Mexican Radio Corp. and Rachel Nicotra. Case 02–CA–168989

April 20, 2018

DECISION AND ORDER

BY MEMBERS MCFERRAN, KAPLAN, AND EMANUEL

On April 26, 2017, Administrative Law Judge Kenneth W. Chu issued the attached decision. The Respondent filed exceptions with supporting argument, and the General Counsel filed an answering brief. In addition, the General Counsel filed limited cross-exceptions and a supporting brief.

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, as modified herein, and to adopt the recommended Order as modified and set forth in full below.[2]

1. We agree with the judge that employees Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino engaged in protected concerted activity when they replied in agreement to a group email written by a former employee, Annette Polanco, that complained about wages, work schedules, tip policies, working conditions, and management's treatment of employees.[3] We further agree that their replies were not so egregious as to cause them to lose the protection of the Act. As the judge noted, the email was part of an ongoing dialogue between the workers and the Respondent and was a reaction to the Respondent's failure to correct the problems perceived by the employees; the email contained little profanity and was merely a critique of the Respondent's management style; the employees did not add to the email with any negative comments of their own; the email was nonpublic and did not cause a loss of reputation or business for the Respondent; and there was no disruption of business.

To the extent that the Respondent contends that the discharges were based on reasons other than responding in agreement to Polanco's email, we agree with the judge's finding that these other purported reasons were pretextual. Therefore, the Respondent failed to meet its burden of showing that it would have taken the same action absent the protected activity. *Rood Trucking Co*., 342 NLRB 895, 897–898 (2004).

Accordingly, because the Respondent's decision to reprimand and discharge these four employees was based on their protected concerted activity, the Respondent violated Section 8(a)(1) of the Act by its actions.

2. We find merit in the General Counsel's exception to the judge's failure to find that the Respondent violated Section 8(a)(1) when it retroactively issued Tangni Fagoth a written reprimand on November 5, 2015.[4] This reprimand concerned Fagoth's purported failure to notify management immediately about an incident that occurred on October 9, in which an employee allegedly threatened the kitchen staff with a knife. After her discharge, Fagoth, along with the other three discriminatees, filed an unemployment claim with the New York State Department of Labor. Upon receiving notification of Fagoth's unemployment claim, the Respondent drafted a reprimand for the October 9 incident and backdated it to October 10, despite the Respondent's failure to issue Fagoth any discipline at the time of the incident.

We find that this allegation is, at the very least, closely connected to the subject matter of the complaint and was fully litigated at the hearing, as would be required by *Pergament United Sales*, 296 NLRB 333 (1989), enfd. 920 F.2d 130 (2d Cir. 1990), to find a violation not alleged in the complaint.[5] Furthermore, the evidence shows that until Fagoth sought compensation for this unlawful discharge, the Respondent did not seek to discipline her for this incident. Therefore, Fagoth's protected concerted activity prompted the Respondent to unlaw-

[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 to conform to the violations found and to the Board's standard remedial language, and we shall substitute a new notice to conform to the Order as modified.

[3] The Respondent excepts to the judge's findings pertaining to events not specifically pled in the complaint. We rely on these findings merely as background evidence. Cf. *CSC Holdings, LLC and Cablevision Systems New York City Corp.*, 365 NLRB No. 68, slip op. at 4 fn. 14 (2017).

[4] All dates hereinafter are in 2015, unless otherwise indicated.

[5] The complaint, as amended at the hearing without objection by the Respondent, alleges in pars. 6(c), (e), and (f) that on or about October 30, the Respondent prepared and/or issued reprimands to Fagoth because she engaged in protected concerted activities and to discourage employees from engaging in such activities. Contrary to the judge's statement that the reprimand issued to Fagoth on November 5, and backdated to October 10, "was not raised as an allegation in the complaint and need not be addressed," we find that an allegation concerning this backdated reprimand is in all practical terms identical to and encompassed by the allegation in pars. 6(c), (e), and (f) and thus is at the very least closely related to the subject matter of the amended complaint.

fully issue this reprimand. As a result, we find that the Respondent violated Section 8(a)(1) by retroactively issuing the October 10 reprimand to Fagoth.

ORDER

The National Labor Relations Board orders that the Respondent, Mexican Radio, Corporation, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or disciplining employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(b) Make Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.

(c) Compensate Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years for each employee.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharges and disciplines of Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino and all references to any notes, memoranda, and any other written documents prepared in response to and in defense of the unemployment insurance claims filed by them with the New York State Department of Labor, and within 3 days thereafter, notify the employees in writing that this has been done and that the discharges, disciplines, and any of these other documents will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its New York, New York facility copies of the attached notice marked "Appendix."[6] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the 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 the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If 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 October 29, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 2 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 20, 2018

Lauren McFerran, Member

Marvin E. Kaplan, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

[6] 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."

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 any of you because you engaged in protected concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino whole for any loss of earnings and other benefits resulting from their discharges, less any net interim earnings, plus interest, and WE WILL also make such employees whole for their reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 2, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any references to the unlawful disciplines and discharges of Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino, including all references to any notes, memoranda, and any other written documents prepared in response to and in defense of the unemployment insurance claims filed by them with the New York State Department of Labor, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that their disciplines, discharges, and any of these other documents will not be used against them in any way.

MEXICAN RADIO CORP.

The Board's decision can be found at www.nlrb.gov/case/02-CA-168989 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Audrey Eveillard, Esq. and *Joseph Luhrs, Esq.,* of New York, New York, for the General Counsel.

Dana L. Salazar, Esq. and *Kathleen McAchran, Esq.,* of East Greenbush, New York, for the Respondent.

Rachel Nictora, Esq., of New York, New York, for the Charging Party.

DECISION

STATEMENT OF THE CASE

KENNETH W. CHU, Administrative Law Judge. This case was tried in New York, New York, on September 13, 27, 28, October 11, 12, November 16 and 17, 2016. Rachel Nicotra, an attorney, filed the initial and amended charges.

Pursuant to a complaint issued by Region 2 of the National Labor Relations Board (NLRB) on May 31, 2016, and amended on September 13, 2016, it is alleged that on about October 5, 2015, the Respondent's employees Tangni Fagoth (Fagoth), Stephanie Garcia (Garcia), and Nadgie Santana (Santana) concertedly complained to Respondent regarding the wages, hours, and working conditions of Respondent's employees, by complaining about, among other things, their work schedules, Respondent's tip policies, and General Manager Theodora Alfredou's treatment of employees. Further, on about October 29, 2015, the Respondent's employees Juliana Palomino (Palomino), Fagoth, Garcia, and Santana engaged in concerted activities with other employees for the purposes of mutual aid and protection, by replying to a group email which complained about, among other things, work schedules, Respondent's tip policies, and General Manager Alfredou's treatment of employ-

ees.

The complaint alleges that on about October 30, 2015, the Respondent prepared and/or issued reprimands to employees Fagoth, Garcia, Palomino, and Santana and subsequently discharged the four employees on the same date.[1]

The complaint alleges that the Respondent reprimanded and discharged Fagoth, Garcia, and Santana because they concertedly complained about their terms and conditions of employment and to discourage employees from engaging in these or other concerted activities.

The complaint further alleges that the Respondent reprimanded and discharged Palomino, Fagoth, Garcia, and Santana because they engaged in concerted activity with others for the purpose of mutual aid and protection in replying to a group email and to discourage employees from engaging in these or other concerted activities.

The complaint alleges that by the conduct described, the Respondent has been interfering with, restraining, and coercing employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act (GC Exh. 2).[2]

The Respondent timely filed an answer denying the material allegations in the complaint (GC Exh. 1).

On the entire record, including my assessment of the witnesses' credibility[3] and my observation of their demeanor at the hearing and corroborating the same with the adduced evidence of record, and after considering the briefs filed by the General Counsel, the Charging Party and the Respondent, I make the following[4]

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a New York State corporation with an office and place of business at 19 Cleveland Place, New York, New York, operates a restaurant at 19 Cleveland Place serving food and beverages to the public, where it derived gross revenues valued in excess of $500,000. It purchased and received at its New York, New York restaurant, goods and materials valued in excess of $5000 directly from points outside the State of New York. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

Background

The Respondent operates a food and beverage public restaurant. At the time of this complaint, the Respondent's corporate office was located in Schenectady, New York, and was operating restaurants in Schenectady, Hudson County and New York City. The Respondent's restaurant at issue in this complaint is located at 19 Cleveland Place, New York, and has been opened since 1996.

The Respondent is co-owned by Mark Young (Young) with Lori Selden (Selden) since December 1, 1999, to the time of this hearing. They are equally responsible for the operation and decision-making of the business. The coowners have the authority to hire, fire, suspend, promote, and to reassign, lay off, and recall employees. The Respondent hired Steve Morgan (Morgan) as the director of operations on March 16, 2015, through January 1, 2016.[5] Morgan also had the authority to hire, fire, reassign, suspend, lay off, and recall employees. The co-owners and Morgan work in the Schenectady office and travel as necessary (Jt. Exh. 1).

At the time of the complaint, the Respondent's New York City restaurant (restaurant) employed approximately 23 workers, with 12 working at the front of the house. The employees working at the front of the restaurant were the hostess, bartenders, shift supervisors, waiters/waitresses and the general manager. The wait staff took customers' orders, served the food, collected the customers' payments, and cleaned the tables. The restaurant also employed "runners" who assisted the wait staff in clearing the finished plates and cleaning the tables. The first general manager for the restaurant was Michael Mogavero, who left in 2011. John Petrow (Petrow) replaced Mogavero and continued to serve as the manager until August 2015.[6]

The Respondent hired Theodora Alfredou (Alfredou) as the general manager on August 5, 2015, through December 19, 2015, to replace Petrow. At all material times, Alfredou had the authority to hire, fire, transfer, promote, suspend, discipline, and lay off or recall employees (Jt. Exh. 1). Petrow was reemployed to his former position as bartender at an hourly rate of $11 dollars (Tr. 19–25).

Tangni Fagoth was employed as a waitress in the restaurant in August 2010. Stephanie Garcia was employed as a waitress in April 2010. Garcia was initially hired as a hostess and was reassigned to a waitress in September 2011. Nadgie Santana was initially hired as a hostess in January 2009 and was reassigned to a waitress in spring 2013. Juliana Palomino started working at the restaurant in 2012 as a hostess and reassigned to a waitress in September 2013.

Tangni Fagoth's Terms and Conditions of Employment with the Respondent

Tangni Fagoth (Fagoth) worked as a waitress since August 2010 and had also served as a shift supervisor towards the latter part of 2014. Fagoth testified that her primary responsibility as a shift supervisor was to record in the restaurant's daily log of activities during her watch so that the owners, Morgan and Petrow would know what had occurred on her shift. Fagoth

[1] All dates are in 2015 unless otherwise noted.

[2] The exhibits for the General Counsel are identified as "GC Exh." and the Respondent's exhibits are identified as "R. Exh." Joint Exhibits by the parties are identified as "Jt. Exh." The posthearing briefs are identified as "GC Br." for the General Counsel, "CP. Br." for the Charging Party and "R. Br." for the Respondent. The hearing transcript is referenced as "Tr."

[3] Witnesses testifying at the hearing included Tangni Fagoth, Stephanie Garcia, Juliana Palomino, Nadgie Santana, Mark Young, Lori Selden, John Petrow, and Stephen Eckert.

[4] I find that all parties submitted their posthearing briefs on a timely basis.

[5] It was not seriously disputed that Lori Selden is a supervisor of Respondent within the meaning of Sec. 2(11) of the Act and/or an agent within the meaning of Sec. 2(13) of the Act.

[6] Chris Stein was hired for less than 1 month in 2014 and Petrow became the manager again after Stein left.

testified that she served 2 or 3 days per week as a shift supervisor. She would serve as a supervisor for her entire shift, which was usually from 4 p.m. until the restaurant closed. Fagoth was also a waitress during her supervisory shifts.

Fagoth said that she had no additional responsibilities as a supervisor other than to enter the daily activities in the log. In contrast, Fagoth asserted that Petrow continued to exercise his supervisory responsibilities after Alfredou was hired as the new general manager in August and Petrow had returned to his bartender position. Fagoth testified that Petrow continued to deal with the vendors, paid the staff, disciplined and assigned the workers and did the schedule and assignments of the workers in 2015 while Alfredou was the manager. Fagoth also stated that Petrow was in charge of the restaurant when Alfredou was not working on Sundays. Fagoth repined that she never had these additional responsibilities while as a shift supervisor. Fagoth also maintained that Petrow was assigned six or seven supervisory shifts while her own shift was reduced to one in August. Fagoth testified that she first noticed a reduction in her supervisory shifts in the second week of August (Tr. 328).

Fagoth further testified to other changes when Alfredou was hired. Fagoth said that Alfredou was rude, loud and cursed at the wait staff in front of the customers and made discriminatory remarks about her coworkers. Fagoth said that she discussed the disparate and demeaning treatment of the wait staff by Alfredou with the other servers, particularly with Juliana Palomino, Nadgie Santana, Noemi Rivera, and Angelica Robleto a day prior to her complaint to Steve Morgan by email on August 9.[7] (Tr. 306–326; 384–387)

Fagoth emailed Morgan at 6:50 p.m. on August 9 to complain about Alfredou (GC Exh. 6b). The email stated

> Hi Steve,
>
> This is in regards to the New GM. I understand we have lots of things to take of ASAP but she is going in all the wrong ways approaching us. She is coming in a very aggressive way. We have had the same staff for a while and trust me I know we need to take care of things but there is no reason to be aggressive or disrespectful about it. We have all being loyal to Mexican Radio, when we didn't have a manager, when everything was breaking down, when no one was making money. The least she can do is schedule a meeting and introduce herself properly and be nice to the staff. If things keep going this way soon everyone will be leave including me. I will not work at a place where I'm being spoken down to. Not after everything I've done.
>
> Tangni

It seems that Fagoth then forwarded the same email 2 minutes later to Lori Selden and copied Mark Young (GC Exh. 6a). Upon further reflection, Fagoth emailed Selden at 11:34 p.m. on the same date and stated

> Hi Lori, I hope you don't take the previous Email to offense. I'm just not happy on the way she is approaching us and the demeaning way she is speaking to us. I just wanted to reach out to our human resources guy so he can look into it. Lori I hope you know I care for the restaurant and I know we need to move forward and for the best and I will keep doing a good job like I have been.
>
> Tangni

The record does not indicate if Morgan had responded to Fagoth's email, but Selden responded in the morning of August 10 and stated to Fagoth that "Not a problem Tangni. I will speak with Steve today and thank you for letting me know" (GC Exh. 6a).

After the August 9 email, Fagoth sent a second email to Selden with a copy to Morgan on August 12 and stated that she and other workers spoke to Alfredou on the same day and Alfredou had apologized for her "rude" behavior and represented to the workers that "it will never happen again." Morgan responded on August 13 that he was pleased that "you are all making process towards coming together as true team in NYC." (GC Exh. 6c). Selden also responded on August 13 stating that Alfredou is the new person and trying to resolve longstanding issues at the restaurant. Selden expressed her appreciation that Fagoth had reached out to her to let her know how Fagoth felt (GC Exh. 6d; Tr. 402, 403).

This amicable working relationship did not last long. Fagoth testified that her relationship with Alfredou deteriorated after her August 9 email. Fagoth testified that she met with Alfredou after sending the email and Alfredou did in fact apologized for her rudeness. Fagoth maintained, however, that Alfredou became rude again from that point until Fagoth was discharged (Tr. 446, 447).

On August 14, Fagoth complained to Morgan that her supervisory shifts were reduced by Alfredou from four to two shifts and given to Petrow. Fagoth complained that "…it seems like everyone's schedule is revolving around JP (John Petrow) and I don't find that fair" (GC Exh. 6e). Fagoth testified that Alfredou told her if she did not like the shift changes, then Fagoth "could leave."

Fagoth's August 14 complaint to Morgan about her reduced schedule shifts had a temporary positive effect. The record shows that Fagoth's shifts were increased from one or two shifts to three or four supervisory shifts the week of August 17 through September 6 (Tr. 389–390; R. Exhs. 2a and 2b).

The August 25 Pre-Service Staff Meeting

Alfredou was hired on August 5. Fagoth testified that Alfredou did not formally introduce herself to the staff until August 25. Fagoth said that some of the wait staff was sitting around a table before the beginning of the evening shift. Fagoth identified herself, Annette Polanco, Angelica Robleto, and a couple of the runners as being presented at the meeting. Fagoth was not certain if Juliana Palomino and Nadgie Santana were present. Fagoth said that the wait staff complained that all the shifts were given to Petrow. Robleto complained that her tips should not be shared with the runners or that the runners should not be given an equal share of the tips as the waitresses. Fagoth testified that Polanco complained that she was switched from a bartender to a waitress. Fagoth further testified that Alfredou told the staff that "if you don't like it, you can go" and that the

[7] Noemi Rivera and Angelica Robleto were also waitresses but were not identified as discriminatees in the complaint.

changes were instructions from Young and Selden.

Fagoth maintained that Alfredou then criticized the staff. It is alleged that Alfredou said that Nadgie Santana "looks and sounds like a retard" and was wondering if Stephanie Garcia was "dead yet" referring to her absence from work due to an illness. Fagoth responded that it was not nice to judge Santana by the way she looks and her remark about Garcia was rude and mean. Fagoth testified that after the pre-service meeting, she spoke to Palomino about her reduced number of shifts. According to Fagoth, Palomino responded that she was not happy with her reduced work hours but she would keep quiet for fear of losing her job. Fagoth also stated that she spoke to Garcia over the phone that night regarding the pre-service meeting. Fagoth stated that Garcia already heard about the derogatory remark about Garcia's demise Fagoth ended the conversation with Garcia by stating that the staff was going to get together and let the owners and Morgan know about Alfredou's behavior and remarks (Tr. 333–341).

John Petrow (Petrow) testified that he was present at the August 25 meeting when Alfredou introduced herself to the wait staff. He said that tip pooling has been in place since the 1990's and the policy of sharing the tips had been determined by the employees. Petrow insisted that everyone has to agree on the tip pooling system. Petrow recalled a heated discussion between Alfredou and Robleto over whether the runners should be included with a full equal share of the tips. Petrow said that an equal share of the tips for everyone except for supervisors is the restaurant policy although there has always had heated discussion over tip pooling (Tr. 195–201; GC Exh. 10).

Stephanie Garcia's Terms and Conditions of Employment with the Respondent

Stephanie Garcia (Garcia) was employed as a waitress in April 2010. Garcia was initially hired as a hostess and was reassigned to a waitress in September 2011 at her request (Tr. 586, 587).

Garcia knew that Alfredou was hired as the general manager. Garcia was hospitalized in August and was not released from the hospital until August 25 and returned to work 2 weeks later. Garcia testified that upon her return to work, she realized that Petrow was now bartending but he had the same duties as in his former position as the manager. Garcia observed Petrow speaking with the vendors, taking restaurant receipts to the bank, dealing with liquor companies, dealing with unsanitary restaurant conditions, and handling situations in the kitchen. Garcia said that she would go to Petrow because Alfredou did not like to deal with the patrons (Tr. 587–591).

Garcia testified that on the eve of her release from the hospital on August 25, she spoke to Fagoth because she was aware that there was a pre-service staff meeting on that date. Garcia was not present at the staff meeting. Garcia testified that Fagoth stated to her that Alfredou wanted to fire Garcia because she has not been at work. At this point, Garcia decided to email Selden on August 28 (GC Exh. 7; Tr. 592). The following is an excerpt of Garcia's salient points to Selden

> Hello
>
> I am writing to you to let you know that I was informed by a few of my coworkers that the GM wants to fire me. I have been in the hospital for 8 days (sick for 3 weeks) and have kept her informed as much as I could through text message and she seemed fine and very understanding. Now I am hearing that she is upset because I did not go to her personally to let her know that I was sick…I don't think it is professional of her to go and tell people that I work with that she is going to fire me before firing Nadgie (Santana) without speaking to me or giving me a warning and telling them not to tell me about it…Sorry to bother but I am upset that she is telling everyone about firing me without speaking to me about it.

Selden replied to Garcia by email on August 28 and thanked her for letting her know about the situation and that she was sorry for Garcia's illness. Selden informed Garcia that her email was forwarded to Morgan and Young. Selden said that Morgan would be at the NYC restaurant the following day and that she will speak to Morgan before he leaves for New York (GC Exh. 7; Tr. 607).

Garcia testified that she is not aware of whether Morgan actually spoke to Alfredou regarding her email. Garcia, however, complained that her work schedule also changed under Alfredou when she returned to work in early September. She testified that her schedule was reduced to 1 shift per week from her previous schedule of 2 or 3 shifts per week. Garcia testified she spoke to Nadgie Santana and Fagoth about her changed work schedule. Garcia, like Fagoth, believed that their reduced work hours were given to Petrow and the new hires (GC Exh. 33; Tr. 593, 594). Garcia admitted that her ability to work at Mexican Radio was limited because Garcia was also working somewhere else during the month of August (Tr. 609).

Nadgie Santana's Terms and Conditions of Employment with the Respondent

Nadgie Santana (Santana) was initially hired as a hostess in January 2009 and was reassigned to a waitress in spring 2013. Santana did not work in July 2015 and returned to the restaurant in early August after her vacation. Santana testified that Petrow was the general manager when she left in July and returned to discover that Alfredou was the new manager. Santana said that Alfredou introduced herself as the new manager by text and immediately wanted to know Santana's work availability.

Santana complained that Alfredou reduced her work schedule from three to one shift when she returned. Santana stated that she returned to work on August 3 and was informed by Alfredou that she wanted to fire her in order to reduce expenses. Alfredou told Santana that it was "not personal" when she informed her that she might be discharged. Santana said that Alfredou mentioned Garcia as someone that might also be fired because of her illness. Santana testified that she left the meeting in tears and was encouraged by Fagoth and Palomino to talk with Alfredou again about her employment status. Santana said that she went back downstairs to speak with Alfredou but there were no change in Alfredou's position (Tr. 518–524).

Santana said that she emailed Selden that same night to inform her as to the way she was being treated and Alfredou's

threat to fire her.[8] According to Santana, Selden replied that Morgan will be at the restaurant the following day and she could speak to him. Santana testified she spoke to Morgan the following day and was informed that Alfredou could not fire her. Santana also testified that she reduced her school hours in order to take more work shifts. Santana subsequently made a request to Selden on August 15 to work as a nonpaid assistant manager to Alfredou under her school's internship program. Selden replied that it was a great idea and would work out the details with Alfredou. For the moment, Santana was satisfied because she was not terminated, her shift increased from one to two, and she now had the opportunity to intern as an assistant manager (Tr. 560–564; R. Exh. 3).

Santana testified that she also attended the August 25 pre-service meeting and discussed the schedule changes and tip pooling with Fagoth, Palomino and Alfredou. Santana stated that she did not work that day, but arrived at the restaurant to attend the meeting. Santana recalled that the meeting centered over the tip pool and work schedule. She testified that Fagoth was the one who complained about her reduced work shifts and Angelica Robleto complained that it was not fair that the runners would now receive an equal share of the tips. Santana said that Alfredou was insistent that the announced reduced work shifts and equal sharing of the tips will remain unchanged (Tr. 518–529).

Juliana Palomino's Terms and Conditions of Employment with the Respondent

Juliana Palomino (Palomino) worked as a waitress in September 2013 to the time of her discharge. Palomino testified that she was aware that Alfredou was hired as the General Manager in August but had observed Petrow continue to perform general manager duties, such as giving supply orders to vendors, ordering alcohol, and setting up work schedules even when Alfredou was present at work (Tr. 465–468).

Palomino was present at the pre-service meeting on August 25. She testified that the staff discussed tip pooling and scheduling at the meeting. Palomino complained that she lost a work shift with the rescheduling. Palomino also complained to Fagoth, Rivera, Netty Polanco, and others about her reduced number of shifts. Palomino recalled that she, Fagoth, Rivera and Robleto complained that it was unfair that Petrow and the runners received an equal share of the tips and that the reduced shifts were given to Petrow. Palomino maintained that Alfredou told the wait staff at the meeting that "If you guys don't like how things working here, then you can go look for another job, you can leave." Palomino testified that she spoke to Garcia over the telephone that night after the August 25 meeting and told her that Garcia might lose her job because Alfredou did not have a vacant position for Garcia and then spoke to Fagoth to complain about her schedule change (Tr. 470–473).

Petrow denied receiving more supervisory shifts when he became the bartender but admitted that every one of his shifts was a supervisory shift because he could "spell management or other supervisors." He was aware that others were upset over his additional supervisory shifts (Tr. 171–175). On this point, Selden testified that Petrow was still the "go to person" after hiring Alfredou because of his tenure at the restaurant. Selden said that Petrow trained the new bartender and that it was alright that Petrow had other duties (Tr. 274–278). There is no denying that Petrow still continued to have managerial authority in August 2015, regarding some managerial duties, including granting sick leave and replacing the sick employee with some other worker (Tr. 185–188; GC Exh. 14).

The Restaurant's Unsanitary Working Conditions

In addition to the complaints over the reduced work shifts and the equal sharing of tips with the runners by Fagoth, Santana, Palomino and Garcia made to Selden, Morgan and Young, the servers complained about the restaurant's unsanitary conditions.

Garcia testified that informed Petrow in early September of unsanitary conditions regarding mold in the ventilation system and dirty water dripping onto the tables. Garcia also reported to Petrow of a mouse that ran across a customer's table. Garcia maintained that she informed Petrow because Alfredou refused to take any action to the customer's complaint about the mouse. Garcia said that she also spoke to Fagoth about the mouse and believed that Fagoth may have spoken to Alfredou, who eventually tried to appease the customer. Garcia also recalled a second incident with a mouse that had died inside the storage area of a banquette and was emitting a noxious odor. Garcia said that she spoke to Petrow and he decided to close off a section of the restaurant. Garcia also observed Petrow taking money out of the cash register and gave the money to a runner to buy some air fresheners (Tr. 594–597).

Fagoth confirmed that the mouse incident occurred in September and that she, Garcia and Palomino went to speak with Petrow when Alfredou refused to take care of the situation with the dead mouse. Fagoth also observed Petrow giving money to another employee to buy air fresheners. Fagoth was also aware of unsanitary conditions in the kitchen. Fagoth said that Robleto and Palomino told her that the kitchen staff was not wearing uniforms; that no gloves were provided to them when they were preparing food; and that the stream tables were not at the correct temperature to keep the prepared food sufficiently warm.

Palomino said that she was aware of the dead mouse inside the banquette and other unsanitary conditions. Palomino described that the kitchen staff did not have uniforms; that kitchen towels were being reused by the kitchen staff; and that there were no plastic gloves provided in preparing the food. Palomino did not speak to any management officials regarding the unsanitary conditions but did maintain that she spoke to Alfredou and Petrow about the dead mouse. Palomino said that Alfredou refused to do anything about the dead mouse, but she did observe Petrow give money to another employee to buy air fresheners (Tr. 499–501).

Fagoth indicated that Palomino told her that they needed to make Morgan aware of the unsanitary conditions. Fagoth agreed to prepare a list of items that they could present to Morgan. Fagoth said that she conferred with Palomino, Garcia, Santana, Robleto and Annette Polanco in preparing her list of

[8] The emails between Santana and Selden were not introduced at the hearing.

complaints. Fagoth recalled that the list included the unsanitary working conditions, the equal sharing of the pooled tips with the runners and Petrow, the derogatory remarks that Alfredou made to Garcia and to Santana, their reduced work shifts, mouse droppings and the unkempt bathrooms that could not be used (Tr. 342–350).

Garcia testified that the list was put together over the telephone the night before Morgan was supposed to be at the restaurant. Garcia recalled some of the listed items to include no tissues in the bathroom, no gloves for the kitchen staff and mice in the restaurant (Tr. 597, 598)

Santana was also aware of the unsanitary conditions in the kitchen. Santana said that she stopped eating her meals from the kitchen because the prepared food was not kept at the correct temperature. Santana said that she had spoken to Fagoth, Palomino, Garcia, and Rivera about the unsanitary conditions (Tr. 530, 531).

Fagoth said that Polanco overheard Petrow saying that Morgan was going to be at the restaurant the following day after the list was prepared. Fagoth could not recall the specific date in September when they met with Morgan. Fagoth said that Polanco signaled her when Morgan arrived at the restaurant in the late afternoon and she, along with Polanco and Robleto went to speak to Morgan. Fagoth said that Polanco was the spokesperson and mentioned everything that was on the list to Morgan. According to Fagoth, Morgan physically took the list and said he would look into the situation (Tr. 349–352).

The October 5 Meeting

The wait staff was informed that there would be Point of Sales (POS) training with a new system for ordering food and keeping track of food items being ordered at the restaurant. The POS training was scheduled for October 5 with Young and Morgan in attendance for the training.

Fagoth, Santana, Palomino, and Garcia believed that Selden, Young, and Morgan took no action in their complaints about Alfredou and they saw no improvements over the unsanitary conditions in the restaurant. Fagoth testified that she spoke to Palomino, Rivera, Santana, Robleto, Polanco, and Garcia the night before October 5. She told them Morgan and Young will be attending the training and that this would be an opportune time to speak with Young and Morgan over their concerns because nothing seems to have been accomplished with their list of complaints that was previously given to Morgan.

Fagoth testified that they agreed to meet at a coffee house near the restaurant before the training to discuss what they were going to say to Young and Morgan. Fagoth testified some of the people that she spoke to the night before were able to attend the meeting, including Robleto, Garcia, Santana, Polanco, and Alex Armstrong. Fagoth said that a second list of complaint items was put together at the meeting. Fagoth said that Polanco did some research on the topic of equal share of pool tipping with the runners, which they were going to present to Young.

Fagoth testified that she approached Young after the POS training and asked to speak to him. Fagoth asked that Alfredou also be present when they speak, but Young suggested that it was not a good idea to have Alfredou present and that the group should meet somewhere other than the restaurant. Fagoth agreed and she, along with Garcia, Santana, Polanco, Robleto, and Rivera met with Young and Morgan at a coffee shop (Tr. 352–356).

According to Fagoth, Polanco spoke about the tip pooling and said that it was unfair to share 100 percent of the tips with Petrow, who everyone believes is still a manager and with the runners. Santana then spoke about how Alfredou was referring to her as a mental retard and that Alfredou wanted to fire her. Santana thought that this was discrimination. Fagoth complained to Young about her reduced number of shifts. Fagoth said that they did not want to cause any trouble and that they did not want to leave Mexican Radio. Fagoth testified that Young wanted people to be happy working at the restaurant. Robleto's suspension was mentioned during this meeting. Young immediately ended Robleto's suspension and agreed to look into the other complaints[9] (Tr. 356–358).

Santana was also at the meeting with Young and Morgan on October 5. Santana informed them of the unsanitary conditions, her adverse treatment by Alfredou, and her objections to the equal sharing of the tips with Petrow and the runners. Santana also told Young that it was unfair being targeted by Alfredou. Young promised to speak to Alfredou about her treatment of Santana. Santana maintained that she saw no improvements after this meeting (Tr. 531–535).

Garcia testified she met with Young and Morgan after the POS training. Garcia recalled that the group discussed the unsanitary conditions and that it was unfair to share equal tips with Petrow, who they believed to be a manager. She also recalled Santana complained about being bullied and discriminated by Alfredou. It was Garcia's belief that Young was "brushing off" Alfredou's treatment of Santana, but that he did not wanted the staff to be unhappy and promised improvements. Garcia repined that nothing changed after the meeting (Tr. 598–601).

Young testified that the group met with him and Morgan after the POS training. He stated that Fagoth initially approached him to meet with the group. Young indicated that he was not aware of the purpose for the meeting but was always willing to talk with his workers. Young testified that Fagoth, Polanco, Robleto, Garcia, Santana, and Palomino were present at the meeting. He said that each of the servers expressed their anger towards Alfredou regarding her treatment of the waitresses, especially with Santana. Young also recalled that Polanco complained about the dirtiness of the bar area. He insisted that no complaints were made about the equal sharing of the tips with the runners and Petrow. He did recall that the group was unhappy with their schedules. He did not recall the group had complained about unsanitary conditions (Tr. 70–73; 623–630).

Complaints made to the New York City Health Department

With the belief that nothing changed after the October 5 meeting, several of the servers, namely Fagoth, Palomino, San-

[9] Robleto did not testify at the hearing. Young testified that Robleto was a bartender and suspended on October 2 because she had Santana cover for her absence without informing the general manager. After Robleto complained at the October 5 meeting, Young and Morgan agreed that the suspension was excessive and reduced her suspension to time served (R. Exhs. 1 and 4; see also testimony of Young at Tr. 111).

tana, and Garcia, decided to elevate a resolution with the restaurant's unsanitary conditions by contacting the New York City Department of Health and Mental Hygiene (Health Department). Each of the named servers discussed among themselves before they individually complained to the Health Department.

Palomino spoke to Fagoth, Rivera, and Garcia before filing a complaint with the Health Department. Palomino testified that the second floor bathroom was still filthy and not operational, that there continued to be mice infestation in the dining area, mold in the ventilation system and in the soda machine nozzles, and that the kitchen staff still did not have uniforms or gloves (Tr. 480–482).

Fagoth spoke to Santana, Palomino, Garcia, and Rivera before she called the Health Department on October 14. Fagoth said that the dead mouse was still inside the booth and the stream table to keep the cooked food at the correct temperature was still inoperative (Tr. 361, 362).

By letter dated October 15, the Health Department informed the Respondent that a complaint had been filed regarding mold in the bar area and in the basement and that the workers complained of chest pain and headaches when in the basement. The letter required the owners to correct the problems and a health inspector may be assigned to investigate if further complaints are received (GC Exh. 25a).[10]

It is not clear from the record whether the initial unsanitary conditions noted in the Health Department letter were resolved by the Respondent. Nevertheless, there were subsequent complaints to the Health Department after the October 15 letter. Garcia testified that she filed her own complaint with the Health Department on October 21 after speaking to Fagoth. Fagoth mentioned to Garcia that she had already called the Health Department (Tr. 599–601).

There was a health inspection at the restaurant on October 21. The restaurant's daily log is prepared by management or a shift supervisor assigned during that day. In the comment log, Petrow indicated that the inspection occurred after three complaints were received that "appear to have been written by a staff member (or one time staff member)." The inspector found mouse dropping and threatened to close the restaurant, but Petrow convinced the inspector to keep the restaurant open after he indicated that the staff was aggressively attacking the unsanitary conditions (GC Exh. 12).

Santana said that she also called the Health Department after speaking to Fagoth, Garcia, Palomino and Rivera, among others. Santana did not indicate when she made the call to the Health Department. Santana was not aware when the health inspection occurred but testified that Petrow told her that he was upset because "we did bad (in the inspection)" and "I'm going to find out who did this" (Tr. 534, 535).

Garcia testified that she was at work on October 21 during the inspection, but was not certain when the inspection actually occurred. She said that Petrow came over to her, Fagoth and another worker while they were counting the tips at the end of the day. Garcia was asked by Petrow if she knew what had occurred and Garcia responded if he was referring to the inspection. Petrow answered in the affirmative and mentioned the inspection regarding the mold infestation. According to Garcia, Petrow believed that a former or current worker was responsible for the complaint to the Health Department and said that this was "harassment against the owners"[11] (Tr. 601–603).

Fagoth testified that she was present the night of October 21, but did not work during the day when the inspection occurred. Fagoth testified that she received a text message on her cell phone from Petrow. Fagoth did not recall when she received the text from Petrow. Fagoth said his text read "The fucking Health Department is here." Fagoth responded by texting "wow." There were no further communications after the second text message was sent (Tr. 361–364).

Fagoth believed that the conversation with Petrow over the inspection occurred on October 23 and not on October 21 (as testified by Garcia). Fagoth worked the evening shift on October 23 and was counting the tips with Garcia and another worker when approached by Petrow.

According to Fagoth, Petrow said that there was no longer a rodent problem, but complained that the Health Department was still investigating the mold infestation. Fagoth further testified that Petrow stated (Tr. 361–366)

> Whoever is calling the Health Department is harassing the owners. I will find out. We will find out. We have says of finding out who called the Health Department and they're going to pay. We have ways of finding out.

Petrow testified that he was present on October 21 during the health inspection of the restaurant. Petrow believed that the complaints filed with DOH were based upon information that only management or a former or current staff would be aware of. Petrow said that he was aware of complaints over reused towels and mouse droppings. He said that the restaurant was cleaned for reinspection after initial inspection. He did not believe that Fagoth had filed the complaint because she was still working there. Nevertheless, he believed it was harassment (Tr. 177–182; GC Exh. 13).

Petrow insisted that the restaurant always had mouse droppings and was not alarmed that a mouse was in the restaurant. Petrow did not believe that discipline was taken against any of the servers for reporting the unsanitary conditions because it's a problem that needed to be fixed and would not be grounds for discipline (Tr. 191–194).

Nevertheless, Alfredou was not happy with the health inspections and was relieved that the inspection did not uncover the mold infestation. Selden was also unhappy about the complaints and believed the complaints were filed by a disgruntled employee and expressed her urgency to Alfredou, Morgan and Young to find those responsible for the complaints and have

[10] The inoperative steaming table, mold and mice infestations were problems recognized by Alfredou as early as October 2 when she complained to Morgan, Selden, Young, and Petrow that everyone was getting sick from a stomach virus after Morgan had inquired why restaurant sales were down during the week (GC Exh. 24).

[11] Petrow was referring to Robleto, who was terminated 3 days prior to the Health Department's complaint of October 15 (GC Exh. 3). In an email dated October 23, Alfredou also believed the complaint could have been filed by Robleto or a current employee (GC Exh. 25a).

their attorney to file a "cease and desist" order against the complainers (GC Exh. 25C).

The October 29 Email from Annette Polanco

Annette Polanco was previously employed as a bartender/server with the Respondent's New York City facility from June 2015 until her resignation about October 29, 2015 (Tr. 42, 43).[12] As noted above, Polanco had actively complained about having to equally share the tips with the runners and Petrow. Polanco also complained about Alfredou's rude treatment of the servers and her discriminatory remarks toward Santana and Garcia. Upon her resignation, Polanco wrote an email to several workers including Garcia, Robleto, Rivera, Fagoth, Santana, Palomino and others. Polanco also included Young, Morgan, Selden, Alfredou and Petrow in the same email (GC Exh. 5A). Her email was sent at 12:21 p.m. on October 29. The email stated

> Let me begin by saying this is something I never thought I would he doing with an employer, pulling no call no show. It truly does break my heart. Given my amazing work ethic, I never thought would find myself in such position. Fortunately for me, when I came to work at your establishment, I came after being told by a friend, that her very fun job was looking for a bartender for a few nights a week, not because I needed the job. I came to Mexican Radio to fill in a couple days in my week and when interviewed I was asked by John if I even wanted to work there, as I was used to working in places with much more volume. I told him I didn't care, because he too made it sound like such an amazing place to work. I ended up loving it so much I made it my priority and went part time at another place where I was at. For the first time in almost two decades, I stayed at a job that paid me pennies compared to what I was used to making, because it was such a pleasure to be working there. Everyone was so close and quickly everyone became like family. l came in there ready and wiling (sic) to help the place in every way I could, even requesting social media access to update more frequently than yearly, as you guys were not posting anything at all. I completely took apart that disgusting bar and made it shine, without anyone asking me to. Every Sunday and Monday I would take it upon myself to give myself cleaning projects to keep it clean, even polishing your wine glasses, snifters, and martini glasses WEEKLY, Again no one told me to do any of it. I genuinely cared about the conditions of a bar I planned on helping bring business to because I saw the potential it had. I had asked Steve and John for their help several times with my ideas.
>
> Fast forward a bit and you guys make the decision to bring in an uncivil, uncouth, disrespectful, vulgar, manipulative tyrant, who has absolutely no sense of respect for others and deserves absolutely none back. Now as a business owner myself, I have to believe that this has to be a business plan. A 6 month cleanup of your NYC location, where you bring someone that has no clue what they are doing with the FOH, or BOH for that matter, to do all your dirty work before you shut down your location, I mean why else would you be trying to "cut costs", yet here you are paying someone $1300 a week to do spreadsheets and now she needs an assistant because she can't work so many hours or close. Probably because she is still hanging on to her evening waitressing job, that she admitted to still having very recently. You've got to be kidding me. You cut the hours of your loyal kitchen staff after not paying them overtime for so many years and just paying them a little hush money, from what I have been told. Yet now that you are forced to pay overtime you refuse to even schedule them their over time, ultimately screwing with their livelihood. There is no way l can believe someone, with the business savvy to have 3 locations open, can make such crass business decisions for their "first born". It has to be a Donald Trump business move to wipe the slate clean, in my opinion.
>
> Theo came in with an agenda. To clean house. Sadly for her, her aggression was met with resistance and a strong alliance and will always continue to do so because she is completely tactless. I've witnessed first and how she pretty much degraded the poor old man who had your business with the linen for so many years. She spoke to him so ill, he had to ask to speak to John and she very bluntly told him, "You no longer speak John, you deal with me only. Work on bringing this price down, because I have friends in the business that can do much better." Obviously that couldn't have been the case because we still have no napkins since the linen company dropped us as they refuse to deal with her, as did our tortilla company. I guess her friends in high places could do nothing for her. Ultimately it trickled down to how she speaks to your guests as well, I mean the ones she actually goes to. She pretty much refuses to do table visits because "those are not the people she wants coming back anyway." When she does make it to a table she is so unprofessionally rude, one table said they felt they were on hidden camera. We brought up this particular incident to not only Steve, but Mark as well. When we had our first official new GM meeting, after Theo had already come in and completely changed everyones (sic) schedules and told us all directly she cannot do anything about it because John had requested to work those days. We brought up the runner tip out situation. I was not aware that we had our runner in the pool 100% until she scheduled me on my first floor shift, that Tuesday. I've been in this business since I was a teenager and never ever have I heard of that. I immediately told John l was not Ok with that AT ALL. l don't disagree that our runners work very hard, but it is NOT our place to pay their salary! The only people benefiting front that situation is Mexican Radio. When this was brought up to her, as the new GM, her VERY HOSTILE (she even got up from her chair to make her tyrant point) solution to the situation was that she would prefer to fire us all and keep the runners working, than to come to a solution for the tip out. Right there and then, losing any ounce of respect I could've had for her. We Naively (sic) told Steve all of our concerns from day one and he did absolutely nothing. It is obvious, to me, that unfortunately, your staff has been a bit ignorant about their rights, but allow me to inform you, that I have been schooling them, as a decent business owner that knows what I cannot and won't ever do to my employees, and that you most definitely cannot

[12] Polanco did not testify at the hearing.

do to yours. Now by law, it is very inappropriate for us to be pooling tips with someone who has any say in what goes on in that restaurant, ESPECIALLY scheduling. Whether John wants to admit it or not he has a high management position at Mexican Radio and would be in his best interest to remain "neutral" to our faces when he is benefiting no matter what. I wouldn't be surprised if he is just being paid to keep shut and be an obedient minion, because I see no other reason for him not to stand up for his staff, or rather "former staff" who he KNOWS is absolutely amazing! I have been patient and always brought our concerns immediately to him us well, Obviously, our concerns were not even acknowledged.

When the Tequila club and specials were first brought to our location, I was on top of them. Handing in memberships for almost every guest who came to the bar. Everyone else was making sure to push them to the tables and the specials were going like crazy, because everyone actually cared. Lori, you have expressed to Theo how we arc 'Los ninos from hell" because we no longer sign up guests for tequila clubs or sell specials, as we did with no problems before. Crazy that I have to even be telling you this when you own 3 restaurants, but if one is being treated condescendingly and like a second class citizen, don't expect people to do more than what their job requires. It is very unfortunate that you had people that cared about your establishment and now because of you, Theo, and even Steve (for looking the other way when we voiced our concern from the very beginning), despise the place.

A little lesson from life, you reap what you sow.

It is obvious to me, Lori, that you conduct business in 3 very fraudulent way. I recently saw an email from you, asking Theo to forge a write up for Jeremy, to avoid paying unemployment, and Theo agreeing. Is this how you run your businesses? Are you really that disgustingly greedy?? Just know that even if deleted, things like that always have a way of coming back up. Always. You have NO LOYALTY to even your most loyal minion, John, and l feel sorry for him...stuck having to deal with you. Trashing him in your emails with your new GM. How fucking dare you, knowing your own unscrupulous business practices, allow her manipulating self to treat your staff in the manner she does. John must know a whooooole lot because the way you speak about him, is as if he is a nuisance you don't around, but you can't do much about it because he knows too much, again giving more fuel to my thoughts on him being paid off to just hush. Steve was made aware from the beginning the discrimination against Nadgie, and even after bringing it up to Mark, nothing was done. After sitting back and just observing these past few weeks I have to say that I still think this is all a plan to shut down right before the year ends to write it all off. I wouldn't be surprised if you forge (sic) your sales with the IRS and the new POS system is just to cover up the fraud. Just remember though, as I stated previously, things like that always have a funny way of surfacing.

Let it be known that I have personally witnessed Stephen being discriminated against because of his MS, by your new GM. She has gone as far as asking, several, if not all of us, if she should just fire him due to the liability he can potentially be. I have no problem testifying on his behalf if it boils down to it. This was also mentioned to Steve when it happened, in the beginning. If you think only ex-employees are a problem for you, you are in for a big surprise. Let me reiterate, I have been schooling the staff on their rights and how they are being completely violated, even more now with your new GM. Her arrogant sloppiness will be much more costly than the change you are trying to save by screwing over your employees and the change you save lowering the quality of the food, which is suffering. So many people have complained it's ridiculous, especially about the vegan cheese changing. Which she actually wouldn't even admit she changed, as if we vegans don't know the difference.

I am not only sending this email to the owners and management, I am sending this to the entire staff so that they know, they should stand up for their rights and that I, will help them with the process. Please note staff, it is ILLEGAL for management to intimidate you or try to talk you out of contacting the Department of Labor, if you really wanted to make this place work, Lori, you would have hired someone to come in to provide structure, which I admitted we needed and voiced it to Steve when I first met him, but that treats your staff with dignity and the gratefulness they deserve. Although after reading your emails, I can see how despicable you are (2 seconds after meeting Mark, I could see he was the ONLY good thing in your life.) Instead of hiring someone to work with us,, you hired someone who makes discriminating decisions because she is so emotionally charged, she can't help it. Maybe if she can stop hiring porters with her vagina, we can get one that is worthwhile. Are you aware that your GM opened Angelica's check and then poked fun at her finances with the kitchen? I am sure you are aware by now, but do not care. I am sure you understand the legality of that as well.
I am positive since I stopped cleaning the bar several weeks ago, it is back to its disgusting state. Sink is back to being black and the soda gun back to being moldy. I got tired of caring for a place more than the owners did. I got tired of doing it for people that didn't even appreciate it, I hope your staff does what needs to be done and they stand up for what they deserve. I will diligently try to help them in any way I can. If your plan is to shut down Mexican Radio NYC and turn your entire staff against you, you are very much succeeding.

Netty

The workers named in paragraph 6(c) of this complaint all responded in a positive manner to the email. Their responses to the email were sent to Polanco and to everyone listed in Polanco's email, including Young, Selden, Morgan and Petrow.

Fagoth responded to the email on October 29, approximately 1 hour later. Fagoth stated "Wow Anette, gracias. Thank you for standing up for us. We will miss you" (GC Exh. 5B). Fagoth testified that Polanco's email was an "accurate reflection" of the situation at the restaurant (Tr. 366, 367).

Garcia responded approximately 1 hour later to the email and stated "Just finish reading and I agree. Sad that things have to be this way" (GC Exh. 5A at 1). Garcia testified that she agreed with the contents of the email (Tr. 603, 604). Garcia testified that she spoke to Fagoth and Santana over the contents of the email before she sent out her response. Garcia said that Fagoth agreed with the email and Garcia responded that she will also respond in agreement with the email. Garcia said that Santana also agreed to the email and Garcia said she would reply in the affirmative to the email (Tr. 609, 610).

Santana responded at 2:21 p.m. on October 29 and stated "I'm glad you said what you felt was right. I understand your point of view 100%. Thanks you for being voice for us all" (GC Exh. 5C). Santana testified that her response was a true and accurate statement of the situation. She had discussed the email with Fagoth before sending out her reply. According to Santana, Fagoth said Santana should respond because of the manner she was spoken to (by Alfredou). Santana believed that all the servers felt the same way as to what she wrote in her response (Tr. 535, 536).

Palomino responded at 1:31 p.m. on the day of the email and stated "I agree a 100% as well" (GC Exh. 5D). Palomino testified that she agreed with the email and especially in regard to the uncorrected black mold in the soda nozzle at the bar (Tr. 481, 482). Palomino stated that she never discussed the contents of the email with anyone before or after the email was sent out (Tr. 505–507).

The owners were taken by surprise at the content of the email. Young and Selden were also surprised that the other workers had responded in agreement with the email. Young testified that the email was hurtful and mean spirited (Tr. 42–48).

Young testified that he spoke to Morgan, Petrow, Selden and Alfredou after receiving the email. Young discussed with them regarding several possible courses of action, including the termination of employees. Young decided to visit the restaurant with Selden and Morgan on October 30.

Petrow confirmed that he received a phone call from Young. Young asked Petrow if he had read the email from Polanco and that they (Young, Morgan and Selden) were coming into the city the following day (Tr. 151–153).

Selden testified that she was "stunned" by the contents of Polanco's email. She did not understand what was happening so she spoke to Morgan. Selden viewed the email as "deeply insubordinate" and viewed the responses from the servers as supportive of the email. Selden said that the contents of email were "extremely insulting" and "deeply insubordinate." Selden viewed the responses from the servers as being "deeply concerning" (Tr. 225–229). Selden confirmed that she visited the New York restaurant on the following day with Young and Morgan.

Young testified that Alfredou was present when they arrived and also observed Santana working the floor. Young informed Alfredou that they wanted to meet with the servers in the basement office on an individual basis. Young wanted to know what had happened to their working relationship, why and how it got damaged and the reasons they were angry with management. He also wanted to know if they were still supportive of the email. Young said that Morgan, Selden and himself would be interviewing the servers (Tr. 48–51).

Selden testified that they had planned to speak individually with each of the wait staff. She confirmed that only Santana was present when they arrived. Selden's purpose for the interviews was to discuss with the servers as to what was going on (Tr. 229–232).

The Discharge of Tangni Fagoth

Santana testified that she observed Morgan, Young and Selden arriving at the restaurant in the afternoon. Her work shift had ended at 4:30 p.m. and was instructed by Alfredou to go downstairs and speak with the owners and Morgan. Santana was too nervous to immediately go and informed Alfredou to give her a moment before going downstairs (Tr. 536–539). At this point in time, Fagoth arrived at the restaurant to begin her evening shift.

Alfredou then told Fagoth to meet with the owners. Fagoth believed that the interview with the servers was over the email because of the closeness in time between the email and their arrival. Fagoth believed that the owners intended to fire some of the workers over the email and because she was outspoken over the sharing of the tips. Fagoth insisted on having a witness and requested that Rivera accompany her to the interview. Rivera had not yet arrived at the restaurant, but Alfredou agreed that Rivera could be a witness. However, shortly thereafter, Morgan went upstairs and instructed Fagoth to attend the interview without Rivera (Tr. 369–372).

Fagoth testified that she was asked by Morgan regarding the email and told her that the contents of the email were not true. Fagoth disagreed with Morgan and Morgan responded by stating that if that's her response with the email, then it was "insubordination" and "it's unfortunate that it has to be this way but you are being fired for insubordination." At this point, Young agreed with Morgan and Fagoth left the meeting and went upstairs (Tr. 373, 374).

Young said that Fagoth was the first to be interviewed over the contents of the email. Young was informed that Fagoth wanted to meet collectively and was told no. Young said that Morgan did most of the talking and had asked Fagoth about the email. Fagoth responded that you (referring to Morgan) "did absolutely nothing" and said Alfredou "didn't do anything" to help the wait staff. Young agreed that Fagoth was not contrite and had stood by the statements in the email. Morgan told Fagoth that if that is her position, "I don't think you can work here any longer" or words to that effect. Fagoth then left and was subsequently fired. Young stated that Fagoth was terminated for insubordination (Tr. 51–55).

Fagoth was the only one interviewed over the email on October 30. Fagoth testified that Palomino asked what had happened after she went upstairs to get her belongings and use the restroom. Fagoth replied that she was fired. Rivera finally arrived as Fagoth was walking out of the restaurant and she asked Fagoth what had occurred. Fagoth again replied that she was fired. Fagoth asked that Rivera go outside of the restaurant with her so that they can say their farewells. Fagoth testified that Young appeared at this point and demanded that Rivera

give him the keys to the restaurant.[13] Rivera gave her keys to Young and was told by Young that "You girls are no longer welcome" (Tr. 375–378).

Petrow testified that he was at work on October 30, 2015 at around 4 pm. He stated that the management team was already at the restaurant and observed Steve Eckerd working the bar area. Petrow said he also observed Fagoth arrived to work around 4:30 and observed her go downstairs to talk with management. Petrow said that while Fagoth was downstairs, he observed Palomino arrived for work. The next thing Petrow noticed was Fagoth coming up the stairs and talking with Palomino. He did not know what they spoke about.

Petrow also saw Rivera arrived at work at this point and observed Fagoth and Rivera leave the restaurant with Palomino following them. He said that Santana remained in the restaurant because she was working the day shift that ends at 5 p.m. (Tr. 153–155).

Selden recalled Morgan asking Fagoth why she supported the email. Morgan did referenced insubordination in referring to Fagoth's agreement to the email. She also recalled Fagoth replying that "You don't do and haven't done what we want." Selden said that Fagoth did not specifically reference specifically what it was that the servers wanted done. Selden then said that Morgan replied we will have to let you go (Tr. 233–237).

Young testified that he followed Fagoth upstairs. He was under the impression that Fagoth had the keys to the restaurant.[14] Young said it was reported to him that Fagoth told the staff that she was being fired for agreeing to the email and he wanted to assure the others that was not the case.[15] Young saw Fagoth leaving the restaurant and observed Rivera coming in at the same time. Young believed they exchanged words but did not hear what was said. He observed them walking away from the restaurant. Young said he knew that Rivera also had a set of keys and went outside to retrieve them from her. Young asked for the keys and Rivera handed him the keys. Young maintained that no other words were exchanged other than asking Rivera for the keys. Young denied asking Rivera where she was going or if she was coming back to work her shift and said he never told Rivera that he wanted to speak with her. Young testified that Rivera has not returned or worked at restaurant since that day (Tr. 55–58).

The Discharge of Juliana Palomino

Palomino testified that she arrived at work on October 30 at 5 p.m. Palomino had agreed to be Fagoth's witness at the meeting because Rivera was running late. Palomino observed Morgan coming upstairs and instructed Fagoth to attend the interview and refused her request for a witness. Palomino was also told by Alfredou that the owners wanted to speak to her. Shortly thereafter, Palomino met Fagoth coming upstairs and inquired as to what had occurred. Fagoth told Palomino that she was fired. Palomino testified that Morgan came upstairs shortly after she spoke to Fagoth about her termination. Palomino stated that Morgan instructed her to go downstairs and she refused. Morgan then asked Palomino to sign some paper and she again refused. It is alleged that Morgan then stated to Palomino "Okay. So you're fired."

Palomino confirmed that Young appeared and demanded the keys from Rivera when she left and met Fagoth and Rivera outside the restaurant. Palomino, Rivera and Fagoth waited until Santana finished her shift and they all met up afterwards at a drug store. Palomino said that no one from the Respondent contacted her after October 30 (Tr. 482–485; 511–515).

Young testified that he saw Palomino walk outside following Fagoth. Young said that her shift was not over, but she did not return to work. Young did not inquire as to where Palomino was going or if she was going to return to work. He denied telling Palomino that she would not be fired (Tr. 59, 60).

Young said that Palomino was terminated for walking out and not speaking to them about the email. Young insisted that Palomino was not terminated for responding to the email, but rather for not speaking to them on October 30 and for abandoning her position when she walked away with Fagoth and Rivera (Tr. 68–70).

The Discharge of Nadgie Santana

As already noted, Santana was too nervous to meet with the owners on October 30. She related her nervousness to Alfredou and Fagoth took her place to meet with the owners. After Fagoth met with the owners and told Santana that she was fired, Alfredou told Santana that she was next to go downstairs. Santana was too nervous to go and informed Petrow of the same. According to Santana, Petrow told her that she could go home and take the weekend off because she was feeling ill.

Santana did not work the following day and texted Alfredou that Petrow approved her weekend off. Santana said that she never received a response from Alfredou. Santana also texted Petrow, who confirmed by a reply text that it was alright for her to take the day off (Tr. 535-546; GC Exhs. 35 and 36).

Santana subsequently received a phone call from Morgan, which was recorded from her phone on October 31.[16] The voice message from Morgan stated that they had tried to speak to her the day before and that she refused to talk with them and left the restaurant. Morgan also noted that Santana did not arrive at her scheduled shift on Saturday (October 31) and assumed Santana did not want to work for the restaurant any longer because she refused to speak to them and did not arrive at work the following day. Morgan then stated that Santana

[13] Rivera was a shift supervisor for that night and had a set of keys to close the restaurant.

[14] Fagoth testified that her set of keys were taken away from her the night before by Alfredou.

[15] Young learned that some employees, including Steve Eckert, Bernardo Soso, thought they would also be fired. Young subsequently explained to them they would not be fired for receiving the email. He said that he was sorry about the incident and sorry about the email. He assured them that he was not closing the restaurant and was not going to fired Eckert (Tr. 60–64).

[16] The audio CD of the recorded conversation was made part of the record. I provided counsel for the Respondent an opportunity to review the transcription of the recording with the audio CD. The counsel for the Respondent agreed that the transcription in GC Exh. 37 is an accurate reflection of the audio conversation between Santana and Morgan except for some minor deviations (Tr. 544–547).

"don't have a job anymore so you don't need to come back" (GC Exh. 37).

Santana called Morgan back after hearing his voice message on October 31. Her phone conversation was recorded by Santana. In summary, Santana protested that she abandoned her job and reiterated that she informed Alfredou of her absence and that Petrow had approved her day off. Santana also stated to Morgan that she did not agree with Polanco's email and only responded that she understood what she was saying. Santana also stated that she felt targeted and discriminated by Alfredou. Morgan replied that it was wrong that Santana agreed with the email, the contents were untrue and management will not tolerate people working in the restaurant that had agreed with the email. Santana again insisted that she did not agree with the email but nevertheless, Morgan felt that she was being insubordinate and "refused to do things." Santana stated that she never refused but was fired anyway (GC Exh. 37C).

Petrow testified that Santana approached him and she seems upset and nervous. Petrow related that Santana said she was having an anxiety attack over having to talk with Morgan, but did not recall if she mentioned Young and other managers. Petrow said that Santana wanted to go home. Petrow agreed and told her to go home (Tr. 155). It is undisputed that Santana texted Petrow the following morning and asked to take the weekend off. Petrow responded that it was alright for her to take the weekend off (Tr. 160, 161).

Selden testified that the management team was unable to speak to Santana after her shift. She said that Santana refused to come downstairs to meet. Selden was told by Alfredou that Santana had a panic attack and left after her shift was completed. Selden was aware that Santana was scheduled to work on October 31 on the 5:30 p.m. shift. She was also aware afterwards that Santana had texted Petrow about not coming in. Selden insisted that Santana was not terminated for failing to arrive at her shift, but for refusing to come downstairs to speak and instead, she left the restaurant. However, Selden also admitted that Santana was discharged over insubordination in agreeing with the email, walking off the job, which she considered as job abandonment (Tr. 237–244; GC Exhs. 18 and 19).

Young testified that Santana was terminated for a no call/no show on October 31 and insubordination for refusing to speak with them on October 30. However, Young subsequently indicated that Santana was also terminated for insubordination for responding to the email (Tr. 65–68).

The Discharge of Stephanie Garcia

Garcia testified that she was not at work on October 30. She received a phone call from Fagoth and was informed that Fagoth was fired for agreeing to the contents of the email. Garcia said that Fagoth believed she was fired for being insubordinate. Garcia was scheduled to work the evening shift on October 31. Garcia received a phone call from Santana before leaving for work that day. Santana informed Garcia that she was fired and played back the voice conversation she had with Morgan. Santana informed Garcia that Morgan was adamant that he did not want anyone working at the restaurant anymore if they had replied in support of the email. Garcia testified that she never returned to work from that day based upon her belief that Morgan in the voice recording was also referring to her because she had agreed to the contents of the email. Garcia said that she never heard from any management official after that day (Tr. 603–606).

Young testified that Garcia was terminated for a no show to work on October 31 for the 5:30 p.m. shift. He was not aware if anyone in management attempted to call her. Young insisted that Garcia disappeared and was not terminated for insubordination. Young never saw her again. Young said that Garcia was eventually terminated for no show after not hearing from her. However, an affidavit provided by Young pursuant to a charge filed with the EEOC stated that Garcia was terminated for insubordination as well as not reporting for her shift (Tr. 65–68).

The Reprimands to Justify the Discharges

Each of the discharged workers was issued a reprimand memorializing the reasons for their termination.[17] Selden was unsure if Alfredou or Morgan had authored the first set of reprimands. She was also not certain that she recognized the signature of Alfredou on the reprimands (Tr. 245–250).[18] None of the discharged workers had signed the reprimands.

The reprimand for Fagoth (GC Exh. 20B) stated that she was discharged because

> It has come to our knowledge through an email that was sent out to all employees, management and ownership by a former server, whom was terminated 3 days ago, that Tangni deliberately provided access to this server who read unauthorized documents and the General Manager's email conversation with ownership. The email included false accusations concerning both management and ownership and used inappropriate language, to which Tangni replied stating that she agreed with all the aforementioned. As a result of this insubordination, Tangni was terminated the day after by the owners of Mexican Radio.[19]

The reprimand was issued on October 30 and signed by Alfredou.[20]

The reprimand for Palomino was issued on October 30 by Alfredou (GC Exh. 20C) and stated that she was discharged

[17] The reprimands and discharges of Fagoth, Palomino, Garcia, and Santana were alleged in the complaint as violations of the Act. The reprimands and discharges of other workers (such as Rivera) were not raised as allegations in the complaint and served only as background information.

[18] The counsel for the Respondent objected to the reprimands as hearsay and not official business records of the Respondent. However, the documents were received by subpoena issued by the General Counsel and Selden recognized and took ownership of the documents. At that point, counsel for the Respondent did not oppose the reprimands for the record (Tr. 246, 247).

[19] Fagoth was issued an earlier reprimand on October 10 when she was serving as a shift supervisor (GC Exh. 40). That reprimand served as background information. It was not raised as an allegation in the complaint and need not be addressed in this decision.

[20] Although Selden did not recognized the signature, a comparison of Alfredou's signatures with other documents signed by her undisputedly show that Alfredou had signed the reprimands (compared GC Exh. 20A-C with her signatures in GC Exh. 21)

because

> Juliana demonstrated insubordination towards both management and the ownership along with 4 other employees. Juliana replied to an email sent by a colleague of hers who had just resigned, stating that she agrees with all the issues. The email included false accusations concerning both management and ownership and used inappropriate language, to which. On the light of this, management asked to talk to her but she walked out of the restaurant on Friday October 30 and she is considered to have resigned from the position of server at Mexican radio.

The reprimand for Santana was issued on October 30 by Alfredou (GC Exh. 20A) and stated

> Nadgie demonstrated insubordination towards both management and the ownership along with 4 other employees. Nadgie replied to an email sent by a colleague of hers who had just resigned, stating that she agrees with all the issues. The email included false accusations concerning both management and ownership and used inappropriate language, to which. On the light of this, management asked to talk to her but she walked out of the restaurant on Friday October 30 and she is considered to have resigned from the position of server at Mexican radio.

For whatever reason, the Respondent felt it was necessary to draft a second set of reprimands for Fagoth, Santana and Palomino. The reprimands were written by Morgan. Garcia was not given a reprimand by Alfredou, but did receive one from Morgan.The second set of reprimands were written by Morgan and dated October 30. The reprimand for Garcia (GC Exh.29B) stated that Garcia was discharged because

> On 10/29/15 Netty Polanco sent out an e-mail to all of the upper management, ownership, store manager and selected employees of our NYC location. In this e-mail she used foul language, insulted people and wrote about untruths in a very demeaning and negative manner. She undermined the credibility of the management and company in a disparaging way. Stephanie replied to the e-mail in support of Netty. This is insubordination and will not be tolerated. On 10/31/15 Stephanie did not show up for her scheduled shift nor did she call. This is job abandonment.
>
> Outcome:
> Stephanie abandoned her job by not calling in nor showing up for her scheduled shift.

For Fagoth, Morgan prepared the reprimand (GC Exh. 29A) and stated

> On 10/29/15 Netty Polanco sent out an e-mail to all of the upper management, ownership, store manager and selected employees of our NYC location. In this e-mail she used foul language, insulted people and wrote about untruths in a very demeaning and negative manner. She undermined the credibility of the management and company in a disparaging way. Tagni (sic) replied to the e-mail in support of Netty. This is insubordination and will not be tolerated. On 10/30/15 Tagni arrived for her scheduled shift and was asked to speak with me directly. During this conversation she was terminated for insubordination.
>
> Outcome:
> Tagni was terminated for insubordination.

For Palomino, the reprimand (GC Exh. 29C) stated

> On 10/29/15 Netty Polanco sent out an e-mail to all of the upper management, ownership, store manager and selected employees of our NYC location. In this e-mail she used foul language, insulted people and wrote about untruths in a very demeaning and negative manner. She undermined the credibility of the management and company in a disparaging way. Juliana replied to the e-mail in support of Netty. This is insubordination and will not be tolerated. On 10/30/15 Juliana arrived for her scheduled shift and was asked to speak with me directly. She walked out and abandoned her shift instead of talking to me.
>
> Outcome:
> Juliana abandoned her job with no notice.

Finally, for Santana, Morgan wrote in his reprimand (GC Exh. 29D) that

> On 10/29/15 Netty Polanco sent out an e-mail to all of the upper management, ownership, store manager and selected employees of our NYC location. In this e-mail she used foul language, insulted people and wrote about untruths in a very demeaning and negative manner. She undermined the credibility of the management and company in a disparaging way. Nadgie replied to the e-mail in support of Netty. This is insubordination and will not be tolerated. On 10/30/15 Nadgie worked her scheduled shift and was asked to see me before she left. She acknowledged this but left purposely without talking to me. This is also insubordination. On her scheduled shift on 10/31/2015 Nadgie e-mailed the General Manager 1 hour after he rescheduled start time to say she wasn't coming in. I called Nadgie and explained she was being terminated for insubordination and failure to properly notify management of an absence.
>
> Outcome:
> Nadgie was terminated for insubordination and failure to properly notify management of her absence.

The Unemployment Insurance Claims of the Discharged Workers

On about November 2, Fagoth, Palomino and Santana filed claims for unemployment insurance benefits with the New York State Department of Labor (DOL). On November 9, Morgan responded to a questionnaire regarding Fagoth's unemployment claim (GC Exh. 31). Morgan stated in the questionnaire that Fagoth was

> …in full support of an ex employee who emailed owners and mgnt with foul language and false accusations…publicly supported the ex employee to the staff which is insubordination. She was discharged for insubordination.

On December 21, Morgan followed up with the DOL on Fagoth's claim for benefits (GC Exh. 36) and stated

> We feel like Tangni in her position as a part time shift supervisor needed to support the management and the owners publicly and she could certainly have her own opinion privately. By showing support publicly for the employee that wrote the derogatory e-mail she did not support the management and owners and by doing that exhibited insubordinate behavior that required termination. Because of that we felt that Tangni should not be eligible for unemployment benefits.

On November 9, Morgan responded to a DOL questionnaire with regard to Santana's claim for unemployment benefits (GC Exh. 32). Morgan stated that Santana was discharged for

> Insubordination towards management and ownership. Nadgie sent an email supporting another employee who quit and insulted company owners and management with foul language.

There seems not to be a questionnaire prepared by Morgan on Palomino, but in preparation for a hearing on her unemployment claims, Young wrote to the New York State DOL on January 22, 2016 (GC Exh. 8) the reasons that Palomino should be denied benefits

> Juliana worked as a hostess and server at Mexican Radio Corp in NYC.
>
> On 10/29/15 a former employee, Annette Polanco, sent out a disparaging email to the Managers, Owners and Employees alleging all types of untruths about our operations in the city. Juliana replied that she was in agreement with the email and thanked the former employee for speaking out. We as the Owners were very concerned about the email and some of the falsehoods being expressed so that we, with our Director of Ops, went down to the city the next day to speak to those involved.
>
> When the Owners and Director of Operations traveled down to the City on 10/30/15 to inquire about these issues, we asked all the employees involved to come down individually to the office to speak with us. After we had finished our first conversation with Tangni Fagoth, she promptly went upstairs and announced that everyone was being fired. This was a complete fabrication on her part and an attempt to hurt the company and turn staff against management. Juliana, after speaking to Ms Fagoth, turned around and walked out without ever speaking with the Owners or the Director of Operations.
>
> We consider this the clearest example of job abandonment and thus does not make her eligible for Unemployment Insurance.

On January 21, 2016, Young prepared another letter to the New York State DOL to oppose unemployment insurance benefits for Santana. Young stated

> On 10/29/30 a former employee sent an email out to Management, Owners and Employees stating various untruths and malicious insubordinate statements about the restaurant, management and the owners. We as Management and Owners were extremely distressed to see that Nadgie Santana had responded to this email expressing support for the accusations made.
>
> On 10/30/15,, the Owners and Director of Operations went down to NYC to discuss the matter with all the individuals involved. Nadgie was working the day shift when we arrived. We asked her, after her shift, to please come down and talk to us. She acknowledged that she understood what was being asked of her but when her shift ended she simply walked out the door and did not say a word to us.
>
> I have reason to believe that she did speak to the one person that early evening we did speak with and that was Tangni Fagoth. We had spoken to Miss Fagoth first as she was the first to arrive for the evening shift. Miss Fagoth was also the biggest supporter of the insubordinate email and the 'group leader' of all those who went on to agree with the insubordinate email. When Miss Fagoth went upstairs she told the staff that anyone who had received the email would be fired. That was completely untrue and a complete fabrication on her part, causing great stress amongst the staff.
>
> Nadgie left soon after Miss Fagoth's announcement. The following day, 10/31/15, Nadgie informed the manager by text after she was meant to arrive for her scheduled shift that she was not coming back in to work. At my request the Director of Operations called Nadgie and discussed what had happened, why she wasn't coming back into work and why she did not come down into the office to meet with him and the owners the night before as she had been asked to do. Her explanation was that that she had been told by Miss Fagoth that she was being terminated for insubordination and was too nervous to come speak with us directly and therefore decided not to come back in to work. The Director of Operations then terminated Nadgie over the phone for a combination of insubordination, intentionally walking out without speaking with him as directed and then not showing up for her work shift the following day.

The Respondent management officials also had opportunities to directly communicate with the DOL employees handling the unemployment insurance claims of Fagoth, Palomino and Santana.[21] On December 7, Morgan spoke to DOL Agent Lorraine Aimee Labarge about Palomino. In a summary prepared for the claim filed by Palomino (GC Exh. 38B), Labarge took the following statement from Morgan

Per Steve Morgan, Director of Operations:

> Ms. Palomino last worked on 10/30/15 as a Server at Mexican Radio Corp. Another employee had written an email that was

[21] Initially, the counsel for the General Counsel requested to take testimony from the New York State DOL employees involved in handling the unemployment insurance claims of Fagoth, Santana and Palomino by video conference. The request was opposed by Respondent counsel. I request that the General Counsel file a motion for video conferencing witnesses and a response from the Respondent. I also suggested whether there is an alternative to the need to take testimony of witnesses by video conference. On October 24, 2016, I granted the General Counsel's motion to accept the authenticated business records consisting of three pages of investigative documents prepared by the DOL employees pursuant to the unemployment insurance claims in lieu of taking their live testimony by video (see, Order of record (GC Exh. 38).

> disparaging to the company and she agreed with it. We called her in to the office and she walked out before we could talk to her. We were going to fire her but we did not tell her before we called her in to the office that we were going to discharge her because she agreed with the other employees email. We felt that Ms. Palomino agreeing with the email was insubordination. I will email you documentation.

Similarly, Diana A. Beatty took down a statement from Morgan pursuant to Beatty's handling on Santana's unemployment benefits claim (GC Exh. 38D). Beatty wrote on December 21 that Morgan told her the following

> No she wasn't told if she didn't speak to me before leaving, that she'd fired. John is one of the supervisors. He did not tell me that he had allowed her to leave. I know she said she wasn't feeling well but she had been waiting tables all day without a problem. No one said shes having an anxiety attack. I think she just started not feeling well after she found out that I wanted to speak to her.
>
> No, there were not any problems with Nadgie's work performance or any other issues prior to the co-worker's derogatory email that was sent on 10/29/15, that would suggest her job was in jeopardy of termination before 10/31/15.

Finally, with regard to Fagoth's unemployment benefits claim, Morgan responded to DOL Agent Lorraine J. Astemborski on November 19 (GC Exh. 38C). Astemborski memorialized the following statement taken from Morgan

> There is no written policy regarding e-mails. She had never been written up for anything. This is what happened. There were a bunch of them who were working at the restaurant. It was like it was their own little cartel. We had hired a new manager who they didn't get along with. You probably saw the e-mail it was foul and insulting and she responded in a favorable way to it. So that is why we discharged her. She was discharged for agreeing to it.

DISCUSSION AND ANALYSIS

The complaint alleges that the Respondent interfered, restrained and coerced employees in the exercise of the rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. Section 8(a)(1) of the Act provides that it is an unfair labor practice to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

Discharging and disciplining employees because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1). Section 7 of the Act guarantees employees 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 . . . ." See, *Brighton Retail, Inc.*, 354 NLRB 441, 447 (2009).

a. The Workers Engaged in Protected Concerted Activity

The Respondent contends that the workers did not engage in concerted activity because the individual worker's activity was the expression of a personal gripe and not a protected concerted activity. The Respondent argues that concerted activity "does not include an individual's action simply because the action ought to be of group concern," citing to *Meyers I*, 268 NLRB at 497(R. Br. at 12). I disagree.

The Board has long described concerted activity "in terms of interaction among employees." In *Myers Industries (Myers I),* 268 NLRB 493, 494 (1984), and in *Myers Industries (Myers II)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." In *Talsol Corp*, 317 NLRB 290, 316–317 (1995), the Board held that an employee's statements at a safety meeting indicating concern with matter which affected not only himself but other employees constituted protected concerted activity. The Act also protects concerted activities for mutual aid or protection regardless of whether a union is involved. [22] *Alton H. Piester*, 353 NLRB 369, 371 (2008).

Here, shortly after Alfredou was hired as the general manager, several of the servers discussed and complained to Selden about Alfredou's rude behavior and demeanor towards them and others. Fagoth credibly testified that she emailed Morgan about Alfredou's conduct as a general manager. Her email specifically referenced other employees with similar complaints against Alfredou. Fagoth stated, in part, "We have had the same staff for a while and trust me I know we need to take care of things but there is no reason to be aggressive or disrespectful about it. The least she (Alfredou) can do is schedule a meeting and introduce herself properly and be nice to the staff. If things keep going this way, soon everyone will be leave including me. I will not work at a place where I'm being spoken down to" (GC Exh. 6b).

Fagoth also complained to Selden by email and copied Young on August 9 and stated, in part, "I'm just not happy on the way she (Alfredou) is approaching us and the demeaning way she is speaking to us. I just wanted to reach out to our human resources guy (Morgan) so he can look into it" (GC Exh. 6a).

Garcia also sent an email to Selden on August 28. Garcia complained that it was related to her that Alfredou had threatened to fire her despite the fact that she was on approved sick leave and mentioned that Alfredou also wanted to fire Santana. Garcia's email stated, in part, "I am writing to you to let you know that I was informed by a few of my coworkers that the GM wants to fire me. I have been in the hospital for 8 days… Now I am hearing that she is upset because I did not go to her personally to let her know that I was sick…I don't think it is professional of her to go and tell people that I work with that she is going to fire me before firing Nadgie (Santana) without speaking to me or giving me a warning and telling them not to tell me about it…" (GC Exh. 7). Santana also wrote a similar email to Selden regarding the threat by Alfredou to fire her (GC Exh. 17).

There was protected concerted activity during the August 25

[22] To be sure, the complaint does not allege that the Respondent engaged in antiunion hostility despite argued in the posthearing brief by the counsel for the General Counsel (GC Br. at 68).

pre-shift meeting between the servers and Alfredou. Fagoth, Palomino and Santana raised the issues of giving an equal share of the pooled tips to the runners, reduced work shifts that obviously affected their wages and Alfredou's demeaning behavior towards the staff. Palomino maintained that Alfredou told the wait staff at the meeting that "If you guys don't like how things working here, then you can go look for another job, you can leave." I credit this testimony by Palomino, which was corroborated by Fagoth (Tr. 337). Fagoth also credibly testified that she spoke to Garcia, who had not attended the meeting, and conveyed to her that Alfredou had threatened to fire Garcia. Fagoth ended that phone conversation by saying to Garcia that she was going to canvass the servers and draw up a list of complaints to present to Morgan who was expected to arrive at the restaurant. Fagoth's purpose in relaying the complaints to Garcia was to encourage her to take corrective action to protect her job. Thus, I find that Fagoth's conduct was clearly undertaken for the mutual aid and protection of a fellow employee and therefore constituted actual concerted activity. The Board has repeatedly held that an employee's warning to another employee that the latter's job is at risk constitutes protected, concerted activity. *Food Services of America, Inc.,* 360 NLRB 1012, 1013–1015 (20014); *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987).

In addition to meeting with Morgan, a group of the servers also met with Young and Morgan on October 5. At that meeting, another list of complaints was presented to Young for his response. Young corroborated that he met with the group and discussed their complaints about each of the servers expressing their anger towards Alfredou regarding her treatment of the waitresses, especially towards Santana. Young also recalled that Polanco complained about the dirtiness of the bar area. He also recalled that the group was unhappy with their schedules, which affected their wages (Tr. 70–73; 623–630).

There was also concerted activity by the four discriminatees over the unsanitary working conditions at the restaurant. Each of the discriminatees discussed the problem among themselves and followed up with complaints to the Health Department. Fagoth testified that she spoke to Santana, Palomino, Garcia and Rivera before she called the Health Department on October 14 because little action was done to correct the unsanitary conditions. Garcia and Santana testified that they had also contacted the Health Department.

Most significantly, there was concerted activity when Fagoth, Garcia, Santana and Palomino agreed to the Polanco email. The email was a culmination of the complaints made by the servers to Selden, Morgan and Young. Fagoth, Garcia and Santana had individual conversations before sending out their support for the email. Palomino did not discuss the email with anyone prior to sending out her response, but she supported the group action regarding the demeaning remarks by Alfredou and the terms and conditions of employment mentioned in the email. The Board has found concerted activity when employees discuss matters of common concerns, such as wages, sharing tips, working conditions or work schedules, even when no specific group action was discussed because "it is obvious that discussions of this kind usually precede group action." See *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204, 212 (2007).

Here, the email is a concerted activity. Concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 3 (2014). This is true even if the employee is unsuccessful in persuading other employees to join in group action. *El Gran Combo*, 284 NLRB 111, 115, 117 (1987). If the employee or employees who are acting in concert are seeking to improve terms and conditions of employment, their actions are for mutual aid and protection of all employees within the meaning of Section 7. *Fresh & Easy Neighborhood Market*, above, slip op. at 3, 5–6. Actions taken by the servers were for mutual aid or protection and include activity to "improve terms and conditions of employment or to otherwise to improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

b. 8(a)(1) Standard of Review

Once having determined that the employees engaged in protected, concerted activity, the analysis focuses on whether this conduct was the cause of the discipline, and if so, whether they in fact committed misconduct in the course of the protected activity warranting the discipline. When an employer discharges an employee ostensibly for conduct unrelated to protected activity, the Board must determine whether an unlawful consideration—the protected activity of the employee or other employees—entered into the decision making process and, if so, whether it affected the outcome of that process. In such situations, the Board follows the mixed motive analysis articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983); *La-Z Boy Midwest*, 340 NLRB 80, 80 (2003); *Shamrock Foods Co*., 337 NLRB 915, 915 (2002).[23]

However, the Board has held that where the conduct for which the employee is disciplined is intertwined with protected concerted activity, the Board's traditional *Wright Line*

[23] Under the mixed motive analysis articulated in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983), the Respondent has the burden to show it would have taken the same action even absent the employee's protected activity. The employer does not meet its burden merely by showing it had a legitimate reason for the action; it must demonstrate that it would have taken the same action in the absence of the protected conduct. In finding that the employer's proffered reasons are pretextual, the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons, absent the protected activity. See *Alternative Energy Applications*, 361 NLRB No. 139, at slip op. 3 (2014), citing authorities. It has long been recognized that where an employer's reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

analysis does not apply. *Taylor Motors, Inc.,* 365 NLRB No. 21 fn. 1 (2017); *Rogers Corp.,* 344 NLRB 504, 513 (2005), citing *Felix Industries*, Inc., 331 NLRB 144, 146 (2000).

Having ruled out a *Wright Line* analysis, there are two types of violations involving employees who were discharged for conduct associated with their protected activity: 1) Cases involving employees who were discharged because their employers honestly but mistakenly believed that they had engaged in misconduct during the course of the protected activity and (2) Cases involving employees who did, in fact, mingle some alleged misconduct with the protected activity, but the misconduct was not opprobrious enough to forfeit the protection of the Act. The Board evaluates cases in the first category using the *NLRB v. Burnup & Sims, Inc.*, 379 U.S. 21, 23 (1964) framework. See *Amelio's*, 301 NLRB 182 (1991). For cases in the second category, the analysis focuses on the factors the Board set forth in *Atlantic Steel, Co*., 245 NLRB 814 (1979) and its progeny. Here, the General Counsel's theory of the case falls within the second category (GC Br. at 63–65).

As with all alleged Section 8(a)(1) violations, the judge's task is to "determine how a reasonable employee would interpret the action or statement of her employer . . . and such a determination appropriately takes account of the surrounding circumstances." *The Roomstore*, 357 NLRB 1690, 1690, fn. 3 (2011) (taking account of the surrounding circumstances was incorporated with the Board's later decision in *Pier Sixty, LLC*, 362 NLRB No. 59 (2015) that looks into the totality of the circumstances).

c. Credibility

The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the demeanor of the witnesses, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, *Inc.,* 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, above. Nevertheless, the credibility findings by the judge must be clear and uncertain. *Taylor Motors, Inc.*, 365 NLRB No. 21 (2017); *Roto Rooter*, 283 NLRB 771, 773 (1987).

Here, it was necessary to make several credibility determinations. The counsel for the Respondent objected on numerous occasions that testimony provided by the discriminatees as to statements told to them by other individuals was hearsay testimony. I ruled that the Board "does not invoke a technical rule of exclusion but admits hearsay evidence and gives it such weight as its inherent quality justifies" and their testimony was allowed in. *Midland Hilton & Towers*, 324 NLRB 1141 fn. 1 (1997).

d. The Respondent Displayed Animosity to the Workers' Concerted Activity

I find that the Respondent has already demonstrated its animus towards the discriminatees for their protected concerted activity. At the pre-service meeting on August 25, Santana complained that Alfredou reduced her work shifts from three to one when she returned. Santana stated that she returned to work on August 3 and was informed by Alfredou that she wanted to fire her in order to reduce expenses. Alfredou told Santana that it was "not personal" when she informed her that she might be discharged. Santana said that Alfredou mentioned Garcia as someone that might also be fired because of her illness. Palomino maintained that Alfredou told the wait staff at the meeting that "If you guys don't like how things working here, then you can go look for another job, you can leave." Fagoth corroborated the threat made by Alfredou and that Alfredou repeated the same threat to fire the waitresses that refused to agree with her work shift schedule and the sharing of the tips. Fagoth testified that Alfredou said to her and the wait staff that "if you don't like it, you can go" and that the changes were instructions from Young and Selden.

Much of the hearsay objections were statements attributed to Alfredou, Young, Selden, Morgan and Petrow as described by the discriminatees. Inasmuch as Young, Selden and Petrow testified and were subjected to examination about a prior statement, such statements are not hearsay. To the extent that out-of-court statements were attributed to Alfredou and Morgan, their statements made to the discriminatees went unrebutted because Alfredou and Morgan did not testify. Thus, the threat made by Alfredou to the discriminatees at the August 25 pre-service meeting was a party admission against interest and are not hearsay. See *Grey v. Heckler*, 721 F.2d 41, 48 (2d Cir. 1983); *Avon Roofing & Sheet Metal Co.*, 312 NLRB 499, 499 (1993). As such, I credit the testimony of Palomino and Fagoth that Alfredou had in fact threatened to discharge those who did not agree with her management policy and I further credit Fagoth's testimony that Alfredou was instituting the changes in the working conditions at the direction of the owners. Additionally, I also find that the statements attributed to Alfredou were fully corroborated and consistent with the testimony provided by the discriminatees and therefore, have significant probative value.

The remark made by Alfredou that "If you guys don't like how things working here, then you can go look for another job, you can leave" is certainly threatening and clearly had the tendency to restrain and coerce employees in the exercise of their Section 7 rights. The Board has long held that such statements by an employer implicitly threaten discharge because they convey the impression that the employer considers complaining about working conditions incompatible with continued employment. See *Equipment Trucking Co*., 336 NLRB 277 (2001) (the Board found that the statement by the employer's president that she would run the company "any way she wanted, and if he (the employee) didn't like it, find another job" was unlawful); *Electrical South, Inc*., 327 NLRB 270, 277 (1998)(statement by supervisor that "employees had better watch their backs" unlawful as a threat of unspecified reprisal); *Bill Scott Oldsmobile*, 282 NLRB 1073 (1987)(when employ-

ees expressed concern about changes in operation, the supervisor told the employees that "if they did not like it, they could get out, leave their jobs").[24] The threat, moreover, made by Alfredou, the general manager, is a factor that the Board has long recognized as significant. "The threats were made by Respondent's general manager, a man who possessed the power not only to threaten but also to turn threat into reality." *General Stencils, Inc.*, 195 NLRB 1109, 1110 (1972).

Further, additional animus towards the workers in their exercise of Section 7 rights were shown by the owners' hostility towards the complaints filed by the workers regarding the unsanitary conditions at the restaurant. Petrow testified that the department of health complaints was part of doing business and was not alarmed over mice in the restaurant. Petrow did not believe that discipline was taken against any of the servers for reporting the unsanitary conditions because it's a problem that needed to be fixed and would not be grounds for discipline. However, when the health complaints were reported to the owners, Selden's response was that Petrow should find out who made the complaints "ASAP" and suggested that their attorneys file a "cease and desist" order against the complainers (GC Exh. 25C). Petrow also confirmed that Selden told him to find out who had made the complaints (Tr. 771, 772).

Fagoth and Garcia testified that they were interrogated by Petrow and that it was stated to them that whoever made the calls to DOH was harassing the owners. I credit the testimony of Fagoth and Garcia that Petrow made such as a statement since the statement is consistent with the demand from Selden to Petrow to find out who had made the complaints and to file a "cease and desist" order against the disgruntled complainers.

e. The Respondent Violated Section 8(a)(1) When the Employees were Disciplined and Discharged

The Respondent argues that by adapting and agreeing to the language in the email, the discriminatees were insubordinate in undermining the owners' authority and credibility and therefore loss the protection of the Act. Upon my review, I find that the sole reason for the discharge of Fagoth, Garcia, Santana and Palomino was over the email and not because they had refused to meet or had abandoned their job.

1. Fagoth, Santana, Garcia, and Palomino were Reprimanded and Discharged for Agreeing to the Polanco Email

With Fagoth, Selden recalled Morgan asking Fagoth why she supported the email. Morgan said it was insubordination in referring to Fagoth's agreement to the email. Selden then said that Morgan replied we will have to let you (Fagoth) go. The reprimand for Fagoth stated that she was discharged because the email included false accusations about management and the owners and had used inappropriate language which Fagoth did not object when she agreed to the statements in the email. In opposing Fagoth's unemployment benefits claim, Morgan stated in the DOL questionnaire that Fagoth was in full support of a former employee's email that contained false accusations and foul language about the owners and management, which Fagoth publicly supported and Morgan deemed this to be insubordination and grounds for discharge.

With Palomino, Young insisted that Palomino was not terminated for responding to the email, but rather for not speaking to them and for abandoning her position when she walked out of the restaurant with Fagoth and Rivera. However, the reprimand for Palomino issued on October 30 by Alfredou stated that she was discharged because she demonstrated insubordination by agreeing with all the issues in the email. Separately, Palomino was also discharged for abandoning her position. Young said that she was terminated for walking out and not speaking to them about the email on October 30.

With Santana, she was discharged for insubordination in refusing to speak with the management team. Selden said that Santana was terminated for refusing to come downstairs to speak and instead, she left the restaurant. Selden also admitted that Santana was discharged over insubordination in agreeing with the email, walking off the job, which she considered as job abandonment. Young's testimony for Santana's discharge was similar to Selden. He testified that Santana was terminated for a no call/no show on October 31 and insubordination for refusing to speak with them on October 30. Young subsequently indicated that Santana was also terminated for insubordination for responding to the email.

With Garcia, she was terminated for a no show to work on October 31 for her 5:30 p.m. shift. Young insisted that Garcia disappeared and was not terminated for insubordination. Young said that Garcia was eventually terminated for no show after not hearing from her. However, an affidavit provided by Young pursuant to a charge filed with the EEOC stated that Garcia was terminated for insubordination as well as not reporting for her shift. The reprimand for Garcia stated that she was discharged because Garcia replied to the email in support of Polanco. Morgan believed this to be insubordination. The reprimand also noted that Garcia abandoned her job.

Accordingly, the Polanco email was clearly the reason that Fagoth, Garcia, Santana and Palomino were reprimanded and discharged. While the Respondent noted other reasons for the discharge (further discussed below), the driving motivation for each of the discharges was the workers' agreement with the email. With Fagoth, Morgan states that she was discharged because of her "full support of the email." With Palomino, Alfredou stated that she was discharged for insubordination by agreeing to the email. With Santana, Selden admitted that Santana was discharged over insubordination in agreeing with the email. Finally, with Garcia, Morgan stated in his reprimand that she was discharged because she replied to the email in support of Polanco.

2. Agreeing to the Polanco Email was not Opprobrious Conduct

Respondent argues that the email was "pretty nasty" and "deeply insubordinate." The Board has held that workers engaged in "opprobrious conduct" can lose the protection of the Act. *Atlantic Steel*, above; *Caterpillar Logistics, Inc. v. NLRB*, 835 F.3d. 536, 539 (6th Cir. 2016) (Where an employee engages in indefensible for abusive misconduct during otherwise protected activity, the employee forfeits the Act's protection).

[24] The complaint did not allege that the threat made by Alfredou was an independent violation of the Act but nevertheless serves as background information for the workers' subsequent termination.

When an employee engages in abusive misconduct during activity that is otherwise protected, the employee forfeits the Act's protection. *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005).

I disagree. It is clear that each of the four discriminatees were discharged for agreeing to the contents of the Polanco email. The only question remaining is whether Fagoth, Santana, Garcia and Palomino lost the protection of the Act by merely responding to Polanco's email. In my opinion, Fagoth, Santana, Garcia and Palomino did not lose the Protection of the Act by agreeing to the email.

Regardless of whether I apply the four factors under *Atlantic Steel*[25] or the totality of the circumstances under *Pier Sixty*, upon my review, I find that the Respondent violated Section 8(a)(1) of the Act when it disciplined and discharged Fagoth, Garcia, Santana and Palomino.

Here, the four discriminatees merely agreed to a nonpublic email from a former employee. First, the four discharged employees did not add to the email with any negative comments of their own; they did not describe their feelings or animosity toward the manager and owners; and they never cursed or made any derogatory comments toward the Respondent in their responses. Second, the email was part of an ongoing dialogue between the workers and the managers/owners and was provoked, in part, on the failure of the Respondent to correct the problems. Third, the email contained little profanity and was not insubordination, but a critique of the management style of Alfredou and others. Fourth, the nonpublic email did not cause a loss of reputation or business for the Respondent. Fifth, there was no disruption of the business on the following day.

The discriminatees, by agreeing to the email did not engage in misconduct that was so opprobrious as to forfeit the Act's protection. The Board has consistently held that discriminatees do not forfeit the protection of the Act by merely participating in an otherwise protected discussion in which other persons made unprotected statements. In *Triple Play Sports Bar & Grille*, 361 NLRB No. 31 (2014), the Board found that a worker engaged in protected concerted activity by liking a Facebook post concerning an on-going work issue refused to attribute unprotected and/or profane statements made by others to the charging party.

The Respondent would like to distinguish *Triple Play* from the situation here because *Triple Play* was a social media posting (R. Br. at 14, 15) and that the four factors under *Atlantic Steel* are more applicable than the *Triple Play* "totality of circumstances" standard of review. However, even applying the four factors under *Atlantic Steel*, I find that the discharged workers did not loose the protection of the Act by agreeing to the contents of the email. Contrary to the position of the Respondent, I find that the email was limited to certain employees, managers and owners of the restaurant, and therefore not known to other employees and the public. Any alleged defamatory statements in the email were significantly limited to a nonpublic email in contrast to a publicly posted comment on social media for the entire world to view. As such, the dissemination of the email was far less intrusion on the Respondent's reputation and business than a social media posting under *Triple Play*. Further, the email was not a discussion between the employer and responding employees and did not occur in a public forum, and therefore there was no disruption of the workplace or with the patrons. The subject matter invoked a continuing dialogue of concerted activity regarding the terms and conditions of employment and is protected under the Act. Finally, the outburst, which was merely agreeing to the contents of the email, was provoked by the employer's unfair labor practice to discharge the workers who had disagreed with Alfredou's change in the working conditions at the restaurant.

3. The Discharged Workers did not Abandoned their Jobs or Refused to be Interviewed

The Respondent also argues, assuming the agreement to the email was concerted protected activity; the workers went beyond with agreeing with a coworker's complaint in an email. The Respondent asserts that Fagoth, Garcia, Santana and Palomino should not be fall under the curative cupola of protected concerted activity because they refused to be interviewed by management over the email and refused to work, either by walking out of the restaurant or not showing up for their scheduled shift.[26] The Respondent states that Palomino and Santana flatly refused to speak to the owners and walked out of the restaurant with Palomino leaving her shift uncovered and Santana abandoning her shift over the weekend. The Respondent states that with Garcia, she simply never returned to work and abandoned her job (R. Br. at 22–23).[27]

With Fagoth, it was clear that she was discharged for agreeing to the email. Fagoth was terminated for insubordination after she reaffirmed her support with the contents of the email. Fagoth met with the owners and therefore, she could not be insubordinate for refusing to meet with them on October 30. The only insubordination charge is her agreement with the email. Before Fagoth was discharged, Selden recalled Morgan asking Fagoth why she supported the email. Selden recalled Fagoth replying that "You don't do and haven't done what we want," obviously referring to the issues in the email and then Morgan discharged Fagoth. In my opinion, Fagoth was discharged immediately after she asserted her Section 7 rights when she conveyed her own and the concerns of other servers that the Respondent officials failed to take any corrective action over the terms and conditions of employment at the restaurant that had been festering since the arrival of Alfredou.

With Garcia, I find that she did not abandon her job. Garcia was not scheduled to work on October 30 and therefore, she would not be aware that the owners wanted to meet with her over the email. Garcia received a phone call from Fagoth and

[25] The four factors articulated in Atlantic Steel are: (1) the place of the discussion between the employee and employer; (2) the subject matter of the discussion; (3) the nature of the employees' outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice.

[26] In such a situation where an employer alleges that the discharged employee engaged in misconduct unrelated to his protected activity, such as poor work performance or tardiness, the Board has applied the "mixed-motive" review as set forth in *Wright Line*, above.

[27] I would note that the Respondent did not assert abandonment as an affirmative defense in its answer to the complaint but I would nevertheless address this contention herein.

was informed that Fagoth was fired for insubordination in agreeing to the contents of the email. Garcia also received a phone call from Santana before leaving for work on October 31. Santana informed Garcia that she was fired and played back the voice conversation she had with Morgan. Santana informed Garcia that Morgan was adamant that he did not want anyone working at the restaurant if they had replied in support of the email. Garcia testified that she never returned to work from that day based upon her belief that Morgan in the voice recording was also referring to her because she had agreed to the contents of the email. Garcia said that she never heard from any management official after that day.

Young testified that Garcia was terminated for a no show to work on October 31, yet no one in management had contacted Garcia to determine whether she was ill or unable to work. Although an employer is not obligated to contact an employee for failing to report to work, I find it significant that Young went out of his way to assure other employees on October 30 that their jobs were not in jeopardy but did not give the same assurances to Garcia (Tr. 60–64).

In addition, Young's affidavit provided pursuant to an EEOC charge stated that Garcia was terminated for insubordination as well as not reporting for her shift. Garcia's reprimand (GC Exh. 29B) also stated that Garcia was discharged because Garcia supported the email and Respondent deemed this to be "insubordination and will not be tolerated." This was the real reason for Garcia's termination and her alleged abandonment of her job was merely a smokescreen and therefore, a false reason.

I find it was reasonable for Garcia to believe that her agreement to the email would result in her termination in light of the fact that she heard the taped statement by Morgan that the Respondent did not want anyone working in the restaurant who had agreed to the email. Equally as significant, the reprimand used to discharge Garcia had already been drafted on October 30 before Garcia even had an opportunity to speak and explain her position over the email with the owners and Morgan.

With Santana, she received a phone call from Morgan and the message was recorded on Santana's phone on October 31. The voice message from Morgan stated that they had tried to speak to her the day before and that she refused to talk with them and left the restaurant. Morgan also noted that Santana did not arrive at her scheduled shift on Saturday (October 31) and assumed Santana did not want to work for the restaurant any longer because she refused to speak to them and did not arrive at work the following day. Morgan then stated that Santana "don't have a job anymore so you don't need to come back" (GC Exh. 37).

Santana called Morgan back after hearing his voice message on October 31. Her phone conversation was recorded by Santana. Santana protested that she had abandoned her job and reiterated that she informed Alfredou of her absence and that Petrow had approved her day off because Alfredou never responded to her text. Morgan replied that it was wrong that Santana agreed with the email, the contents were untrue and management will not tolerate people working in the restaurant that agreed with the email. Morgan felt that she was being insubordinate and "refused to do things." Santana stated that she never refused any appropriate instructions but was fired anyway (GC Exh. 37C).[28]

The fact that Santana did not abandon her job is evidenced in Santana's reprimand written by Morgan, which stated that "she undermined the credibility of the management and company in a disparaging way. Nadgie replied to the email in support of Netty. This is insubordination and will not be tolerated." [29]

Inasmuch as Morgan did not testify, I find that Santana's statement that Morgan will discharge any workers in agreement with the email as credible and fully corroborated with the transcript of the phone conversation with Santana. Again, like Garcia, I find that the real reason for Santana's termination was her agreement with the email and not for abandoning her job her refusing to speak with the owners on October 30.

Finally, with Palomino, it was already a foregone conclusion that she was going to be discharged once she met with the owners and her refusal to meet with the owners can only be seen as a pretext for her termination. The owners were intent on discharging Palomino before she had refused to meet with the owners. In the summary prepared pursuant to the DOL unemployment insurance claim filed by Palomino, Morgan responded that "Another employee had written an email that was disparaging to the company and she (Palomino) agreed with it. We called her in to the office and she walked out before we could talk to her. *We were going to fire her but we did not tell her before we called her in to the office that we were going to discharge* (emphasis added) her because she agreed with the other employees email. We felt that Ms. Palomino agreeing with the email was insubordination." Again, the alleged abandonment of her position by Palomino as a reason for her discharge is a pretext for her termination.[30]

In order to meet the *Wright Line* burden of persuasion, an employer must establish that it has consistently and evenly applied its disciplinary rules. *DHL Express, Inc*., 360 NLRB 730, 736 (2014). In the instant case, the Respondent has produced no evidence of other employees who have been discharged for "failure to report to work or refusing to meet with the owners." Indeed, the evidence shows that an employee who had not reported to work was suspended and not terminated and other employees in similar circumstances were given less se-

[28] I find it unnecessary to determine whether John Petrow was an agent of the Respondent within the meaning of Section 2(13) of the Act since his employment status did not play a role in the reprimands and discharge of the four workers.

[29] Selden also testified that Santana was not discharged for her failure to report to work on October 31.

[30] It is also clear that the Respondent failed to establish that Garcia, Palomino and Santana abandoned their positions since they had protested the allegation that they had abandoned their jobs. In order to establish abandonment of employment ... an employer must present 'unequivocal evidence of intent to permanently severe employment relationship..." *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1029 (2006); *Harowe Servo Controls, Inc.*, 250 NLRB 958, 964 (1980)("…unequivocal evidence of intent to permanently severe employment relationship. …"). I note that the Board has held "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F.Bolin, 5 Co*., 311 NLRB 1118, 1119 (1993), enfd. mem 99 F.3d 1139 (6th Cir. 1996).

vere discipline for arriving late or not showing up for work (GC Exh. 28). In light of that, the Respondent does not point to any evidence that establishes objective standards regarding what constitutes abandonment or refusal to speak to management officials as being inappropriate and grounds for termination. As such, I find that the Respondent has failed its burden of persuasion to demonstrate the same action would have taken place even in the absence of the protected conduct. *Wright Line*, supra, at 1089.

Accordingly, I find that the Respondent unlawfully reprimanded and discharged Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino in violation of Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. At all material times, the Respondent, Mexican Radio Corporation, is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Respondent violated Section 8(a)(1) of the Act on about October 30, 2015, by discriminatorily issuing written reprimands to Tangni Fagoth, Stephanie Garcia, Nadgie Santana and Juliana Palomino.

4. The Respondent violated Section 8(a)(1) of the Act by discriminatorily terminating Tangni Fagoth and Juliana Palomino on October 30; and Nadgie Santana and Stephanie Garcia about October 31, 2015.

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

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, the Respondent having discriminatorily issued terminations to Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino, I shall order the Respondent to offer Fagoth, Garcia, Santana, and Palomino full reinstatement to their former positions or, if those positions no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other employee emoluments, rights or privileges previously enjoyed, and to make them whole for any loss of earnings suffered as a result of the Respondent's unlawful actions against them. Backpay shall be computed in accordance with *F.W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

In accordance with *Don Chavas, LLC, d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014), my recommended order requires Respondent to compensate Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. *AdvoServ for New Jersey*, 363 NLRB No. 143 (2016).

In addition to the remedies ordered, I shall recommend that the Respondent compensate Tangni Fagoth, Stephanie Garcia, Nadgie Santana and Juliana Palomino for their search-for-work and interim employment expenses regardless of whether those expenses exceed their interim earnings. *King Soopers, Inc*., 364 NLRB No. 93 (2016). Search for work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

It is further recommended that Respondent remove all references to the reprimands dated October 30, 2015 issued to Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino, including said "Reprimands" from their files and notify them in writing that it has done so and that the reprimands will not be used against them in any way.

My recommended order requires the Respondent to expunge from its files any and all references to the unlawful termination of Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino, including the reprimands dated October 30, 2015, and any notes, documents or references regarding their reprimands and termination that were prepared and/or provided to the New York State Department of Labor in response to their unemployment insurance claims and to notify them in writing that this has been done and that the unlawful discharges and reprimands will not be used against them in any way.

ORDER

On these findings of facts and conclusions of law and on the entire record, I issue the following recommended[31]

The Respondent, Mexican Radio, Corp., its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging, disciplining, or otherwise discriminating against employees because they engaged in protected concerted activities.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino whole for any loss of earnings and other benefits, including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, suffered as a result of the unlawful reprimand and discharge, as set forth in the remedy section of this decision.

(b) Compensate Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and to file with the Regional Director for Region 2 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

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

(c) Immediately offer full reinstatement to Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino and if the offers are accepted, reinstate Fagoth, Garcia, Santana and Palomino to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino, including their reprimands dated October 30, 2015, and thereafter notify them in writing that this has been done and that the discipline will not be used against them any way.

(e) Remove all references to any notes, memoranda, and any written documents prepared in response and defense of the unemployment insurance claims filed by Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino with the New York State Department of Labor and notify them in writing that it has done so and that the reprimands will not be used against them in any way.

(f) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay. Absent exceptions as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its existing property at the 19 Cleveland Place, New York, New York facility, a copy of the attached notice marked "Appendix."[32] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the 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, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. 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 October 29, 2015.

(i) Mail a copy of said notice to Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino at their last known addresses.

(j) Within 21 days after service by the Region, file with the Regional Director for Region 2, a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. April 26, 2017

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 threaten to discipline or discharge or otherwise discriminate against you because you engage in protected concerted activities or to discourage you from engaging in these or other concerted activities.

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

WE WILL, within 14 days from the date of the Board's Order, offer Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino full reinstatement to their former jobs or, if the jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest, including any pay increases made to similarly situated employees from the date of their respective discharge dates to the present, and including reimbursement for all search-for-work and interim-work expenses, regardless of whether they received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period.

WE WILL compensate Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino for the adverse tax consequences, if any, of receiving a lump-sum backpay award.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all references to the unlawful discharge

[32] 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."

of Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino, including their respective reprimands.

WE WILL, within 3 days thereafter, notify Tangni Fagoth, Stephanie Garcia, Nadgie Santana, and Juliana Palomino in writing that this has been done and that their discharge and reprimands will not be used against them in any way.

MEXICAN RADIO, CORP.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/02-CA-168989 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.