether the discipline imposed upon the employee was typical of that imposed for similar violations, or disproportionate to the employee's offense; (v) whether the discipline was clearly directed at offensive language as opposed to protected activity; (vi) whether the record contains any record of anti-union hostility; and (vii) whether the employee had previously engaged in similar protected conduct without objection. *Honda of America Mfg.,* 334 NLRB at 748.

The evidence establishes that these additional considerations ultimately support the conclusion that Perez' activity did not lose its protected character. As discussed in Section III(C)(3)(c) above, the "Other Forms of Harassment" policy maintained by Respondent does not encompass vulgar or offensive language in general. The policy only addresses such statements when they are "directed toward an individual because of one of [the] protected classifications" the policy covers, such as "age, race, religion, color, national origin, citizenship, disability, marital status," and the like. As discussed in further detail in Section III(C)(3)(c) above, the evidence adduced regarding the use of profanity by DeMaiolo, Giordano, McSweeney, and other managers establishes that Respondent tolerated such vulgarity, even when incorporated into personal insults. The evidence also establishes that while Perez did not have a face-to-face confrontation with McSweeney, his Facebook comments were an impulsive reaction to the encounter between McSweeney and himself, Gonzalez and Lora earlier that evening, which had upset them all. They were certainly not "premeditated" in the manner of comments published in a written newsletter and distributed weeks after the competing newsletter to which they responded. See *Honda of America Mfg.,* 334 NLRB at 746–747.

Furthermore, as discussed in Section III(C)(3)(c) above, the evidence establishes that no employee had ever been discharged for the use of obscene or vulgar language in the past, and that at the most employees had been issued a written counseling. The evidence establishes that despite the daily use of vulgar language, and the word "fuck" in particular, since 2005 Respondent has disciplined only five employees for incidents involving the use of inappropriate language, three of which also involved the employee's refusal to comply with a managerial directive. Compare *Fresenius USA Mfg.*, 358 NLRB No. 138, slip op. at 7 (employer "had previously dealt with vulgar employee conduct—unconnected to any protected activity—by issuing only minor discipline," as opposed to discharge); with *Honda of America Mfg.*, 334 NLRB at 748 (employee received a penalty "typical of the discipline the Respondent imposed for similar violations"). In addition, the record here establishes that Respondent committed other unfair labor practices, including threats of discharge and the loss of business and benefits, and the disparate application of its "no-talk" rule, at a time proximate to Perez' discharge. *Honda of America Mfg.*, 334 NLRB at 748 (discipline not retaliatory where record contained "no indication that Respondent is an antiunion employer," or that employer "evidenced any union hostility during counseling sessions" with employee). Indeed, the evidence regarding the disparate application of the "no-talk" rule to groups of employees including Gonzalez and Perez indicates that Respondent previously attempted to prevent him from discussing the Union. Id.

Finally, to reiterate the evidence discussed in the *Atlantic Steel* analysis, above, the record establishes that Perez' Facebook comments were made in a nonwork setting, and that employees who viewed them did so on their own time, outside of the workplace. There was no direct, open confrontation with McSweeney in the workplace that would have undermined employee discipline or supervisory authority. There was no physically intimidating or threatening conduct involved, and no evidence of disruption to Respondent's operations or to its rela-

tionships with its customers. Although the Facebook comments themselves were vulgar and contained obscenities, they involved an issue—demeaning and disrespectful treatment by management—of critical concern to the employees during their protected concerted activities. Perez' comments also referred to the upcoming union election, and did not constitute a threat.

For all of the foregoing reasons, the evidence overall establishes that Perez' Facebook comments did not lose the Act's protection under a totality of the circumstances analysis. As a result, Respondent's discharge of Perez based upon his Facebook posting violated Section 8(a)(1) and (3) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Pier Sixty, LLC, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Evelyn Gonzalez Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By threatening employees with the loss of current benefits if the Union prevailed in a representation election, Respondent violated Section 8(a)(1) of the Act.

4. By informing employees that "bargaining will start from scratch" in an unlawful manner, Respondent violated Section 8(a)(1) of the Act.

5. By threatening employees with discharge if the Union prevailed in a representation election, Respondent violated Section 8(a)(1) of the Act.

6. By threatening employees with the loss of business if the Union prevailed in a representation election, Respondent violated Section 8(a)(1) of the Act.

7. By applying its "no talk" rule in a disparate manner to prohibit employee discussions involving the Union during worktime, Respondent violated Section 8(a)(1) of the Act.

8. By discharging Hernan Perez in retaliation for his Union and protected concerted activities, Respondent violated Section 8(a)(1) and (3) of the Act.

9. Respondent has not violated the Act in any other manner.

10. The above-described unfair labor practices affect commerce within the meaning of Section 2(2), (6), and (7) of the Act.

THE REMEDY

Having found that Respondent has violated Section 8(a)(1) and (3) of the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having found that Respondent violated the Act by discharging Hernan Perez, Respondent shall be ordered to reinstate Perez to his former or substantially equivalent position, dismissing, if necessary, any employees hired subsequently, without prejudice to Perez' seniority or other rights and privileges Perez previously enjoyed. Respondent shall further be ordered to make Perez whole for any loss of earnings he may have suffered as a result of its unlawful conduct, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest as set forth in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010), enf. denied on other grounds 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters, and shall compensate Perez for the adverse tax consequences, if any, of receiving one or more lump-sum backpay award covering periods longer than 1 year. *Latino Express, Inc.*, 359 NLRB No. 44 (2012). Finally, Respondent shall be ordered to post a notice, in English and Spanish, informing its employees of its obligations herein.

Upon the foregoing findings of fact and conclusions of law, and upon the entire record, I issue the following recommended[45]

ORDER

Respondent Pier Sixty, LLC, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees because they engage in protected concerted activities or activities on behalf of the Union.

(b) Threatening employees with the loss of current benefits in retaliation for their union support and activities.

(c) Informing employees that "bargaining will start from scratch" in an unlawful manner.

(d) Threatening employees with discharge in retaliation for their union support and activities.

(e) Threatening employees with the loss of business in retaliation for their union support and activities.

(f) Applying its "no talk" rule in a disparate manner to prohibit employee discussions regarding the Union on worktime.

(g) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed to 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 immediate and full reinstatement to Hernan Perez to his former position or, if such position no longer exists, to a substantially equivalent position, without prejudice to Perez' seniority or to other rights and privileges Perez previously enjoyed.

(b) Make whole with interest Hernan Perez for any lost wages he may have suffered as a result of Respondent's unlawful discrimination against him, in the manner set forth in the Remedy section of this decision.

(c) Within 14 days of the date of this Order, remove from all files any reference to the discharge of Hernan Perez on November 9, 2011, and within 3 days thereafter, notify Perez in writing that this has been done and that the discharge will not be used against him in any way.

(d) 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

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

records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay, if any, due under the terms of this Order.

(e) Within 14 days after service by the Region, post at the facility at the Chelsea Piers, New York, New York, copies of the attached notice marked "Appendix."[46] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, 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. Notices shall be posted and, if pertinent, electronically distributed, in English and Spanish. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 22, 2011.

(f) 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 Respondent has taken to comply.

Dated, Washington, DC April 18, 2013

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in activities on behalf of the Evelyn Gonzalez Union (EGU), or other protected concerted activities.

WE WILL NOT threaten you with discharge in retaliation for your support for or activities on behalf of EGU.

WE WILL NOT tell you that "bargaining will start from scratch" in an unlawful manner.

WE WILL NOT threaten you with the loss of business in retaliation for your support for or activities on behalf of EGU.

WE WILL NOT threaten you with the loss of benefits in retaliation for your support for or activities on behalf of EGU.

WE WILL NOT apply our "no talk" rule to prohibit conversations about EGU during worktime, when we permit employees to talk about other nonwork-related matters.

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

WE WILL within 14 days of the date of the Board's Order, offer Hernan Perez full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed.

WE WILL make Hernan Perez whole for any loss of earnings and other benefits suffered as a result of his discharge, less any net interim earnings, plus interest compounded daily

WE WILL file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters.

WE WILL compensate Hernan Perez for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Hernan Perez, and within 3 days thereafter, notify Perez in writing that this has been done and that the discharge will not be used against him in any way.

PIER SIXTY, LLC

[46] 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."