Three D, LLC d/b/a Triple Play Sports Bar and Grille *and* Jillian Sanzone

Three D, LLC d/b/a Triple Play Sports Bar and Grille *and* Vincent Spinella. Cases 34–CA–012915 and 34–CA–012926

August 22, 2014

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

The principal issue in this case is whether the Respondent violated Section 8(a)(1) of the Act by discharging two employees for their participation in a Facebook discussion involving claims that employees unexpectedly owed additional State income taxes because of the Respondent's withholding mistakes.[1] We agree with the judge that the discharges were unlawful. We also adopt the judge's findings that the Respondent violated the Act by threatening employees with discharge for and interrogating employees about their Facebook activity, as well as by informing employees they were being discharged because of their Facebook activity.[2] In addition, we adopt the judge's finding that the Respondent unlawfully threatened legal action for engaging in that activity.[3] Finally, we reverse the judge and find that the Respondent violated Section 8(a)(1) by maintaining its "Internet/Blogging" policy. We address in detail the discharges, then the policy.

I.

Section 7 of the National Labor Relations Act provides, in pertinent part, that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ." Under Section 7, employees have a statutory right to act together "to improve terms and conditions of employment or otherwise improve their lot as employees"[4]—including by using social media to communicate with each other and with the public for that purpose. At the same time, online employee communications can implicate legitimate employer interests, including the "right of employers to maintain discipline in their establishments."[5] However,

[1] On January 3, 2012, Administrative Law Judge Lauren Esposito issued the attached decision. The General Counsel and the Respondent each filed exceptions, a supporting brief, and an answering brief to the other party's exceptions.

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, and conclusions only to the extent consistent with this Decision and Order. We have amended the judge's conclusions of law consistent with our findings herein. We have amended the remedy and modified the judge's recommended Order consistent with our legal conclusions herein, and we shall substitute a new notice to conform to the Order as modified and in accordance with our decision in *Durham School Services*, 360 NLRB No. 85 (2014). In addition to the remedies recommended by the judge, we shall order the Respondent to compensate Charging Parties Jillian Sanzone and Vincent Spinella for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee. We shall also modify the judge's recommended Order in accordance with our decision in *Guardsmark, LLC,* 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007).

The Respondent has implicitly 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 judge's findings.

[2] We agree with the judge that the Respondent separately violated Sec. 8(a)(1) of the Act by telling Sanzone and Spinella that their Facebook activity was the reason for their discharges. In doing so, we rely on *Benesight, Inc*., 337 NLRB 282, 283–284 (2001) (finding statement to employee linking her unlawful discharge to her protected activity independently violated Sec. 8(a)(1) separate and apart from the discharge itself). We do not rely on the cases cited by the judge—*Extreme Building Services Corp*., 349 NLRB 914, 914 fn. 3 (2007); *Watts Electric Corp*., 323 NLRB 734, 735 (1997), revd. in part, vacated in part mem. 166 F.3d 351 (11th Cir. 1998)—which involved employers unlawfully telling employees that *another* employee had been discharged for engaging in protected activities.

[3] In adopting the judge's finding that the Respondent unlawfully threatened legal action, we rely on the Respondent's postdischarge statement to Spinella that he would "be hearing from [the Respondent's] lawyers." The threat directed at Spinella was not incidental to a lawsuit: the Respondent's counsel did not contact Spinella and the Respondent took no legal action against him. Accordingly, by its threat, the Respondent violated Sec. 8(a)(1) of the Act, regardless of whether a lawsuit against Spinella would have been unlawful had one been filed. See *DHL Express, Inc.*, 355 NLRB 680, 680 fn. 3 (2010). The judge erred in stating that the Board has "explicitly declined to apply" the principles of *BE & K Construction Co.*, 351 NLRB 451 (2007), to threats to initiate litigation "where they are 'incidental' to the actual filing of the lawsuit itself." That issue remains undecided. See *DHL Express, Inc.*, supra at 680 fn. 3; *Postal Service*, 350 NLRB 125, 126 fn. 5 (2007), enfd. 526 F.3d 729 (11th Cir. 2008). We need not resolve it here. We find it unnecessary to pass on the judge's finding that the Respondent also violated Sec. 8(a)(1) by threatening Sanzone with legal action because finding that additional violation would be cumulative and would not affect the remedy.

[4] *Valley Hospital Medical Center,* 351 NLRB 1250, 1252 (2007), enfd. 358 Fed. Appx. 783 (9th Cir. 2009).

[5] *Republic Aviation Corp. v. NLRB,* 324 U.S. 793, 798 (1945).

neither of these rights is "unlimited in the sense that [it] can be exercised without regard to any duty which the existence of rights in others may place upon employer or employee."[6] In this case, there is no dispute that the Facebook communications at issue constituted "concerted activities" and that they were "for the purpose of . . . mutual aid or protection." Rather, mindful of the balance to be struck between employee rights under Section 7 and legitimate employer interests, our focus here is on whether these Facebook activities, which indisputably prompted the Respondent to discharge the two employees, lost the protection of the Act. While our analysis differs somewhat from that of the judge, we agree that they did not.

A.

The Respondent, which is owned by Ralph DelBuono and Thomas Daddona, operates a bar and restaurant; DelBuono is responsible for the Respondent's accounting. The Respondent's employees are not represented by a labor organization.

The Respondent employed Jillian Sanzone as a waitress and bartender, and Vincent Spinella as a cook. In approximately January 2011,[7] Sanzone and at least one other employee discovered that they owed more in State income taxes than they had expected. Sanzone discussed this at work with other employees, and some employees complained to the Respondent. In response to the complaints, the Respondent planned a staff meeting for February with its payroll provider to discuss the employees' concerns.

Sanzone, Spinella, and former employee Jamie LaFrance, who left the Respondent's employ in November 2010, have Facebook accounts. On January 31, LaFrance posted the following "status update" to her Facebook page:

> Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!

The following comments were posted to LaFrance's page in response:[8]

> KEN DESANTIS (a Facebook "friend" of LaFrance's and a customer): "You owe them money...that's fucked up."
>
> DANIELLE MARIE PARENT (Triple Play employee): "I FUCKING OWE MONEY TOO!"
>
> LAFRANCE: "The state. Not Triple Play. I would never give that place a penny of my money. Ralph [DelBuono] fucked up the paperwork…as per usual."
>
> DESANTIS: "yeah I really dont go to that place anymore."
>
> LAFRANCE: "It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it bc he still owes me about 2000 in paychecks."
>
> (At this juncture, employee Spinella selected the "Like" option under LaFrance's initial status update. The discussion continued as follows.)
>
> LAFRANCE: "We shouldn't have to pay it. It's every employee there that its happening to."
>
> DESANTIS: "you better get that money…thats bullshit if thats the case im sure he did it to other people too."
>
> PARENT: "Let me know what the board says because I owe $323 and ive never owed."
>
> LAFRANCE: "I'm already getting my 2000 after writing to the labor board and them investigating but now I find out he fucked up my taxes and I owe the state a bunch. Grrr."
>
> PARENT: "I mentioned it to him and he said that we should want to owe."
>
> LAFRANCE: "Hahahaha he's such a shady little man. He prolly pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. Thank goodness I got outta there."
>
> SANZONE: "I owe too. Such an asshole."
>
> PARENT: "yeah me neither, i told him we will be discussing it at the meeting."
>
> SARAH BAUMBACH (Triple Play employee): "I have never had to owe money at any jobs…i hope i wont have to at TP…probably will have to seeing as everyone else does!"
>
> LAFRANCE: "Well discuss good bc I won't be there to hear it. And let me know what his excuse is ;)."
>
> JONATHAN FEELEY (a Facebook "friend" of LaFrance's and customer): "And ther way to expensive."

Sanzone added her comment from her cell phone on February 1. She testified that her Facebook privacy settings permit only her Facebook friends to view her posts.[9] LaFrance's privacy settings are not in the record.

Co-owner Daddona learned about the Facebook discussion from his sister, who, in addition to being em-

[6] Ibid.

[7] All dates are in 2011, unless otherwise noted.

[8] We quote the comments verbatim without the corrections the judge made in her decision.

[9] To become Facebook "friends," one person must send a "friend request," and the recipient must accept the request.

ployed by the Respondent, is a Facebook friend of LaFrance. On February 2, when Sanzone reported to work, Daddona told her she was being discharged. When Sanzone asked why, Daddona responded that she was not loyal enough to be working for the Respondent because of her Facebook comment.

When Spinella reported for work on February 3, he was summoned to the Respondent's office, where Daddona and DelBuono were waiting; the Facebook comments from LaFrance's account were displayed on a computer screen in the office. After asking Spinella if he "had a problem with them, or the company," DelBuono and Daddona interrogated him about the Facebook discussion, the meaning of his "Like" selection, the identity of the other people who had participated in the conversation, and whether Spinella had written anything negative about DelBuono or Daddona. DelBuono told Daddona that the "Like" option meant that Spinella stood behind the other commenters. He told Spinella that, because he "liked the disparaging and defamatory comments," it was "apparent" that Spinella wanted to work somewhere else. DelBuono also said that his attorney had informed him that he should discharge anyone involved in the Facebook conversation for defamation. DelBuono then discharged Spinella. As Spinella was leaving, DelBuono said, "You'll be hearing from our lawyers." The Respondent's counsel did not contact Spinella, and the Respondent did not take any legal action against him. Counsel did contact Sanzone by letter, raising the possibility of an action for defamation. Counsel also contacted LaFrance, who thereafter deleted the entire conversation and posted a retraction.

B.

The judge found that the Facebook discussion was *concerted* activity because it involved four current employees (Danielle Marie Parent, Sarah Baumbach, Sanzone, Spinella) and was "part of an ongoing sequence" of discussions that began in the workplace about the Respondent's calculation of employees' tax withholding. Noting that the employees, in their Facebook conversation, discussed issues they intended to raise at an upcoming staff meeting as well as possible avenues for complaints to government entities, the judge found that the participants were seeking to initiate, induce, or prepare for group action. As a result, the judge concluded that the Facebook discussion was concerted under the standard set forth in *Meyers Industries*, 281 NLRB 882, 887 (1986).[10]

[10] Enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988).

The judge further found that Sanzone and Spinella were engaged in *protected* concerted activity because the discussion concerned workplace complaints about tax liabilities, the Respondent's tax withholding calculations, and LaFrance's assertion that she was owed back wages. The judge found that Spinella's selection of the "Like" button expressed his support for the others who were sharing their concerns and "constituted participation in the discussion that was sufficiently meaningful as to rise to the level of" protected, concerted activity. Having found Sanzone's and Spinella's Facebook activities protected by the Act, the judge further found that they did not lose the Act's protection under the test set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), or under the standards established in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966). Applying *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964), and *Wright Line,* 251 NLRB 1083 (1980),[11] the judge concluded that the Respondent unlawfully discharged Sanzone and Spinella for their protected Facebook posts.

C.

The Respondent does not dispute that the employees' Facebook activity was concerted or that its employees have a protected right to engage in a Facebook discussion about the Respondent's tax withholding calculations that looks toward group action. Rather, citing *Linn*, *Jefferson Standard*, and *Atlantic Steel,* it contends that, as a result of their Facebook activities, Sanzone and Spinella adopted LaFrance's allegedly defamatory and disparaging comments and lost the protection of the Act.[12] The Respondent asserts that the Facebook posts were made in a "public" forum accessible to both employees and customers and that, as a result, they undermined DelBuono's authority in the workplace and adversely affected the Respondent's public image. Finally, the Respondent contends that *NLRB v. Burnup & Sims*, 379 U.S. at 21, cited by the judge, is inapplicable here.

D.

We begin by finding that, as a general matter, the *Atlantic Steel* framework is not well suited to address issues that arise in cases like this one involving employees' off-duty, offsite use of social media to communicate with other employees or with third parties. As a result, we do not follow the judge's lead in applying *Atlantic Steel* to determine whether Sanzone's and Spinella's Fa-

[11] Enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[12] The Respondent further maintains that it lawfully discharged Spinella for performance problems.

cebook comments lost the protection of the Act. Rather, we assess their comments under *Jefferson Standard* and *Linn,* concluding that under those decisions, the comments were statutorily protected. Applying the well-established *Wright Line* test, in turn, we conclude that the discharges of Sanzone and Spinella were unlawful.

1.

To determine whether an employee loses the Act's protection under *Atlantic Steel*, the Board balances four factors: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by the employer's unfair labor practices. This multifactor framework enables the Board to balance employee rights with the employer's interest in maintaining order at its workplace. See *Plaza Auto Center, Inc.,* 355 NLRB 493, 494 (2010), enfd. in part 664 F.3d 286 (9th Cir. 2011), decision on remand 360 NLRB No. 117 (2014). Typically, the Board has applied the *Atlantic Steel* factors to analyze whether direct communications, face-to-face in the workplace, between an employee and a manager or supervisor constituted conduct so opprobrious that the employee lost the protection of the Act. *Atlantic Steel* generally has not been applied to communications by employees with third parties or the general public. See, e.g., *Valley Hospital Medical Center*, supra, 351 NLRB at 1252, enfd. sub nom. *Nevada Service Employees Local 1107 v. NLRB*, 358 Fed.Appx. 783 (9th Cir. 2009); *Emarco, Inc.*, 284 NLRB 832, 833 (1987). Rather, in those cases, the Board has applied the standards set forth in *Jefferson Standard* and *Linn.*[13]

The clear inapplicability of *Atlantic Steel*'s "place of the discussion" factor supports our conclusion that the *Atlantic Steel* framework is tailored to workplace confrontations with the employer.[14] We do not suggest that employees' off-duty, offsite use of social media can never implicate an employer's interest in maintaining workplace discipline and order in the same manner that a face-to-face workplace confrontation with a manager or supervisor does. Here, however, we find that the *Atlantic Steel* framework is particularly inapplicable. The employees engaged in protected concerted activity by taking part in a social media discussion among offsite, off-duty employees, as well as two nonemployees.[15] No manager or supervisor participated in the discussion, and there was no direct confrontation with management.[16] Although we do not condone her conduct, we find that Sanzone's use of a single expletive to describe a manager, in the course of a protected discussion on a social media website, does not sufficiently implicate the Respondent's legitimate interest in maintaining discipline and order in the workplace to warrant an analysis under *Atlantic Steel*.[17]

2.

Having found that *Atlantic Steel* does not apply here, we must next consider whether the Facebook activities of Sanzone or Spinella lost the protection of the Act under precedent relating to disloyal or defamatory statements.

The Board has long recognized that an employer has a legitimate interest in preventing the disparagement of its products or services and, relatedly, in protecting its reputation (and the reputations of its agents as to matters within the scope of their agency) from defamation. Section 7 rights are balanced against these interests, if and when they are implicated. In striking that balance, the

[13] We disagree with our dissenting colleague's assertion that the Board's decision in *Restaurant Horikawa*, 260 NLRB 197, 198 (1982), sets forth the applicable standard for deciding whether a retail employee who engages in misconduct in the presence of customers loses the protection of the Act. See *Starbucks Coffee Co.,* 360 NLRB No. 134, slip op. at 2 fn. 10 (2014).

[14] The Board has applied *Atlantic Steel* to confrontational verbal attacks on supervisors that occurred near, but not within, the workplace. See, e.g., *Starbucks Coffee Co*., 354 NLRB 876 (2009) (finding that employee lost protection when she followed, taunted, and intimidated a manager after a union rally outside the employer's coffee shop), adopted in 355 NLRB 636 (2010), enf. denied in part, and remanded on other grounds sub nom. 679 F.3d 70 (2d Cir. 2012), decision on remand *Starbucks,* supra, 360 NLRB No. 134 . The *Starbucks* Board stated that the location of an employee's misconduct weighs against protection when the employee engages in insubordinate or profane conduct toward a supervisor in front of other employees, regardless of whether those employees are on or off-duty. But there the confrontation began in front of the employer's store following an employer-sponsored event, in the presence of employees under the manager's authority. 354 NLRB at 878. The exceptional circumstances of that case confirm that *Atlantic Steel* typically applies to workplace confrontations.

[15] We reject the Respondent's contention that Sanzone's conduct lost the Act's protection because her Facebook comment was visible to customers Ken DeSantis and Jonathan Feeley. DeSantis and Feeley joined the discussion as LaFrance's Facebook friends on their own initiative and in the context of a social relationship with LaFrance outside of the workplace, not because they were the Respondent's customers. This off-duty discussion away from the Respondent's premises did not disrupt any customer's visit to the Respondent. And, as discussed below, the employee disloyalty perceived by the Respondent did not deprive Sanzone of the Act's protection.

[16] In all likelihood, the revelation at their termination meetings that the Respondent had seen the Facebook comments came as a complete, and unwelcome, surprise to both Spinella and Sanzone.

[17] Indeed, an employee does not necessarily lose the protection of the Act by impulsively directing profanity at supervisors in the course of otherwise-protected activity. Compare *Great Dane Trailers,* 293 NLRB 384, 384, 393 (1989) (employee did not lose protection for calling his foreman a "fucked up foreman" on the shop floor after employee's requests for assistance were denied), with *DaimlerChrysler Corp.*, 344 NLRB 1324, 1329 (2005) (no protection for *sustained*, profane, ad hominem attack on supervisor in work area during worktime).

Board applies these principles in accordance with the Supreme Court's decisions in *Jefferson Standard* and *Linn*.

In *Jefferson Standard*, the Court upheld the discharge of employees who publicly attacked the quality of their employer's product and its business practices without relating their criticisms to a labor controversy. The Court found that the employees' conduct amounted to disloyal disparagement of their employer and, as a result, fell outside the Act's protection. 346 U.S. at 475–477.

In *Linn*, the Court limited the availability of State-law remedies for defamation in the course of a union organizing campaign "to those instances in which the complainant can show that the defamatory statements were circulated with malice and caused him damage." 383 U.S. at 64–65. The Court indicated that the meaning of "malice," for these purposes, was that the statement was uttered "with knowledge of its falsity, or with reckless disregard of whether it was true or false." Id. at 61.

Applying these precedents, the Board has held that "'employee communications to third parties in an effort to obtain their support are protected where the communication indicated it is related to an ongoing dispute between the employees and the employers and the communication is not so disloyal, reckless, or maliciously untrue as to lose the Act's protection.'" *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011) (quoting *Mountain Shadows Golf Resort*, 330 NLRB 1238, 1240 (2000)).

Turning to the facts of this case, we first adopt the judge's finding that the only employee conduct to be analyzed is Sanzone's comment ("I owe too. Such an asshole.") and Spinella's indication that he "liked" LaFrance's initial status update ("Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork correctly!!! Now I OWE money...Wtf!!!!"). In agreement with the judge, we find that in the context of the ongoing dialogue among employees about tax withholding, Sanzone's comment effectively endorsed LaFrance's complaint that she owed money on her taxes due to a tax-withholding error on the Respondent's part. While Spinella's "like" is more ambiguous, we treat it for purposes of our analysis as expressing agreement with LaFrance's original complaint.[18]

We reject the Respondent's contention that Sanzone or Spinella can be held responsible for any of the other comments posted in this exchange. Neither Sanzone nor Spinella accused the Respondent of pocketing employees' money or endorsed any comment by LaFrance to that effect. Assuming, arguendo, that such an accusation would have been unprotected, neither Sanzone nor Spinella would have lost the protection of the Act merely by participating in an otherwise protected discussion in which other persons made unprotected statements. See *Jefferson Standard*, 94 NLRB 1507, 1513 fn. 21 (1951), affd. sub nom. *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953); see also *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 4 fn. 11 (2011).

The comments at issue here are qualitatively different from the disparaging communications that lost protection in the *Jefferson Standard* case. First, the Facebook discussion here clearly disclosed the existence of an ongoing labor dispute concerning the Respondent's tax-withholding practices. Second, the evidence does not establish that the discussion in general, or Sanzone's and Spinella's participation in particular, was directed to the general public. The comments at issue were posted on an individual's personal page rather than, for example, a company page providing information about its products or services. Although the record does not establish the privacy settings of LaFrance's page, or of individuals other than Sanzone who commented in the discussion at issue, we find that such discussions are clearly more comparable to a conversation that could potentially be overheard by a patron or other third party than the communications at issue in *Jefferson Standard*, which were clearly directed at the public.

In any event, we find that Spinella's and Sanzone's comments were not "so disloyal . . . as to lose the Act's protection" under *Jefferson Standard* and its progeny. *MasTec*, 357 NLRB No. 17, slip op. at 5. The comments at issue did not even mention the Respondent's products or services, much less disparage them. Where, as here, the purpose of employee communications is to seek and provide mutual support looking toward group action to encourage the employer to address problems in terms or conditions of employment, not to disparage its product or services or undermine its reputation, the communications are protected. See *Valley Hospital*, 351 NLRB at 1252 fn. 7, and cases cited therein.

[18] The judge found that Spinella's "Like" referred to the "entire topic as it existed at the time"—i.e., up to and including LaFrance's comment: "It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it bc he still owes me about 2000 in paychecks." We disagree with the judge's interpretation of what it means for an individual to "Like" an individual's status update. We interpret Spinella's "Like" solely as an expression of approval of the initial status update. Had Spinella wished to express approval of any of the additional comments emanating from the initial status update, he could have "liked" them individually.

The comments at issue likewise were not defamatory. Under the standard set forth in *Linn* and its progeny, the Respondent has the burden to establish that the comments were maliciously untrue, i.e., were made with knowledge of their falsity or with reckless disregard for their truth or falsity. E.g., *Springfield Library & Museum,* 238 NLRB 1673, 1673 (1979). The Respondent has failed to meet this burden; there is no basis for finding that the employees' claims that their withholding was insufficient to cover their tax liability, or that this shortfall was due to an error on the Respondent's part, were maliciously untrue.[19] And Sanzone's characterization of DelBuono as an "asshole" in connection with the asserted tax-withholding errors cannot reasonably be read as a statement of fact; rather, Sanzone was merely (profanely) voicing a negative personal opinion of DelBuono. Accordingly, we find that these statements also did not lose protection under *Linn*. See *El San Juan Hotel,* 289 NLRB 1453, 1455 (1988) (leaflet's "references to the trustee as a 'Dictator' and as 'Robin Hood' [were] obvious rhetorical hyperbole"); *NLRB v. Container Corp. of America,* 649 F.2d 1213, 1214, 1215–1216 (6th Cir. 1981) (newsletter criticizing company's grievance process and calling the general manager a "slave driver" was protected rhetoric), enfg. in relevant part 244 NLRB 318 (1979).

3.

Having found that the Facebook activity at issue constituted protected concerted activity, and that conduct did not lose the protection of the Act, we must now decide whether the Respondent violated the Act by discharging Sanzone and Spinella. For the reasons set forth in the judge's decision, we adopt the judge's finding that the discharges of Sanzone and Spinella violated Section 8(a)(1) under *Wright Line,* 251 NLRB at 1083.[20]

II.

The judge dismissed the allegation that the Respondent's maintenance of its Internet/Blogging policy violated the Act.[21] Because we find that employees would reasonably construe the policy to prohibit the type of protected Facebook posts that led to the unlawful discharges, we reverse.

The Respondent maintains the following work rule as part of its Internet/Blogging policy in its employee handbook:

> The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

A rule violates Section 8(a)(1) if it would reasonably tend to chill employees in the exercise of their Section 7 rights.[22] If the rule explicitly restricts activities protected by Section 7, it is unlawful.[23] If it does not, "the violation is dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village*, 343 NLRB at 647. In analyzing work rules, the Board "must refrain from reading particular phrases in isolation, and . . . must not presume improper interference with employee rights." Id. at 646.

[19] As noted above, Sanzone admitted at the hearing that she had no reason to believe that her withholding had been improperly calculated. But this admission does not establish that her statement, "I owe too," was untrue, let alone maliciously so. Sanzone and Spinella may have tacitly endorsed LaFrance's claim that the Respondent had erred in its tax withholding, but they did not repeat it. In any case, as the Board has noted, the fact that a statement may ultimately prove inaccurate does not in itself remove the statement from the protections of the Act when it is relayed by others. See *Valley Hospital,* 351 NLRB at 1253.

[20] We agree with the Respondent that the *Burnup & Sims* framework is not applicable here. Purporting to apply *Burnup & Sims*, the judge found that the discharges violated Sec. 8(a)(1), notwithstanding that the Respondent may have mistakenly believed, in good faith, that Sanzone's and Spinella's Facebook posts were unprotected. But *Burnup & Sims* applies in cases involving mistakes of fact, not mistakes of law. Under *Burnup & Sims*, an employer violates Sec. 8(a)(1) by disciplining or discharging an employee based on a good-faith belief that the employee engaged in misconduct during otherwise protected activity, if the General Counsel shows that the employee was not, in fact, guilty of that misconduct. "Otherwise," the Supreme Court explained, "the protected activity would lose some of its immunity, since the example of employees who are discharged on false charges would or might have a deterrent effect on other employees." 379 U.S. at 23. Plainly, this is not a "mistake of fact" case, and *Burnup & Sims* does not apply.

[21] The General Counsel does not contend that the Respondent expressly relied on this policy in discharging Sanzone or Spinella or in undertaking any disciplinary action.

[22] *Lafayette Park Hotel,* 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

[23] *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646 (2004).

No party disputes the judge's finding that the Internet/Blogging policy does not explicitly restrict protected activity and was neither promulgated in response to, nor applied to restrict, protected activity. Accordingly, the inquiry here is whether the first prong of the *Lutheran Heritage* test is met. The judge found that the first prong was not met; in her view, employees would reasonably construe the Internet/Blogging policy's prohibition of "inappropriate discussions about the company, management, and/or coworkers" on social media as going no further than similar rules found lawful by the Board. On exceptions, the General Counsel contends that the prohibition on "inappropriate discussions" is overly broad and not comparable to restrictions on inappropriate conduct that the Board has found lawful, and that employees would interpret the rule in light of the unlawful discharges.

We find merit in the General Counsel's exception. An employer rule is unlawfully overbroad when employees would reasonably interpret it to encompass protected activities.[24] Here, we believe that employees would reasonably interpret the Respondent's rule as proscribing any discussions about their terms and conditions of employment deemed "inappropriate" by the Respondent. The rule contains only one other prohibition—against revealing confidential information—and provides no illustrative examples to employees of what the Respondent considers to be inappropriate. Under these circumstances, we find the term "inappropriate" to be "sufficiently imprecise" that employees would reasonably understand it to encompass "discussions and interactions protected by Section 7." *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 3 (quoting *2 Sisters Food Group,* 357 NLRB No. 168, slip op. at 2 (2011)).[25]

Furthermore, by unlawfully discharging Sanzone and Spinella for participating in a Facebook discussion about the Respondent and its owners, the Respondent provided employees with an authoritative indication of the scope of its prohibition against inappropriate discussions and that they should construe its rule against inappropriate discussions to include such protected activity. See *The Roomstore,* 357 NLRB No. 143, slip op. at 1 fn. 3 (2011) (employees would reasonably construe rule prohibiting "[a]ny type of negative energy or attitudes" to include protected activity given employer's repeated warnings not to talk negatively about the employer's pay practices). Although the Respondent's Internet/Blogging policy contains a general savings clause stating that the policy "is of no force or effect" if "state or federal law precludes [it]," the two unlawful discharges served as an indication to employees that the clause did not shield Sanzone's and Spinella's protected activity. Faced with these discharges, employees therefore would reasonably construe the Internet/Blogging policy to prohibit Section 7 activity such as the Facebook discussion of tax withholding issues involved in this case.

Contrary to our dissenting colleague, we are not "cobbling together" two prongs of *Lutheran Heritage* to find the violation.[26] The test under the first prong of *Lutheran Heritage* is whether employees would reasonably construe the policy to prohibit their Section 7 activities. We do not believe that we will cause employers greater uncertainty in drafting rules by applying the first prong

[24] See, e.g., *First Transit, Inc.*, 360 NLRB No. 72, slip op. at 2–3 (2014) (finding rule prohibiting "[d]iscourteous or inappropriate attitude or behavior to passengers, other employees, or members of the public" unlawfully overbroad); *Hill & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1–2 (2014) (finding unlawfully overbroad rules requiring employees to "represent [the employer] in the community in a positive and professional manner" and prohibiting "negative comments" and "negativity"); *Lafayette Park Hotel*, 326 NLRB 824, 828 (1998) (finding unlawfully overbroad rule prohibiting "false, vicious, profane or malicious statements toward or concerning [the employer] or any of its employees"). The Board's approach in this area has received judicial approval. See, e.g., *Cintas Corp. v. NLRB*, 482 F.3d 463, 469–470 (D.C. Cir. 2007) (approving the Board's finding that rule requiring employees to maintain "confidentiality of any information concerning the company, its business plans, its partners, new business efforts, customers, accounting and financial matters" was unlawfully overbroad), enfg. 344 NLRB 943 (2005); *Brockton Hospital v. NLRB*, 294 F.3d 100, 106 (D.C. Cir. 2002) (approving the Board's finding that rule prohibiting discussions of "[i]nformation concerning patients, associates, or hospital operations . . . except strictly in connection with hospital business" was unlawfully overbroad), enfg. 333 NLRB 1367 (2001).

[25] The "patent ambiguity" in the phrase "inappropriate discussions" distinguishes the Respondent's rule from the conduct rules found lawful in *Lutheran Heritage* "that were more clearly directed at unprotected conduct." *2 Sisters Food Group,* supra, slip op. at 2 (distinguishing the conduct rules found lawful in *Lutheran Heritage* from a rule prohibiting the "inability or unwillingness to work harmoniously with other employees" because of the "patent ambiguity" in the term "work harmoniously"). We also find distinguishable the cases relied on by our dissenting colleague and the judge where the Board found lawful rules that addressed conduct rather than merely addressing statements or that addressed the use of abusive, threatening, or slanderous statements.

[26] In *Albertson's, Inc.*, cited by our colleague, the Board rejected the analysis of the judge, who found three rules—each of which was lawful in isolation—unlawful when "informed by the context of the Respondent's actions at relevant times," including the maintenance of other overly restrictive rules regarding union buttons, solicitation, and distribution. 351 NLRB 254, 378 (2007). The Board stated bluntly that "[t]he judge also erred by lumping the three rules together in his analysis." Id. at 258. Moreover, the Board found that the individual rules could not be found unlawful by "bootstrapping them to other unrelated work rule violations" or analyzing them in the "'broader context' of unrelated unfair labor practices involving other rules." Id. at 258–259. We have done nothing of the sort here. The one and only rule we have considered is the Respondent's Internet/Blogging policy.

of *Lutheran Heritage* to the facts of this case. Our conclusion that the Internet/Blogging policy is unlawful is in accord with the many Board decisions that have found a rule unlawful if employees would reasonably interpret it to prohibit protected activities. Based on the Respondent's unlawful actions, we find that they would.[27] Accordingly, we find that the Respondent's maintenance of this rule violates Section 8(a)(1) of the Act.

AMENDED CONCLUSIONS OF LAW

Substitute the following for Conclusion of Law 8 in the judge's decision.

"8. The Respondent violated Section 8(a)(1) of the Act by maintaining the Internet/Blogging policy in its employee handbook."

ORDER

The National Labor Relations Board orders that the Respondent, Three D, LLC d/b/a Triple Play Sports Bar and Grille, Watertown, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining an Internet/Blogging policy that prohibits employees from engaging in "inappropriate discussions about the company, management, and/or coworkers."

(b) Discharging or otherwise discriminating against employees because they engage in protected concerted activities.

(c) Threatening employees with legal action in retaliation for their protected concerted activities.

(d) Informing employees that they are being discharged because they engaged in protected concerted activities.

(e) Threatening employees with discharge in retaliation for their protected concerted activities.

(f) Coercively interrogating employees about their protected concerted activities.

(g) 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) Revise or rescind the Internet/Blogging policy in the employee handbook that prohibits employees from engaging in "inappropriate discussions about the company, management, and/or co-workers."

(b) Furnish all current employees with inserts for the current employee handbook that (1) advise that the unlawful Internet/Blogging policy has been rescinded, or (2) provide the language of a lawful policy; or publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful policy, or (2) provides the language of a lawful policy.

(c) Within 14 days from the date of this Order, offer Jillian Sanzone and Vincent Spinella full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or to any other rights or privileges previously enjoyed.

(d) Make Jillian Sanzone and Vincent Spinella 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 judge's decision as amended in this decision.

(e) Compensate Jillian Sanzone and Vincent Spinella for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each employee.

(f) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges of Jillian Sanzone and Vincent Spinella, and within 3 days thereafter, notify Sanzone and Spinella in writing that this has been done and that the discharges will not be used against them in any way.

(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 due under the terms of this Order.

[27] We disagree with our dissenting colleague's reading of the policy as providing that only an "inappropriate discussion" that violates the law would subject an employee to discipline. We find that reading inconsistent with the plain language of the policy. The policy states that "when . . . communication extend[s] to . . . inappropriate discussions …, the employee *may* be violating the law and *is* subject to disciplinary action, up to and including termination." (Emphasis added.) Thus, by the express terms of the policy, while only some "inappropriate discussions" may be unlawful, *all* "inappropriate discussions" subject the employee to discipline, including discharge. We believe that employees would reasonably read this language as informing them that inappropriate discussions subject them to disciplinary action regardless whether the discussion violates the law. Moreover, we recognize that employees could conceivably engage in "inappropriate discussions" that violate the law and, appropriately, result in discipline. However, the question before us is whether the Respondent's employees would reasonably conclude that the Respondent would consider their protected discussions on the Internet as "inappropriate," and grounds for discipline under the policy, because of the Respondent's discharge of Sanzone and Spinella for their protected activities in a Facebook discussion.

(h) Within 14 days after service by the Region, post at its facility in Watertown, Connecticut, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site and/or other electronic means, if 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 August 16, 2010.

(i) Within 21 days after service by the Region, file with the Regional Director for Region 34 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. August 22, 2014

_____
Kent Y. Hirozawa, Member

_____
Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, dissenting in part.

I join my colleagues in finding that the Respondent unlawfully discharged employees Jillian Sanzone and Vincent Spinella for their protected, concerted participation in a Facebook discussion, and I agree with the analysis the majority opinion applies in reaching those findings.[1] I also agree that the Respondent violated the Act by threatening employees with discharge, by interrogating employees about their Facebook activity, and by threatening Spinella with legal action for engaging in that activity.[2] As discussed below, however, I disagree with their finding that the Respondent's Internet/blogging policy violated the Act.

The Respondent maintained a facially lawful Internet/Blogging policy to prevent disclosure of its proprietary or confidential information by its employees, to help ensure that unauthorized statements by employees would not be attributed to the Respondent, and to warn employees about "inappropriate discussions" that could be unlawful and subject them to discipline. The policy states as follows:

> The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or en-

[28] 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."

[1] When communications by employees with third parties or the general public are at issue, the Board generally has applied the standards set forth in *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and *Linn v. Plant Guards Local 114*, 383 U.S. 53 (1966), and not *Atlantic Steel Co.*, 245 NLRB 814 (1979). When such communications take place in the presence of customers in a retail establishment and involve conduct that seriously disrupts the employer's business and interferes with its ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion, the applicable standard is set forth in *Restaurant Horikawa*, 260 NLRB 197 (1982). See also *Starbucks Coffee Co.,* 360 NLRB No. 134, slip op. at 7 (2014) (Member Miscimarra, concurring). In addition, I believe that social-media communications may lose the Act's protection where, for example, they are "'so egregious as to take [them] outside the protection of the Act, or of such character as to render the employee unfit for further service.'" *Neff-Perkins Co.*, 315 NLRB 1229, 1229 fn. 2, 1233–1234 (1994) (quoting *Consumers Power Co.*, 282 NLRB 130, 132 (1986)). Here, Sanzone and Spinella did not lose the Act's protection under any standard.

[2] Unlike my colleagues, I do not find that the Respondent separately violated Sec. 8(a)(1) of the Act by *telling* Sanzone and Spinella that their protected Facebook activity was the reason they were being discharged. Merely advising employees of the reason for their discharge is "part of the res gestae of the unlawful termination, and is subsumed by that violation." *Benesight, Inc*., 337 NLRB 282, 285 (2001) (Chairman Hurtgen, dissenting in part).

My colleagues find it unnecessary to pass on the judge's finding that the Respondent also unlawfully threatened Sanzone with legal action. I would dismiss this allegation. The Respondent informed Sanzone that it would commence an action for defamation against her in a letter from its counsel requesting that she retract her allegedly defamatory statements. That letter was sent to Sanzone pursuant to a provision of Connecticut law cited in the letter requiring such a request prior to the institution of an action for defamation. Because the letter was procedurally prerequisite to filing a lawsuit, I would not find it unlawful absent a showing by the General Counsel that a defamation lawsuit against Sanzone would have violated Sec. 8(a)(1). See *BE & K Construction Co. v. NLRB*, 536 U.S. 516 (2002). No such showing was attempted here.

> gaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

The policy does not expressly or implicitly restrict Section 7 activity, and it was not promulgated in response to such activity. Neither has it been applied to restrict protected activity: the Respondent did not apply or in any way refer to the policy when it discharged Sanzone and Spinella. Nor is there any language in the policy that employees would reasonably construe to prohibit Section 7 activity. The Policy is legitimately aimed to prevent the revelation of proprietary information and statements about the company, its management, and its employees that may be unlawful.

The judge correctly dismissed the allegation, under the first prong of *Lutheran Heritage Village-Livonia,* 343 NLRB 646, 646–647 (2004), that employees would reasonably construe the language warning them against "inappropriate discussions about the company, management, and/or co-workers" to prohibit Section 7 activity.[3] She observed that the language the General Counsel challenged is similar to restrictions on speech or conduct (including speech) in other work rules that the Board has found lawful.[4]

For several reasons, I do not agree with my colleagues' theory that employees would reasonably understand the rule to encompass Section 7 activity on the basis that (i) it uses an "imprecise" word—"inappropriate"—without providing "illustrative examples," and (ii) the Respondent discharged Spinella and Sanzone for their protected Facebook activity.

First, the Respondent neither cited nor applied its Internet/Blogging policy in discharging Spinella or Sanzone. It did not accuse them of revealing confidential or proprietary information or assert that they had engaged in "inappropriate conversations about the company." Rather, it claimed their Facebook comments were disloyal and defamatory. Under these circumstances, there is no factual basis for the majority to conclude that the discharges provided employees with an "authoritative indication" of how the Internet/Blogging policy should be construed.

Second, this cobbling together prongs one and three of the *Lutheran Heritage Village* standard is contrary to the careful separation of those two theories of violation established in that case. Under prong one, the inquiry is whether the language of a rule, on its face, would reasonably be interpreted to prohibit Section 7 activity. Under prong three, the inquiry is whether a rule, *regardless* of its wording, has been applied to restrict the exercise of Section 7 rights. Following *The Roomstore*, 357 NLRB No. 143 (2011)—in my view, incorrectly decided in this regard—the majority continues down the path of this hybrid category of violation, under which a rule that is not unlawful on its face and has not been applied to restrict the exercise of Section 7 rights nevertheless is found unlawful based on a mixture of the rule's language and the employer's conduct.[5] In so doing, the majority contributes to the uncertainty employers confront in seeking to square their rules with our *Lutheran Heritage* prong-one precedent, which, at this point, consists of so many distinctions, qualifications, and factual variations as to preclude any reasonable "certainty beforehand" for most parties "as to when [they] may proceed to reach

[3] I do not agree with the current Board standard regarding alleged overly broad rules and policies, which is set forth as the first prong of *Lutheran Heritage* (finding rules and policies unlawful, even if they do not explicitly restrict protected activity and are not applied against or promulgated in response to such activity, where "employees would reasonably construe the language to prohibit Section 7 activity"). I would reexamine this standard in an appropriate future case. I agree with the judge, however, that the policy here is lawful under the *Lutheran Heritage* standard. In fact, for the reasons set forth in the text, I believe the policy is phrased in general commonsense terms that preclude it from reasonably being considered unlawful under any standard.

[4] See, e.g., *Tradesmen International*, 338 NLRB 460, 462–463 (2002) (finding lawful rule prohibiting "verbal or other statements which are slanderous or detrimental to the company or any of the company's employees"); *Ark Las Vegas Restaurant Corp.,* 335 NLRB 1284 fn. 2, 1291–1292 (2001) (finding lawful rules prohibiting "any conduct" that "reflects adversely on yourself, fellow associates, [or] the Company," or "conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company"), enfd. in part 334 F.3d 99 (D.C. Cir. 2003); see also *Community Hospitals of Central California v. NLRB,* 335 F.3d 1079, 1088–1089 (D.C. Cir. 2003) (finding lawful rule prohibiting "insubordination . . . or other disrespectful conduct"), denying enf. in pertinent part to 335 NLRB 1318 (2001).

[5] The Board rejected a similar analysis in *Albertson's, Inc.,* 351 NLRB 254, 258–259 (2007). There, the judge improperly bootstrapped the employer's unlawful application of one rule to restrict the exercise of Sec. 7 rights to find unlawful two other rules lawful in themselves. My colleagues distinguish *Albertson's* as involving multiple rules while this case involves only one. However, the judge in *Albertson's* went outside the plain language of the challenged rules and applied an analysis "informed by the context of the Respondent's actions at relevant times, including the history of improper restriction of employees' Section 7 rights." Id. at 378. The Board properly rejected that approach, and my colleagues here embrace it.

decisions without fear of later evaluations labeling [their] conduct an unfair labor practice."[6]

Third, I do not believe one can reasonably construct a theory that it constitutes unlawful restraint, coercion, or interference with protected concerted activities to advise employees, as set forth in the policy, that an employee "may be violating the law and is subject to disciplinary action" if their internet communications "extend to employees revealing *confidential and proprietary information about the Company*, or engaging in *inappropriate discussions* about the company, management, and/or coworkers" (emphasis added). Nobody can seriously disagree that the two listed infractions—disclosing "confidential and proprietary information" and "inappropriate discussions"—"may" violate one or more laws "and" be proper grounds for discipline. Although the reference to "inappropriate" discussions is potentially susceptible to different interpretations, there is no law against using an understandable catchall phrase as a general statement of policy, particularly in the circumstances presented here (where employees are advised such discussions "may" violate the law and make the offenders "subject to" discipline). It is also significant that the reference to possible legal violations and potential discipline is phrased in the conjunctive (the two concepts are connected by "and," not "or"). Thus, the policy states, in effect, that "inappropriate discussions," *if* they violate the law, may *also* "subject" the offending employees to discipline.[7]

Most people appreciate that "inappropriate" behavior may have consequences sufficiently serious as to violate the law and result in discipline. It does not per se violate Federal labor law to use a general phrase to describe the type of conduct that may do so.[8] If it did, "just cause" provisions contained in most collective-bargaining agreements that have been entered into since the Act's adoption nearly 80 years ago would be invalid.[9] However, "just cause" provisions have been called "an obvious illustration" of the fact that many provisions "must be expressed in general and flexible terms."[10] More generally, the Supreme Court has stated, in reference to collective-bargaining agreements, that there are "a myriad of cases which the draftsmen cannot wholly anticipate," and "'[t]here are too many people, too many problems, too many unforeseeable contingencies to make the words . . . the exclusive source of rights and duties.'"[11] The policy at issue in the instant case makes reference to "inappropriate discussions" in the same manner, which precludes reasonably regarding this phrase as unlawful interference, restraint or coercion.[12]

Finally, the Board is finding that Sanzone's and Spinella's discharges were unlawful, and the policy's disclaimer states that the policy "is of no force or effect" if State or Federal law precludes it. Thus, even if the discharges had some bearing on interpretations of the policy (notwithstanding the fact that the Respondent here never invoked or relied upon the policy in relation to the discharges), the policy on its face disclaims any application in circumstances that would be unlawful. Although a general disclaimer may not be sufficient to render valid language that explicitly runs afoul of the Act's requirements, such a disclaimer reinforces that the policy is meant to be interpreted in a manner not contrary to appli-

[6] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679 (1981).

[7] Notwithstanding this phrasing, my colleagues believe that employees would read the policy as subjecting them to discipline for any discussion the Respondent deems inappropriate, "regardless whether the discussion violates the law." In other words, in their view, the reference in the policy to communications that violate the law has no effect on how employees would read the policy; they would read it the same way with or without that language. This interpretation may be conceivable, but it is not reasonable. See *Lutheran Heritage Village*, 343 NLRB at 647 (rejecting an analytical approach that would "require the Board to find a violation whenever the rule could conceivably be read to cover Section 7 activity, even though that reading is unreasonable").

[8] To the contrary, as the Board observed in *Lutheran Heritage Village*, "[w]ork rules are necessarily general in nature . . . . We will not require employers to anticipate and catalogue in their work rules every instance in which [prohibited types of speech] might conceivably be protected by (or exempted from the protection of) Section 7." 343 NLRB at 648. My colleagues' apparent requirement that employers include "illustrative examples" of general terms to avoid violating the Act is difficult to square with that decision.

[9] "Just cause" provisions—which state that employees are subject to discipline or discharge if there is "just cause"— have been ubiquitous in collective-bargaining agreements throughout the Act's history. See, e.g., *Burgie Vinegar Co*., 71 NLRB 829, 840 (1946) ("It is agreed that the right to discharge employees for just cause is a management prerogative."); *Solutia, Inc*., 357 NLRB No. 15, slip op. at 4 fn. 8 (2011) (contract reserves to the company the right to "discipline or discharge for just cause"), enfd. 699 F.3d 50 (1st Cir. 2012).

[10] Archibald Cox, *Reflections Upon Labor Arbitration*, 72 Harv. L. Rev. 1482, 1491 (1959).

[11] *Steelworkers v. Warrior & Gulf Navigation Co*., 363 U.S. 574, 578–579 (1960) (quoting Cox, supra fn. 38, 72 Harv. L. Rev. at 1498–1499).

[12] Although my colleagues cite D.C. Circuit decisions in which the court approved the Board's analysis in cases involving overly broad confidentiality rules, those cases are distinguishable from the instant case, and that court has criticized Board decisions finding rules unlawful because, like here, they employed general language to prohibit serious misconduct. See *Adtranz ABB Daimler-Benz Transportation, N.A., Inc. v. NLRB*, 253 F.3d 19, 28 (D.C. Cir. 1991) (admonishing Board to not "pars[e] workplace rules too closely in a search for ambiguity that could limit protected activity"); *Community Hospitals of Central California v. NLRB,* supra at 1089 ("[T]o quote the Board itself in a more realistic moment, 'any arguable ambiguity' in the rule 'arises only through parsing the language of the rule, viewing the phrase . . . in isolation, and attributing to the [employer] an intent to interfere with employee rights'" (quoting *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998))).

cable law. For this reason as well, I believe the policy is lawful, and the majority should not require the Respondent to rescind or revise it.

Dated, Washington, D.C. August 22, 2014

Philip A. Miscimarra, Member

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 maintain an Internet/Blogging policy that prohibits employees from engaging in "inappropriate discussions about the company, management, and/or coworkers."

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in protected concerted activities.

WE WILL NOT threaten you with legal action in retaliation for your protected concerted activities.

WE WILL NOT inform you that you are being discharged because you engaged in protected concerted activities.

WE WILL NOT threaten you with discharge in retaliation for your protected concerted activities.

WE WILL NOT coercively question you about your 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 of the Board's Order, revise or rescind the Internet/Blogging policy in the employee handbook that prohibits employees from engaging in "inappropriate discussions about the company, management, and/or co-workers," and WE WILL advise employees in writing that we have done so and that the unlawful rules will no longer be enforced.

WE WILL furnish you with inserts for the current employee handbook that (1) advise that the unlawful Internet/Blogging policy has been rescinded, or (2) provide the language of a lawful policy; or WE WILL publish and distribute to all current employees a revised employee handbook that (1) does not contain the unlawful policy, or (2) provides the language of a lawful policy.

WE WILL, within 14 days from the date of the Board's Order, offer Jillian Sanzone and Vincent Spinella 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 Jillian Sanzone and Vincent Spinella whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL compensate Jillian Sanzone and Vincent Spinella for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for each of them.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jillian Sanzone and Vincent Spinella, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges will not be used against them in any way.

THREE D, LLC D/B/A TRIPLE PLAY SPORTS BAR AND GRILLE

The Board's decision can be found at www.nlrb.gov/case/34-CA-012915 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

Claire Sellers, Esq. and *Jennifer Dease, Esq.,* for the Acting General Counsel.
Melissa Scozzafava, Esq. (Yamin & Grant, LLC), for the Respondent.

DECISION

STATEMENT OF THE CASE

LAUREN ESPOSITO, Administrative Law Judge. Based on a charge filed on February 16, 2011, and amended on March 7 and April 5, 2011, by Jillian Sanzone, an individual (Sanzone), and upon a charge filed on February 24, 2011, and amended on April 8, 2011, by Vincent Spinella, an individual (Spinella), a consolidated complaint and notice of hearing issued on August 17, 2011. The complaint alleges that Three D, LLC d/b/a Triple Play Sports Bar and Grille (Triple Play or Respondent) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by discharging Sanzone and Spinella on February 2 and 3, 2011, respectively, in retaliation for their protected concerted activities. The consolidated complaint also alleges that Respondent violated Section 8(a)(1) by coercively interrogating and threatening employees, informing them that they were discharged because of their protected concerted activities, threatening them with legal action in retaliation for their protected concerted activities, and maintaining an unlawful policy in its employee handbook. Respondent filed an answer denying the material allegations of the complaint. This case was tried before me on October 18, 2011, in New York, New York.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the Acting General Counsel (the General Counsel) and Respondent I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent is a Connecticut limited liability corporation with a place of business located in Watertown, Connecticut, where it operates a sports bar and restaurant. 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

A. Background

Respondent began its operations in December 2009. At all times material to the events at issue in this case, Ralph DelBuono and Thomas Daddona have owned Respondent's business. DelBuono and Daddona oversee the restaurant's day-to-day operations, including the supervision of employees. DelBuono is also responsible for Respondent's accounting. Respondent admits and I find that DelBuono and Daddona are supervisors within the meaning of Section 2(11) of the Act. Respondent also admits and I find that Lucio Dibona is an agent of Respondent within the meaning of Section 2(13) of the Act. Finally, Respondent admits and I find that its attorney, Joseph P. Yamin, was Respondent's agent within the meaning of Section 2(13) of the Act with respect to the actions he took on Respondent's behalf.

B. The Employment of Jillian Sanzone and Vincent Spinella, and their Alleged Protected Concerted Activity

Jillian Sanzone was hired by Respondent when its operations began in December 2009, and worked continuously until her discharge on February 2, 2011. Sanzone worked as a waitress on Monday evenings, and as a bartender on Wednesday evenings, Thursday during the day, Friday days and evenings, and Saturday evenings. She clocked in and out through Respondent's computer system, and received a paycheck every Friday. During her employment, Sanzone received two raises, one 4 or 5 months after her employment began, and the second around Thanks-giving 2010. She also received a cash Christmas bonus in 2010.

Vincent Spinella began working for Respondent as a cook in September 2010, and worked from Wednesday through Sunday, for at least 8 hours per shift. He clocked in by punching a timecard, and received a paycheck every week. Spinella also received a cash Christmas bonus in 2010, together with a restaurant gift certificate.

Sanzone and Spinella both have accounts on the website Facebook, as does Respondent. Sanzone and Spinella both testified that prior to February 1, 2011, they had written about their employment with Respondent on their Facebook accounts. Sanzone had suggested that others visit the restaurant during her bartending shifts. Spinella had listed the restaurant's special dishes of the day, and suggested that others visit to watch particular sporting events. Both testified that prior to February 1, 2011, they had never been told that they were not permitted to write about Respondent on their Facebook accounts.

In January 2011,[1] when Sanzone filed her tax returns for 2010, she discovered that she owed taxes to the State of Connecticut. Sanzone testified that the Wednesday night prior to her discharge, waitress Amanda Faroni approached her and asked whether she had filed her tax return for the previous year. Sanzone said that she had done so, and that she owed about $200 in taxes to the State. Faroni said that she was required to pay additional taxes to the State as well. Waiter Anthony Cavallo then approached them, and said that he was getting his taxes done soon, and hoped that he did not owe anything. Daddona testified that he was aware that employees were concerned with this issue, and that as a result he and DelBuono had arranged for a staff meeting with Respondent's accountant and payroll company. This meeting was to take place a week or two after Sanzone and Spinella were discharged.

On February 1, Sanzone read and commented on a posting about Respondent on the Facebook account of a former employee named Jamie LaFrance. LaFrance had worked with Sanzone at the bar, and left her employment with Respondent in November 2010. Sanzone was "friends" with LaFrance on Facebook, meaning that she was permitted by LaFrance to write on the "wall" of LaFrance's Facebook account. On January 31, LaFrance posted a comment on her "wall" stating, "Maybe someone should do the owners of Triple Play a favor and buy it from them. They can't even do the tax paperwork

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

correctly!!! Now I OWE money . . . . Wtf!!!!" (Emphasis in original). The postings on LaFrance's Facebook "wall" continued as follows:

> KEN DESANTIS (customer): You owe them money . . . that's f—ked up.
>
> DANIELLE MARIE PARENT (employee): I F—KING OWE MONEY TOO!
>
> LAFRANCE: The state. Not Triple Play. I would never give that place a penny of my money. Ralph f—ked up the paperwork . . . as per usual.
>
> DESANTIS: Yeah I really don't go to that place anymore.
>
> LAFRANCE: It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about 2000 in paychecks.
>
> LAFRANCE: We shouldn't have to pay it. It's every employee there that it's happening to.
>
> DESANTIS: You better get that money . . . that's bullshit if that's the case I'm sure he did it to other people too.
>
> PARENT: Let me know what the board says because I owe $323 and I've never owed.
>
> LAFRANCE: I'm already getting my 2000 after writing to the labor board and them investigating but now I find out he f–ked up my taxes and I owe the state a bunch. Grrr.
>
> PARENT: I mentioned it to him and he said that we should want to owe.
>
> LAFRANCE: Hahahaha he's such a shady little man. He probably pocketed it all from all our paychecks. I've never owed a penny in my life till I worked for him. That goodness I got outta there.
>
> SANZONE: I owe too. Such an asshole.
>
> PARENT: Yeah me neither, I told him we will be discussing it at the meeting.
>
> SARAH BAUMBACH (employee): I have never had to owe money at any jobs . . . I hope I won't have to at TP . . . probably will have to seeing as everyone else does!
>
> LAFRANCE: Well discuss good because I won't be there to hear it. And let me know what his excuse is ☺.
>
> JONATHAN FEELEY (customer): And they're way too expensive.[2]

Spinella clicked "Like" under LaFrance's initial comment, and the text "Vincent VinnyCenz Spinella and Chelsea Molloy like this" appears beneath it. Spinella testified that at the time he clicked "Like," the last comment on the wall was LaFrance's statement, "It's all Ralph's fault. He didn't do the paperwork right. I'm calling the labor board to look into it because he still owes me about 2000 in paychecks."

Daddona testified that he learned of the discussion on LaFrance's Facebook account from his sister, Jobie Daddona, who also works at the restaurant. He and DelBuono then logged onto Facebook,[3] and DelBuono printed out a hard copy of the comments from LaFrance's account.

C. The Discharge of Jillian Sanzone

Sanzone testified that when she arrived for work on February 2, Daddona spoke to her as she entered the building. Daddona told her that the Company had to make some changes, and that they had to let her go. Sanzone treated the statement as a joke, and Daddona reiterated that they had to fire her. Sanzone asked why, and Daddona said that she was not loyal enough to be working with Respondent because of her comment on Facebook. Daddona said that he had learned about Sanzone's Facebook comment from customers. Sanzone protested that she worked hard, worked holidays, and did various favors for DelBuono and Daddona, all of which demonstrated her loyalty to the Company. Daddona responded that Sanzone was not loyal because of her Facebook comment. Sanzone then asked for a "pink slip" and her last paycheck. Daddona did not respond, and Sanzone left.

Daddona testified that Sanzone was discharged because her Facebook comment indicated that she was disloyal, and based on several incidents where at the end of her shift her cash register held more money than could be accounted for by totaling individual receipts.

D. The Discharge of Vincent Spinella

Spinella testified that when he arrived at work on February 3, Daddona asked him to come to the office downstairs. DelBuono was in the office, and the Facebook comments on LaFrance's account were displayed on the screen of the office computer. DelBuono asked Spinella if there was a problem with him and Daddona, or with the Company, and Spinella replied that he had no such problems. DelBuono said that LaFrance's Facebook wall indicated the opposite. DelBuono and Daddona proceeded to ask Spinella about the various comments, and about the significance of the "Like" option that Spinella had chosen. DelBuono asked Spinella whether he had written anything negative about DelBuono and Daddona, and Spinella said that he hadn't written anything; he had only clicked the "Like" option. DelBuono also asked Spinella who Chelsea Molloy was, and Spinella explained that he did not know. DelBuono then told Daddona that the "Like" option meant that Spinella stood behind the other commenters, and asked Daddona whether Spinella had their best interests in mind given that he clicked the "Like" option. Daddona responded that this demonstrated that Spinella did not have their best interests in mind. DelBuono then said that his attorney had informed him that he should discharge anyone involved in the Facebook conversation for defamation. Spinella stated that the restaurant was DelBuono and Daddona's business, and that if they believed that his clicking the "Like" option was grounds for discharge, he understood that they felt they had to do so. DelBuono told Spinella that it was time for him to go home for good, and Spinella then left. As Spinella was leaving,

[2] GC Exh. 2. Participants have been identified, and minor spelling, grammatical, and punctuation errors corrected, in the interests of clarity. Parent and Baumbach were employed by Respondent as of February 2011, but have since left Respondent's employ.

[3] Daddona testified that Respondent also has its own Facebook account.

DelBuono told him that he would be hearing from Respondent's attorneys.

Daddona testified that Spinella was discharged for poor work performance, including excessive cell phone use, conversing with the waitresses, and cigarette breaks, and failure to perform his work in an expedient manner. Daddona testified that Spinella's having chosen the "Like" option on LaFrance's Facebook account was not a factor in the decision to discharge him, and was not discussed during the conversation terminating his employment. Daddona testified that when he and DelBuono met with Spinella, they asked whether he was happy working for them, and asked him to provide a reason why he should remain employed, given his work performance. Daddona testified that when Spinella did not respond, he and DelBuono felt that Spinella was not interested in continuing his employment.

DelBuono also testified regarding Spinella's discharge meeting. DelBuono said that he and Daddona decided to meet with Spinella because Spinella's "Facebook comment raised a red flag," and made it apparent that he was unhappy. During the meeting, DelBuono told Spinella that he was obviously not happy, and then "questioned him," asking him, "if he liked those defamatory and derogatory statements so much well why is he still working for us?" DelBuono told Spinella that because he "liked the disparaging and defamatory comments," it was "apparent" that Spinella wanted to work somewhere else. He asked Spinella to provide "one valid reason why you want to continue working for us," and Spinella made no response and left.

Spinella testified that later on the day of his discharge he called Daddona to inquire about his final paycheck. He left a message for Daddona, which DelBuono returned. After they arranged for Spinella to receive his paycheck, Spinella asked DelBuono whether he would need any additional paperwork to file for unemployment, and DelBuono stated that Respondent's attorneys would not permit him to receive unemployment benefits.

E. Respondent's Threat to Institute an Action for Defamation Against Sanzone

On February 4, Respondent's attorney, Joseph P. Yamin of Yamin & Grant, LLC, wrote to Sanzone, stating as follows:

> We represent Three D, LLC d/b/a Triple Play Sports Bar and its principals, Thomas Daddona, Ralph Delbuono, and Lucio Dibona. Pursuant to Connecticut General Statute § 52-237 (a copy is attached), this letter is a formal request for you to retract, in as public a manner as they were made, the defamatory statements regarding Triple Play and its principals published to the general public on Facebook. To refresh your recollection of those statements, attached are the excerpts from the Facebook website. Provide us with written confirmation that you have retracted your defamatory statements. If such statements are not retracted within thirty (30) days, we will be forced to commence an action for defamation against you.

Because users of Facebook are unable to delete the comments they post on another user's account, Sanzone asked LaFrance to delete the comment she had made on LaFrance's "wall" regarding owing money on her taxes. LaFrance deleted Sanzone's comment.[4] LaFrance had been sent a letter identical to Yamin's letter to Sanzone, and LaFrance had posted a retraction. On February 26, Sanzone sent Yamin a letter stating that her comment on LaFrance's Facebook page had been erased, and that she had filed a charge with the National Labor Relations Board. On March 1, Yamin responded that "[a] retraction requires that you post a formal statement that the defamatory statements were not true. Provide us with written confirmation that you have retracted your defamatory statements." Sanzone did not respond, and did not post any other statement or communicate with Yamin again.

The evidence establishes that no lawsuit was ever filed against Sanzone, Spinella, or LaFrance.

F. Respondent's Internet/Blogging Policy

Respondent maintains a handbook containing employee guidelines, which, according to Delbuono, was discussed with Respondent's initial employees when the restaurant began its operations in December 2009. Delbuono testified that at employee orientation the handbook was passed around among the employees, and that he told the employees that they could request their own copy. As discussed above, Sanzone was one of Respondent's initial employees.

The "Internet/Blogging Policy" contained in Respondent's employee guidelines states as follows:

> The Company supports the free exchange of information and supports camaraderie among its employees. However, when internet blogging, chat room discussions, e-mail, text messages, or other forms of communication extend to employees revealing confidential and proprietary information about the Company, or engaging in inappropriate discussions about the company, management, and/or co-workers, the employee may be violating the law and is subject to disciplinary action, up to and including termination of employment. Please keep in mind that if you communicate regarding any aspect of the Company, you must include a disclaimer that the views you share are yours, and not necessarily the views of the Company. In the event state or federal law precludes this policy, then it is of no force or effect.

III. ANALYSIS AND CONCLUSIONS

A. The Discharges of Jillian Sanzone and Vincent Spinella

1. Summary of the Parties' contentions

The General Counsel contends that Respondent's decision to discharge Sanzone and Spinella was based entirely on their having participated in the conversation on LaFrance's Facebook account. The General Counsel argues as a result that the discharges must be considered pursuant to the analysis articulated by the Supreme Court in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). Under *Burnup & Sims*, an employer violates Section 8(a)(1) when the discharged employee was engaged in

[4] Spinella testified that after Sanzone was discharged he rescinded his selection of the "Like" option on LaFrance's Facebook account.

protected activity at the time of their purported misconduct, the employer knew of the protected activity, the basis for the discharge was the employee's alleged misconduct in the course of their protected activity, and the employee was not actually guilty of the misconduct. The General Counsel thus argues that Sanzone and Spinella's participation in the Facebook conversation was protected concerted activity, that Respondent was aware of their participation, that Respondent discharged them for the comments constituting alleged misconduct, and that Sanzone and Spinella did not in fact commit misconduct causing them to lose the Act's protection. Applying the Board's analysis articulated in *Atlantic Steel Co.*, 245 NLRB 814, 816–817 (1979), the General Counsel argues that given the location and subject matter of the Facebook discussion, the nature of the "outburst," and the extent to which the outburst was provoked by Respondent's conduct, Sanzone and Spinella's comments on LaFrance's Facebook account remained protected activity. General Counsel also argues that Sanzone and Spinella's comments did not constitute disparaging and disloyal statements unprotected under *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953), and its progeny. Finally, the General Counsel contends that, to the extent that the *Wright Line* analysis may be applicable, it has established a prima facie case and Respondent has failed to establish by a preponderance of the credible evidence that it in fact discharged Sanzone and Spinella for other, legitimate, reasons.

Respondent contends in its posthearing brief that Sanzone was discharged for "disloyalty," consisting of her "disparaging attack" on DelBuono during the Facebook discussion, and repeated cash register inaccuracies. Respondent argues that Sanzone's comment on LaFrance's Facebook account was unprotected under *Jefferson Standard*. Respondent contends that Spinella was discharged for poor work performance, and not for any participation in the Facebook discussion. However, Respondent contends that even if Spinella had been discharged for his participation in the Facebook conversation, his having selected the "Like" option would constitute unprotected disloyalty and disparagement under *Jefferson Standard*. Respondent further contends that Sanzone and Spinella's comments were defamatory and unprotected under *Linn v. Plant Guards*, 383 U.S. 53 (1966), in that they were made with knowledge that they were false or with reckless disregard for their truth or falsity. Finally, Respondent argues that Sanzone and Spinella's comments lost the protection of the Act under the *Atlantic Steel* analysis.

The evidence here establishes that the General Counsel has satisfied the *Burnup & Sims* standard, and that Sanzone and Spinella's participation in the Facebook discussion did not lose its protected status under *Atlantic Steel*, *Jefferson Standard*, or *Linn*. The evidence further establishes that, with respect to Respondent's other asserted reasons for the discharges, the General Counsel has established a prima facie case that Sanzone and Spinella were discharged in retaliation for their protected concerted activity. Finally, Respondent has not met its burden to show by a preponderance of the evidence that Sanzone and Spinella were in fact discharged for legitimate, nondis-criminatory reasons.

2. Sanzone and Spinella engaged in protected concerted activity by participating in the discussion on LaFrance's Facebook account

The evidence establishes that Sanzone and Spinella were engaged in concerted activity within the meaning of Section 7 of the Act when they participated in the discussion on LaFrance's Facebook account. Section 7 of the Act provides that "employees shall have the right to self organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." It is beyond question that issues related to wages, including the tax treatment of earnings, are directly related to the employment relationship, and may form the basis for protected concerted activity within the meaning of Section 7. See, e.g., *Coram Pond Diner*, 248 NLRB 1158, 1159–1160, 1162 (1980) (protected concerted activity involving employee complaint regarding employer's failure to deduct taxes from pay and provide W-2 forms). While LaFrance herself was a former employee and two customers posted comments as well, current employees Parent and Baumbach, as well as Sanzone and Spinella, were involved in the discussion.

The evidence also establishes that the Facebook discussion was part of a sequence of events, including other, face-to-face employee conversations, all concerned with employees' complaints regarding Respondent's tax treatment of their earnings. It is well settled that concerted activity "encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action." *Worldmark by Wyndham*, 356 NLRB No. 104, slip op. at 2 (2011), quoting *Meyers Industries*, 281 NLRB 882, 887 (1986), enfd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987); see also *KNTV, Inc.*, 319 NLRB 447, 450 (1995) ("Concerted activity encompasses activity which begins with only a speaker and listener, if that activity appears calculated to induce, prepare for, or otherwise relate to some kind of group action."). The specific medium in which the discussion takes place is irrelevant to its protected nature. See, e.g., *Timekeeping Systems, Inc.*, 323 NLRB 244, 247 (1997) (email regarding vacation policy sent by employees to fellow employees and to management concerted activity).

The record here establishes that prior to the Facebook discussion several employees, including Sanzone, had spoken at the restaurant about Respondent's calculation of their tax withholdings, and that a number of them owed a tax payment to the State of Connecticut after filing their 2010 tax returns. Indeed, DelBuono and Daddona were aware that this was an important issue for a number of the employees, and had as a result scheduled a meeting between the employees and Respondent's payroll administrator for the week after Sanzone and Spinella were discharged. The employees who posted comments on LaFrance's Facebook account specifically discussed the issues they intended to raise at this upcoming meeting and avenues for possible complaints to government entities. As a result, I find that the employees' Facebook discussion was part of an ongoing sequence of events involving their withholdings and taxes owed to the State of Connecticut, and was therefore concerted activity. See, e.g., *Tampa Tribune*, 351 NLRB 1324, 1325

(2007), enf. denied 560 F.3d 181 (4th Cir. 2009) (single conversation concerted when "part of an ongoing collective dialogue" between respondent and its employees and a "logical outgrowth" of prior concerted activity); *Circle K Corp.*, 305 NLRB 932, 933–934 (1991), enfd. 989 F.2d 498 (6th Cir. 1993) ("invitation to group action" concerted activity regardless of its outcome).

I further find that Spinella's selecting the "Like" option on LaFrance's Facebook account constituted participation in the discussion that was sufficiently meaningful as to rise to the level of concerted activity. Spinella's selecting the "Like" option, so that the words "Vincent VinnyCenz Spinella . . . like[s] this" appeared on the account, constituted, in the context of Facebook communications, an assent to the comments being made, and a meaningful contribution to the discussion. In fact, Spinella's indicating that he "liked" the conversation was sufficiently important to engender the meeting with DelBuono and Daddona which ended with his discharge. In addition, the Board has never parsed the participation of individual employees in otherwise concerted conversations, or deemed the protections of Section 7 to be contingent upon their level of engagement or enthusiasm. Indeed, so long as the topic is related to the employment relationship and group action, only a "speaker and a listener" is required. *KNTV, Inc.*, 319 NLRB at 450. I find therefore that Spinella's selecting the "Like" option, in the context of the Facebook conversation, constituted concerted activity as well.

I find that Sanzone and Spinella's Facebook comments were not sufficiently egregious as to lose the protection of the Act under *Atlantic Steel* and its progeny.[5] The *Atlantic Steel* analysis requires the consideration of four factors: (i) the place of the discussion; (ii) the discussion's subject matter; (iii) the nature of the outburst on the part of the employee; and (iv) whether the outburst was provoked by the employer's unfair labor practices. See, e.g., *Plaza Auto Center, Inc.*, above at 495, citing *Atlantic Steel*, 245 NLRB at 816. These four criteria are intended to permit "some latitude for impulsive conduct by employees" during protected concerted activity, while acknowledging the employer's "legitimate need to maintain order." *Plaza Auto Center, Inc.*, 355 NLRB at 495. As the Board has stated, the protections of Section 7 must "take into account the realities of industrial life and the fact that disputes over wages, bonuses, and working conditions are among the disputes most likely to engender ill feelings and strong responses." *Consumers Power Co.*, 282 NLRB 131, 132 (1986). Therefore, statements during otherwise protected activity lose the Act's protection only where they are "so violent or of such serious character as to render the employee unfit for further service." *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204–205 (2007), enfd. 519 F.3d 373 (7th Cir. 2008), quoting *Dreis & Krump Mfg. Co. v. NLRB*, 544 F.2d 320, 329 (7th Cir. 1976).

In order to apply the *Atlantic Steel* analysis, the specific statements at issue must be determined. Sanzone posted one comment on LaFrance's Facebook account: "I owe too. Such an asshole." Although Sanzone testified that she was using the word "asshole" to refer to the fact that she owed tax monies to the State of Connecticut, I find that the more plausible conclusion is that she was in fact referring to Ralph DelBuono, who was responsible for Respondent's accounting, and is discussed by LaFrance. Spinella clicked the "Like" option, resulting in the statement "Vincent VinnyCenz Spinella and . . . like this," which refers in the context of a Facebook discussion to the entire topic as it existed at the time.

I reject Respondent's contention that Sanzone and Spinella may be deemed responsible for comments that they did not specifically post, such as those of LaFrance. Respondent makes much of the fact that it did not discharge the other two employees—Danielle Marie Parent and Sarah Baumbach—who participated in the discussion, contending that this illustrates that Sanzone and Spinella's comments lost the Act's protection. Such an argument is not meaningful within the context of the *Atlantic Steel* analysis, and evidence that some employees involved in protected concerted activity were not subject to retaliation generally carries little weight in the *Wright Line* context. In any event, Respondent makes no attempt to explain why Parent and Baumbach should not be charged with having adopted LaFrance's comments, as were Sanzone and Spinella. In addition, the Board has emphasized that when evaluating the conduct of individual employees engaged in a single incident of concerted activity, each employee's specific conduct must be analyzed separately. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 4–6 (2011) (only employees that deliberately attempted to physically restrain manager lost Sec. 7's protection; other employees involved in confrontation were unlawfully discharged). As a result, the two comments under consideration are Sanzone's remark, "I owe too. Such an asshole." and Spinella's statement "Vincent VinnyCenz Spinella [and] like this."

The first of the *Atlantic Steel* factors–the place of the discussion–militates in favor of a finding that Sanzone and Spinella's comments did not lose the protection of the Act. The comments occurred during a Facebook conversation, and not at the workplace itself, so there is no possibility that the discussion would have disrupted Respondent's work environment. *Datwyler Rubber & Plastics, Inc.*, 350 NLRB at 670 (outburst which took place during a meeting in the employee breakroom not disruptive to employer's work processes). Because DelBuono and Respondent's other owners were not present, there was no direct confrontational challenge to their managerial authority.

The evidence does establish, as Respondent contends, that two of its customers participated in the Facebook conversation. However, I find that this fact is insufficient to remove Sanzone and Spinella's comments from the protection of the Act. The Board has held that the presence of customers during brief episodes of impulsive behavior in the midst of otherwise protected activity is insufficient to remove the activity from the ambit of

[5] Contrary to Respondent's contention in its posthearing brief, the *Atlantic Steel* analysis is not limited to statements made during formal grievance proceedings. See, e.g., *Plaza Auto Center, Inc.*, 355 NLRB at 493, 495 (statement made during meeting between employee and managers in nonunionized workplace); *Datwyler Rubber & Plastics, Inc.*, 350 NLRB 669, 669–670 (2007) (outburst occurred during employee meeting).

Section 7's protection where there is no evidence of disruption to the customers. *Crowne Plaza LaGuardia*, 357 NLRB No. 95, slip op. at 6 (presence of two hotel guests during employees' loud chanting and confrontation with manager insufficient to divest activity of statutory protection without evidence that services were disrupted); *Goya Foods of Florida*, 347 NLRB 1118, 1134 (2006), enfd. 525 F.3d 1117 (11th Cir. 2008) (brief episode of shouting inside supermarket insufficient to render activity unprotected in absence of evidence of customer disruption). In addition, the activity at issue here did not take place at Respondent's restaurant, but on the Facebook account of a former employee, whom customers would have to specifically locate and "befriend" in order to view. As a result, the situation at issue here is materially different from conduct occurring in an employer's establishment, which customers engaged in ordinary business transactions with the employer would be forced to witness. Finally, there is no evidence that the Facebook discussion somehow generally disrupted Respondent's customer relationships. Although Daddona testified that he had not seen one of the customers who participated in the conversation since that time, there is no evidence as to why this customer had not visited the restaurant. In fact, the other customer who participated in the conversation stated that in his opinion the restaurant was too expensive. As a result, there is insufficient evidence to find that Sanzone and Spinella's comments resulted in some sort of harm to Respondent's business.

For all of the foregoing reasons, I find that the first component of the *Atlantic Steel* analysis militates in favor of a finding that Sanzone and Spinella's participation in the Facebook discussion did not lose its protected character.

With respect to the second aspect of the *Atlantic Steel* analysis, the subject matter of the discussion, the evidence establishes that the Facebook conversation generally addressed the calculation of taxes on the employees' earnings by Respondent, and the fact that many of the employees ended up owing money to the State of Connecticut after filing their 2010 tax returns. Because the subject matter of the conversation involved and protected concerted activity, this factor militates in favor of a finding that Sanzone and Spinella's activity remained protected under the Act. *Plaza Auto Center, Inc.*, 355 NLRB at 495 (discussion involving intemperate comments addressed protected concerted activity pertaining to compensation).

As to the third factor, the nature of Sanzone and Spinella's "outburst" clearly did not divest their activity of the Act's protection under the *Atlantic Steel* line of cases. First of all, the comments were not made directly to DelBuono or Daddona, and did not involve any threats, insubordination, or physically intimidating conduct. See *Plaza Auto Center*, above at 496–497 (nature of outburst "not so opprobrious" as to deprive employee of statutory protection where no evidence of physical harm or threatening conduct); *Tampa Tribune*, 351 NLRB at 1326 (employee's outburst remained protected where not directed at manager and unaccompanied by physical conduct, threats, or confrontational behavior). Spinella's comment contained no profanity, and Sanzone's use of the word "asshole" to describe DelBuono is clearly insufficient to divest her activity of the Act's protection.[6] See *Plaza Auto Center*, above at 495–498 (employee referred to owner as a "f—king motherfucker," "f—king crook," and "asshole"); *Tampa Tribune*, 351 NLRB at 1324–1325 (employee called vice president a "stupid f—king moron"); see also *Alcoa, Inc.*, 352 NLRB 1222, 1225–1226 (2008) (employee referred to supervisor as an "egotistical f–ker"); *Burle Industries*, 300 NLRB 498 (1990), enfd. 932 F.2d 958 (3d Cir. 1991) (employee called supervisor a "f—king asshole").

Respondent contends that Sanzone and Spinella's remarks also lost the Act's protection in that they were disparaging and disloyal statements within the meaning of *NLRB v. Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. 464 (1953). In that case, employee statements were found unprotected where they were made "at a critical time in the initiation of the company's business," were unrelated to any ongoing labor dispute, and constituted "a sharp, public, disparaging attack upon the quality of a company's product and its business policies, in a manner reasonably calculated to harm the company's reputation and reduce its income." *Electrical Workers Local 1229 (Jefferson Standard)*, 346 U.S. at 472; see also *Santa Barbara News-Press*, 357 NLRB No. 51, slip op. at 3–4 (2011); *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (2011); *Valley Hospital Medical Center*, 351 NLRB 1250, 1252 (2007), enfd. 188 LRRM 2384 (9th Cir. 2009). The Board has cautioned that "disparagement of an employer's product" and "the airing of what may be highly sensitive issues" must be carefully distinguished. *Valley Hospital Medical Center*, 351 NLRB at 1252. In order to lose the Act's protection, public criticism of the employer must be made with a "malicious motive." Id. In this respect, the Board has held that statements are "maliciously untrue" when "made with knowledge of their falsity or with reckless disregard for their truth or falsity."[7] *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5. The fact that statements are "false, misleading, or inaccurate" is not sufficient to establish that they are maliciously untrue. Id.; see also *Valley Hospital Medical Center*, 351 NLRB at 1252.

As an initial matter, however, I find that the statements made by Sanzone and Spinella here never lost the Act's protection, in that they were not susceptible to a defamatory meaning under the relevant caselaw. It is axiomatic that prior to considering issues of reckless or knowing falsity, "there must be a false statement of fact." *DHL Express, Inc.*, 355 NLRB 680, 680 fn. 3, 695 (2010), quoting *Steam Press Holdings v. Hawaii Team-*

[6] The epithet "shady little man" is also clearly insufficient to divest a statement from the protection of the Act under the *Atlantic Steel* line of cases, even in the event that Sanzone and Spinella could be deemed to have adopted this comment of LaFrance's.

[7] As Respondent discusses in its post-hearing brief, the Supreme Court has also applied this standard, originating in *New York Times v. Sullivan*, 376 U.S. 254 (1964), to actions for defamation involving labor disputes and other conduct protected by the Act. See *Linn v. Plant Guards*, 383 U.S. 53, 64–65 (1966) (State law defamation actions based upon statements made in the course of a labor dispute permissible where the plaintiff can show that the defamatory statements were made with malice and caused damages); see also *Old Dominion Branch No. 496, Letter Carriers v. Austin*, 418 U.S. 264, 273 (1974).

sters Local 996, 302 F.3d 998, 1009 fn. 6 (9th Cir. 2002). The Board and the courts have long recognized that in the context of a labor dispute, statements may be "hyperbolic," biased, "vehement," "caustic," and may even involve a "vigorous epithet," while retaining the Act's protection. *DHL Express, Inc.*, 355 NLRB 680, quoting *Joliff v. NLRB*, 513 F.3d 600, 609–610 (6th Cir. 2008); see also *Valley Hospital Medical Center*, 351 NLRB at 1253. Sanzone's statement, "I owe to . . . such an asshole," accurately reflects the fact that she did owe a tax payment to the State of Connecticut, and her referring to DelBuono as an "asshole" constitutes an epithet, as opposed to an assertion of fact. *Joliff*, 513 F.3d at 609–610; see also *Moriarty v. Lippe*, 162 Conn. 371, 294 A.2d 326 (Conn. 1972) (epithets such as "big fat oaf," "son of a bitch" and other "words of general abuse" are not slanderous per se, and require proof of special damages for recovery). Spinella's statement "Vincent VinnyCenz Spinella . . . like[s] this" is also not a statement of fact with respect to Respondent or DelBuono. As a result, Sanzone and Spinella's statements are not even potentially defamatory, and did not lose the protection of the Act under the *Jefferson Standard* line of cases. I would reach the same conclusion even if I found that Sanzone and Spinella had somehow adopted the comments of LaFrance and the other employees. See *Steam Press Holdings, Inc.*, 302 F.2d at 1002, 1005–1009 (accusations that company's owner was "making money" and "hiding money," which belied employer's asserted poor financial condition during negotiations, were not fact statements susceptible to a defamatory meaning).

I also find that the statements made by Sanzone and Spinella were not deliberately false, or made with reckless disregard for their truth or falsity, even assuming they somehow adopted LaFrance's comments that DelBuono "fucked up the paperwork," was "a shady little man," and "probably pocketed [the tax deductions] from all our paychecks." There is no real dispute that DelBuono was responsible for Respondent's accounting, and that many of Respondent's employees owed taxes to the State of Connecticut after filing their 2010 tax returns. Indeed, the evidence establishes that the problem was so widespread, and had caused such consternation among Respondent's employees, that a meeting had been arranged with representatives from the payroll service used by Respondent for the following week. In addition, Sanzone testified that her paycheck only reflected 40 hours of work per week regardless of her actual work hours, and that she was sometimes paid in cash for work in excess of 40 hours per week, and sometimes not paid at all for overtime hours. While DelBuono generally denied this during his testimony, Respondent provided no other meaningful evidence to rebut Sanzone's assertions.

Given the requirement of malice, the Board considers the perspective of the employee in order to determine whether statements, regardless of their actual truth, were made with knowledge that they were false or with reckless disregard for their truth or falsity. *MasTec Advanced Technologies*, 357 NLRB No. 17, slip op. at 5 (statements in dispute "fairly reflected [employees'] personal experiences" and were therefore not made maliciously); *Valley Hospital Medical Center*, 351 NLRB at 1253 (statements not maliciously false where they were based on employee's "own experiences and the experiences of other nurses as related to [employee]"). Assuming LaFrance's comments were adopted by Sanzone and Spinella, the evidence establishes that, given the employees' direct experience with their 2010 tax returns and Respondent's other payroll practices, they were not malicious. While they might be considered "hyperbolic," the evidence does not establish that they were made with knowledge of their falsity or reckless disregard for the truth. See, e.g., *Asplundh Tree Expert Co.*, 336 NLRB 1106, 1108 (2001), vacated on other grounds 365 F.3d 168 (3d Cir. 2004) (employee's statement that supervisor had "pocketed" the difference between employees' per diem and actual hotel expenses protected); *Mediplex of Wethersfield*, 320 NLRB 510, 513 (1995) (accusation that employer had "cheated" employees through paid time off program protected); *KBO, Inc.*, 315 NLRB 570 (1994), enfd. 96 F.3d 1448 (6th Cir. 1996) (statement that employer was "taking money out of the employees' profit-sharing accounts to pay the lawyers to fight the Union" protected).

In addition, the evidence establishes that Sanzone and Spinella's statements were not directed to the public as part of a campaign to raise public awareness of the employees' dispute with Respondent. Other cases applying the *Jefferson Standard* analysis involve the deliberate dissemination of allegedly disparaging statements through the news media, or as part of a campaign specifically directed to the public at large. See, e.g., *MasTec Advanced Technologies*, 357 NLRB No. 17 slip op. at 3–4 (statements made on news broadcast); *Valley Hospital Medical Center*, 351 NLRB at 1250–1251, 1253–1254 (statements made at press conference organized by the union, on a website maintained by the union and accessible to the general public, and in a flyer distributed to the public by the union in front of the employer's facility). Here, by contrast, Sanzone, Spinella, and LaFrance's comments were posted on LaFrance's Facebook account, which was not accessible to the general public. Instead, each person wishing to view the account (including customers of Respondent) needed to obtain LaFrance's specific permission through an accepted request to become her "Friend." This militates against a finding that the statements made during the Facebook discussion were made with a malicious intent to injure Respondent's business and DelBuono's reputation in the eye of the general public. The more reasonable conclusion is that the participants were, in LaFrance's words, "venting" their frustration with one another regarding the tax withholding situation and discussing the upcoming meeting with representatives from Respondent's payroll service.

The other factors considered as part of the *Jefferson Standard* analysis also do not support a conclusion that Sanzone and Spinella's statements on LaFrance's Facebook account lost the protection of the Act. There is no evidence that the statements were made at a critical time during the initiation of the employer's business; Respondent's restaurant and bar had been operating since December 2009. The statements were directly related to the ongoing dispute between the employees and Respondent's management regarding the tax treatment of the employees' earnings, which had resulted in a number of the employees' owing taxes to the State of Connecticut. They were not a gratuitous attempt to injure Respondent's business. Finally,

Sanzone and Spinella's statements were not an attack on Respondent's product. They did not address, for example, the quality of the food, beverages, services, or entertainment at Respondent's restaurant and bar,[8] but were solely related to the employees' owing taxes to the State.

For all of the foregoing reasons, I find that the third component of the *Atlantic Steel* analysis—the nature of the outburst—indicates that Sanzone and Spinella's statements did not lose their protected character.

As for the fourth of the *Atlantic Steel* criteria, whether the outburst was provoked by Respondent's unfair labor practices, General Counsel does not contend that Sanzone and Spinella's Facebook statements were provoked by any unfair labor practice of Respondent. Therefore, this component of the analysis militates in favor of a finding that Sanzone and Spinella's statements were not protected. However, in that I have concluded that factors one, two, and three of the *Atlantic Steel* standard support a finding that Sanzone and Spinella's Facebook comments did not lose the protection of the Act, I find that they remained protected concerted activity.

3. Sanzone and Spinella's discharges were unlawful under the *Burnup & Sims* standard

As discussed above, the *Burnup & Sims* analysis involves the application of four factors: (i) whether the discharged employee was engaged in protected activity at the time of their purported misconduct; (ii) whether the employer knew of the protected activity; (iii) whether the basis for the discharge was the employee's alleged misconduct in the course of their protected activity; and (iv) whether the employee was actually guilty of the misconduct. When the evidence establishes that the employee was discharged based on alleged misconduct occurring in the course of protected activity, the burden shifts to the respondent to show that "it had an honest or good-faith belief that the employee engaged in the misconduct." *Alta Bates Summit Medical Center*, 357 NLRB No. 31, slip op. at 1–2 (2011); see also *Roadway Express*, 355 NLRB 197, 1015 (2010), enfd. 427 Fed. Appx. 838 (11th Cir. 2011). If the respondent does so, the burden then shifts back to the General Counsel to prove that the employee did not actually engage in the alleged misconduct. *Alta Bates Summit Medical Center*, 357 NLRB No. 31, slip op. at 2; *Roadway Express*, 355 NLRB at 1015.

The evidence establishes here, as discussed above, that Sanzone and Spinella were engaged in protected concerted activity—the discussion with other employees of Respondent's calculation of their tax withholdings—at the time of their alleged misconduct. The record also establishes that Respondent knew of this protected activity at the time that Sanzone and Spinella were discharged. Daddona testified that his sister informed him of the Facebook discussion on LaFrance's account, and that he viewed the discussion with DelBuono, prior to Sanzone and Spinella's discharge. In fact, Respondent admits that it discharged Sanzone in part for her comments, and as discussed below DelBuono testified that he initiated the meeting during which Spinella was discharged specifically to confront him about his having selected the "Like" option. Therefore, the first two components of the *Burnup & Sims* analysis are satisfied.

I also find that the evidence establishes that Sanzone and Spinella were discharged for alleged misconduct in the course of their protected activity, the third criterion of the *Burnup & Sims* analysis. Respondent admits that Sanzone was discharged for "disloyalty," comprised in part of her comment on LaFrance's Facebook account.[9] However, Respondent contends that Spinella was discharged for poor work performance, including failing to stock deliveries, unauthorized cigarette breaks, and excessive cell phone use and socializing with other staff. The evidence does not substantiate this contention. While Daddona testified that Spinella was not discharged because of his having selected the "Like" option on LaFrance's Facebook account, and that his having done so was not discussed during the meeting which culminated in his discharge, DelBuono thoroughly contradicted these assertions. Thus, DelBuono testified that he and Daddona decided to confront Spinella because his "Facebook comment raised a red flag" that he was not happy working for Respondent. DelBuono testified that during the meeting he told Spinella that he was obviously not happy, and "questioned him" regarding the Facebook discussion, asking him, "if he liked those defamatory and derogatory statements so much well why is he still working for us?" DelBuono stated that he then told Spinella that because he "liked the disparaging and defamatory comments," it was "apparent" that Spinella wanted to work somewhere else. I therefore find based on DelBuono's testimony that Spinella was discharged because of his having selected the "Like" option on LaFrance's Facebook account, and that both he and Sanzone were discharged for alleged misconduct occurring in the course of their protected activity.

Finally, as discussed above, I have found that Sanzone and Spinella's comments did not lose the Act's protection under the four *Atlantic Steel* factors, and that they did not lose the protection of the Act under the *Jefferson Standard* analysis, in that they were not made with knowledge of their falsity or with reckless disregard for their falsity or truth. I therefore find that regardless of the character of any belief regarding misconduct held by Daddona and DelBuono, Sanzone and Spinella did not in fact commit misconduct by virtue of their participating in the discussion on LaFrance's Facebook account.

For all of the foregoing reasons, I find under *Burnup & Sims* that Respondent violated Section 8(a)(1) of the Act by discharging Sanzone and Spinella.

[8] Indeed, the sole comment of this nature was offered, unsolicited, by customer Jonathan Feeley, who stated that Respondent's restaurant and bar were "way too expensive." Customer DeSantis stated, "Yeah I really don't go to that place anymore," but there is no evidence to establish why. In fact, because he made this comment during the discussion on LaFrance's Facebook account, he had presumably stopped frequenting Respondent's restaurant prior to that time.

[9] For the reasons discussed in sec. 4 regarding Respondent's asserted reasons for Sanzone and Spinella's discharges based on work performance under *Wright Line*, I find that Sanzone was not discharged for reasons relating to cash register inaccuracies.

4. Respondent's *Wright Line* defenses

In addition to its arguments regarding the nonprotected nature of Sanzone and Spinella's participation in the Facebook discussion, Respondent asserts reasons for Sanzone and Spinella's discharges based upon their work performance, and unrelated to their protected concerted activity. Respondent contends that Sanzone was discharged for repeated cash register inaccuracies, and that Spinella was discharged for poor work performance involving a number of issues. To the extent that Respondent has raised issues regarding its motivation for the discharges, I will analyze these contentions within the framework articulated in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983).

To establish an unlawful discharge under *Wright Line*, the General Counsel must prove that the employee's protected conduct was a motivating factor in the employer's decision to take action against them by proving the employee's protected activity, employer knowledge of that activity, and animus against the employee's protected conduct. *Manno Electric, Inc*., 321 NLRB 278, 280 (1996); *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999). The burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 at 1089; *Septix Waste, Inc*., 346 NLRB 494, 496 (2006); *Williamette Industries*, 341 NLRB 560, 563 (2004). Respondent must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co*., 316 NLRB 771 (1995); *Manno Electric, Inc*., 321 NLRB at 280 fn. 12 (1996).

I find that General Counsel has established a prima facie showing that Sanzone and Spinella's protected concerted activity was a motivating factor in their discharges. As discussed above, Sanzone and Spinella's participation in the Facebook discussion remained protected activity throughout, and there is no question that at the time they were discharged Daddona and DelBuono were aware of their comments. Animus against their protected activity is evinced by the timing of their discharges immediately after the Facebook discussion, and Daddona and DelBuono's comments while discharging them, some of which, as addressed below, constitute independent violations of Section 8(a)(1). See, e.g., *Manorcare Health Services–Easton*, 356 NLRB No. 39, slip op. at 3, 25 (2010), enfd. 661 F.3d 1139 (D.C. Cir. 2011) (discipline of employee "just days" after initial public support for the union indicative of unlawful motivation); *Austal USA, LLC*, 356 NLRB No. 65, slip op. at 1–2 (2010) (8(a)(1) violations constitute evidence of animus).

The evidence presented here is insufficient to satisfy Respondent's burden to show that it discharged either Sanzone or Spinella for legitimate, non-discriminatory reasons. Respondent's asserted work-performance reasons for discharging Spinella are utterly unsubstantiated by the record. Both Daddona and DelBuono generally testified that Spinella failed to restock supplies in a timely manner, socialized excessively with waitresses, and took too many breaks to smoke cigarettes and use his cell phone. However, DelBuono testified that what "raised a red flag" and immediately precipitated the meeting which culminated in Spinella's discharge was his having selected the "Like" option on LaFrance's Facebook account. According to DelBuono, he then "questioned" Spinella regarding the Facebook conversation before asking him why he was still working for Respondent; the evidence does not establish that Spinella's various performance problems were even touched upon during this meeting. Given DelBuono's testimony, Daddona's testimony that the Facebook discussion was not mentioned during the meeting and played no role in Respondent's reasons for discharging Spinella is obviously not worthy of belief, and undermines his credibility as a witness overall.

Other factors also contradict Respondent's assertion that it discharged Spinella for work performance problems. Daddona testified that he first noticed Spinella's poor work habits during the first 2 months of his employment, and discussed them with him on a minimum of six occasions. Although I do not find Daddona to be a credible witness, Spinella did testify that Daddona and DelBuono had a number of informal conversations with him and the other kitchen workers, which included suggestions for improvement. However, there is no evidence that Respondent issued written discipline to Spinella, and no evidence that Spinella was ever informed in any way that failure to improve would result in discharge. Crediting Spinella's testimony, I find that DelBuono and Daddona's discussions with him failed to rise to the level of meaningful disciplinary action. In any event, it is also well settled that the imposition of discipline for conduct that has been tolerated or condoned constitutes evidence of unlawful motivation. See, e.g., *Air Flow Equipment, Inc.*, 340 NLRB 415, 419 (2003). As a result, I find that Respondent has failed to substantiate its contention that Spinella was discharged for work performance problems, as opposed to his protected participation in the Facebook discussion.

With respect to Respondent's assertion that Sanzone was discharged in part for cash register inaccuracies, the credible evidence establishes that Daddona informed her on one occasion that her cash drawer was short after a bartending shift some time in the fall of 2010. I do not credit Daddona's assertion that her cash drawer "somewhat regularly" contained funds in excess of what could be accounted for through sales at the end of her bartending shifts, which he purportedly first discovered in August 2010. Daddona claims he was told by a business acquaintance that this might mean that Sanzone was recording fewer drinks than were actually purchased by customers, and in effect stealing the difference. If this is the case, it is implausible that Respondent would not have taken more immediate action to discharge Sanzone given the direct impact on its business and the egregious nature of potential theft. The evidence also establishes that Sanzone received a raise in November 2010 and a Christmas bonus that same year, actions which no reasonable employer would take if it truly believed that she was possibly engaged in theft. Respondent also failed to offer a shred of documentary evidence to substantiate its contention that Sanzone's cash drawer regularly contained an overage of funds. Indeed, DelBuono, who has overall responsibility for Respondent's accounting, was not even questioned regarding this asserted reason for Sanzone's discharge. As a result, I find

that Respondent has failed to provide adequate evidence to substantiate its contention that Sanzone was discharged for cash register inaccuracies, as opposed to her comment during the discussion on LaFrance's Facebook account.

For all of the foregoing reasons, I find that Respondent has failed to meet its burden to establish that it discharged Sanzone and Spinella for legitimate, nondiscriminatory reasons. I therefore find that Sanzone and Spinella's discharges violated Section 8(a)(1).

B. Threats to Initiate Legal Action

The consolidated complaint alleges that Respondent threatened employees with legal action in violation of Section 8(a)(1) on February 3 and 4. There is no dispute that Respondent's attorney and admitted agent, Joseph Yamin, wrote to Sanzone on February 4, threatening to institute a defamation action against her if she did not retract her statement on LaFrance's Facebook account. Sanzone had LaFrance delete her comment, and sent a letter to Yamin stating that her comment had been erased. Yamin then wrote to Sanzone stating that she was required to post a "formal statement that the defamatory statements were untrue," and demanded written proof that she had done so. Sanzone did not respond, and did not hear from Yamin again.

The evidence overall also establishes that Respondent threatened Spinella with legal action on February 3, as alleged in the consolidated complaint. I credit Spinella's testimony that as he was leaving the discharge meeting with Daddona and DelBuono on February 3, DelBuono stated that Spinella would be hearing from Respondent's lawyers. Daddona's testimony regarding this meeting is simply not believable, as he contended that Spinella's participation in the Facebook conversation was never discussed. DelBuono's testimony is more credible, as he admitted to "questioning" Spinella regarding the Facebook discussion, including asking Spinella "why is he still working for us?" given his affinity for "the disparaging and defamatory comments." Given DelBuono's corroboration of Spinella's account in this regard, and Respondent's written threat, by its attorney, to initiate an action against Sanzone, I credit Spinella's statement that DelBuono told him as he left the February 3 meeting that he would hear from Respondent's attorney. Given DelBuono's statements during the meeting that the comments were defamatory, and that his attorney had advised him to discharge anyone involved for that reason, Spinella would reasonably have interpreted DelBuono's statement that he would hear from Respondent's attorney as a threat of legal action.

There is no dispute that Respondent never filed an action for defamation against Sanzone, Spinella, or LaFrance.

The General Counsel contends that Respondent's threats to sue Sanzone and Spinella for defamation violated Section 8(a)(1), in that they reasonably tended to interfere with, restrain, and coerce them in the exercise of their Section 7 rights. *DHL Express, Inc.*, 355 NLRB 680 fn. 3, 692–694 (2010); see also *Network Dynamics Cabling*, 351 NLRB 1423, 1425 (2007); *Postal Service*, 350 NLRB 125, 125–126 (2007), enfd. 526 F.3d 729 (11th Cir. 2008). Respondent argues that its correspondence with Sanzone was permissible in that the filing and prosecution of a well-founded lawsuit does not violate Section 8(a)(1) even if initiated with a retaliatory motive, citing *Bill Johnson's Restaurants v. NLRB*, 461 U.S. 731 (1983). Respondent contends that an action for defamation against Sanzone would have had a reasonable basis, and therefore Respondent's threats to initiate one did not violate Section 8(a)(1).[10]

The Board has consistently held that threats to bring legal action against employees for engaging in protected concerted activity violate Section 8(a)(1), in that they reasonably tend to interfere with, restrain, and coerce employees in the exercise of their Section 7 rights. *DHL Express, Inc.*, 355 NLRB 680 fn. 3, 692, citing *S.E. Nichols Marcy Corp.*, 229 NLRB 75 (1977). In *BE & K Construction Co.*, 351 NLRB 451 (2007), the Board held that retaliatory but reasonably based lawsuits do not violate Section 8(a)(1). However, the Board has explicitly declined to apply this standard to threats to initiate litigation, even where they are "incidental" to the actual filing of the lawsuit itself. *Postal Service*, 350 NLRB at 125–126; see also *DHL Express, Inc.*, 355 NLRB 680 fn. 3. In addition, the Board has repeatedly held that, even if it had determined that the *BE & K* standard applied to threats of litigation "incidental" to the filing of a lawsuit, such threats cannot be considered "incidental" to litigation where, as here, a lawsuit was never filed.[11] *DHL Express, Inc.*, 355 NLRB 680 fn. 3; *Postal Service*, 350 NLRB at 125–126. As a result, I find that the *BE & K* standard is inapplicable.

As discussed in section A,2 above, I find that Sanzone and Spinella's statements were not defamatory, and were not made with knowledge of their falsity or with reckless disregard for their truth or falsity. *DHL Express, Inc.*, 355 NLRB at 692. I therefore find, as discussed above, that their participation in the Facebook conversation never lost the Act's protection.

As a result, the evidence establishes that Respondent's repeated threats to bring legal action against Sanzone and Spinella would reasonably tend to interfere with, restrain, and coerce them in the exercise of their Section 7 rights. Indeed, Sanzone had LaFrance remove her statement from the Facebook account, and Spinella returned to the account to select the "Unlike" option. Even after Sanzone did so, Respondent's attorney wrote to her again demanding written proof that she had made "a formal statement" that her previous remark was "untrue." See *DHL Express, Inc.*, 355 NLRB at 693–694 (threat to initiate legal action coercive where never retracted, even after "the allegedly offensive statements were corrected"). Sanzone and Spinella's responses to Respondent's threats of litigation, and Respondent's subsequent insistence on pursuing the matter through its attorney, further indicate that its conduct was impermissibly coercive. Thus I find that Respondent violated Section 8(a)(1) of the Act by threatening Sanzone and

[10] Respondent does not advance any argument regarding DelBuono's threat to take legal action against Spinella.

[11] Sanzone's written response to Yamin's February 4 letter stating that she had had LaFrance remove her remark from LaFrance's Facebook account further supports the conclusion that the threat to initiate legal action against her was not "incidental" to the filing of a lawsuit. See *Network Dynamics Cabling*, 350 NLRB at 1427 fn. 14.

Spinella with legal action in retaliation for their protected concerted activity.

C. Other Statements by Daddona and DelBuono Allegedly Violating Section 8(a)(1)

The consolidated complaint alleges that Respondent also violated Section 8(a)(1) on February 2, when Daddona informed employees that they were discharged because of their protected concerted activities, and on February 3, when DelBuono interrogated employees regarding their protected concerted activities and threatened employees with discharge for that reason. I find that the evidence establishes that Respondent committed these additional violations of Section 8(a)(1).

Sanzone testified that while discharging her on February 2, Daddona stated that she "wasn't loyal enough to be working at Triple Play anymore," because of her comment on LaFrance's Facebook account. Daddona admitted that Sanzone was discharged because "her loyalty was not to us" after "we saw what was going on on Facebook and with the drawer;" however, he did not testify regarding his actual conversation discharging Sanzone. Because Sanzone's account is therefore not meaningfully rebutted,[12] the record establishes that Daddona told her that she was discharged because she was insufficiently "loyal" to work for Respondent given her comment on Facebook. As Sanzone's participation in the Facebook discussion constituted protected concerted activity, Daddona's statement to her that she had been discharged for that reason violated Section 8(a)(1). *Extreme Building Services Corp.*, 349 NLRB 914, 914 fn. 3, 929 (2007) (employer violated Sec. 8(a)(1) by telling an employee he was discharged because of his union membership); *Watts Electric Corp.*, 323 NLRB 734, 735 (1997) (employee unlawfully informed that he had been discharged for distributing union flyers), "revd. in part, vacated in part mem. 166 F.3d 351 (11th Cir. 1998)."

The evidence also establishes that DelBuono coercively interrogated Spinella and unlawfully informed him that those employees who participated in the Facebook discussion would be discharged during their meeting on February 3. DelBuono admitted that he "questioned" Spinella during this meeting, and I credit Spinella's testimony that DelBuono asked him about the identities of the participants, the significance of the "Like" option, and, as DelBuono testified, "[I]f he liked those defamatory and derogatory statements so much well why is he still working for us?" DelBuono admitted that he told Spinella that it was "apparent" that he wanted to work somewhere else, and given the threats to initiate legal action as discussed above, I credit Spinella's testimony that DelBuono told him that Respondent's attorney had advised discharging anyone involved in the Facebook discussion for defamation.

I find that DelBuono's questioning of Spinella was coercive and therefore unlawful. The Board determines whether questioning regarding protected activity is unlawfully coercive by considering any background of employer hostility, the nature of the information, the status of the questioner in the employer's hierarchy, the place and method of questioning, and the truthfulness of the employee's answer. *Westwood Health Care Center*, 330 NLRB 935, 939 (2000). Here, these factors overall establish that DelBuono's questioning was impermissibly coercive. DelBuono and Spinella's conversation was not a casual talk on a shop floor between individuals who had some sort of personal relationship. See *Manor Health Services-Easton*, 356 NLRB No. 39, slip op. at 17 (questioning impermissible where no evidence of personal friendship between agent and employees); compare *Smithfield Packing Co.*, 344 NLRB 1, 2 (2004). DelBuono and Daddona specifically called Spinella into their office for a meeting, and had LaFrance's Facebook account displayed on the computer. *Manor Health Services-Easton*, 356 NLRB No. 39, slip op. at 18 (questioning coercive where interaction was "neither casual nor accidental"). Sanzone's discharge the previous day evinces a backdrop of hostility toward the employees' protected concerted activity. The meeting was characterized by unlawful conduct on the part of DelBuono, including the statement that Respondent's attorney had advised discharging all employees engaged in the discussion, and DelBuono's threat to initiate legal action against Spinella for participating in the Facebook conversation. See *Evergreen America Corp.*, 348 NLRB 178, 208 (2006), enfd. 531 F.3d 321 (4th Cir. 2008) (questioning accompanied by statements evincing hostility toward union activities more likely to be coercive); *Demco New York Corp.*, 337 NLRB 850, 851 (2002). Finally, the meeting culminated in Spinella's unlawful discharge. In these circumstances, the truthfulness of Spinella's responses to DelBuono's questions is not significant.

I further find that DelBuono's statement that his attorney had advised him to discharge every employee who participated in the Facebook discussion, which occurred in the context of DelBuono's repeatedly demanding that Spinella provide a justification for his continued employment, constituted a threat of discharge in violation of Section 8(a)(1). See *White Transfer & Storage Co.*, 241 NLRB 1206, 1209–1210 (1979) (employer's statement to employees that he "had been with his lawyer all day," who advised him "that if he had a good enough reason to terminate [employees], to go ahead and do it" unlawful threat of discharge).

For all of the foregoing reasons, I find that Daddona and DelBuono's statements to Sanzone and Spinella violated Section 8(a)(1) of the Act in the manner described above.

D. Respondent's Internet/Blogging Policy

It is well settled that an employer's maintenance of a work rule which reasonably tends to chill employees' exercise of their Section 7 rights violates Section 8(a)(1) of the Act. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). A particular work rule which does not explicitly restrict Section 7 activity will be found unlawful where the evidence establishes one of the following: (i) employees would "reasonably construe the rule's language" to prohibit Section 7 activity; (ii) the rule was "promulgated in response" to union or protected concerted activity; or (iii) "the rule has been applied to restrict the exercise of Section 7 rights." *Lutheran Heritage Village-Livonia*, 343 NLRB 646,

[12] I decline to draw an adverse inference based upon the failure of Daddona and DelBuono to address certain of the events of Sanzone and Spinella's discharges during their testimony, as suggested by the General Counsel.

647 (2004). The Board has cautioned that rules must be afforded a "reasonable" interpretation, without "reading particular phrases in isolation" or assuming "improper interference with employee rights." *Lutheran Heritage Village-Livonia*, 343 NLRB at 646.

The General Counsel contends that Respondent's Internet/Blogging policy is unlawful, in that it states that employees may be "subject to disciplinary action" for "engaging in inappropriate discussions about the company, management, and/or co-workers." The General Counsel contends that employees would reasonably construe the language of the policy to restrict Section 7 activity given the breadth of the word "inappropriate," and of the phrase "the company, management and/or coworkers." The General Counsel also argues that the rule's failure to provide concrete examples of prohibited conduct which would lead employees to believe that it applies solely to serious misconduct leaves it susceptible to the interpretation that it encompasses protected concerted activity.

I find that Respondent's Internet/Blogging policy is not unlawful under the *Lutheran Heritage Village* standard. The policy does not explicitly restrict Section 7 activity, and was not issued in response to an organizing campaign or other protected concerted activity. Furthermore, there is no evidence that Sanzone and Spinella were discharged pursuant to the policy or that the policy has otherwise been applied to restrict employees' Section 7 rights. Therefore, the legality of the policy is contingent upon whether employees would reasonably construe it to prohibit Section 7 activity.

I find that under the existing case law, the Internet/Blogging policy would not be reasonably construed as prohibiting Section 7 activity.[13] I find that the Internet/Blogging policy's caution against "inappropriate discussions about the company, management, and/or co-workers" is similar to restrictions on speech having a potentially detrimental impact on the company which the Board has found to be permissible. See *Tradesmen International*, 338 NLRB 460, 462–463 (2002) (rule prohibiting "verbal or other statements which are slanderous or detrimental to the company or any of the company's employees" per-missible). The Board has similarly found that rules prohibiting any conduct, on or off-duty, which could injure the company's reputation are not unlawful. *Tradesmen International*, 338 NLRB at 460 (prohibition on "any conduct which is disloyal, disruptive, competitive, or damaging to the company" permissible); *Ark Las Vegas Restaurant Corp.*, 335 NLRB 1284 fn. 2, 1291–1292 (2001) (rules prohibiting "any conduct, on or off duty, that tends to bring discredit to, or reflects adversely on, yourself, fellow associates, the Company," and "conducting oneself unprofessionally or unethically, with the potential of damaging the reputation or a department of the Company" not unlawful); *Flamingo Hilton-Laughlin*, 330 NLRB 287, 288–289 (1999) (rule prohibiting "off-duty misconduct that materially and adversely affects job performance or tends to bring discredit to the Hotel" did not violate Sec. 8(a)(1)); see also *Albertson's, Inc.*, 351 NLRB 254, 258–259 (2007) (rule prohibiting "[o]ff the-job conduct which has a negative effect on the Company's reputation or operation or employee morale or productivity"); *Lafayette Park Hotel*, 326 NLRB at 825–826 (rules prohibiting conduct which does not meet employer's "goals and objectives," and "improper conduct, which affects the employee's relation-ship with the job, fellow employees, supervisors or the hotel's reputation or good will in the community").

This conclusion is supported by the context of the allegedly unlawful segment of the policy. The policy begins by stating that Respondent "supports the free exchange of information" among its employees, and states that only when electronic communi-cations "extend to confidential and proprietary information" or "inappropriate discussions" would they potentially be subject to disciplinary action. Immediately following that statement is a requirement that employees clearly identify opinions they share regarding Respondent as their own, as opposed to those of Respondent. The policy closes by stating that it will have no effect to the extent it conflicts with State or Federal law. Under the case law discussed above, I find that in this context the prohibition on "inappropriate discussions about the company, management and/or co-workers" would not be reasonably construed as restricting Section 7 activity.

The General Counsel argues that the Internet/Blogging policy is impermissibly broad, in that it fails to provide specific examples of inappropriate discussions to clarify that it does not encompass protected activity. However, as the Board noted in *Tradesmen International*, the lawful rules at issue in *Lafayette Park Hotel*, *Ark Las Vegas Restaurant Corp.*, and *Flamingo Hilton-Laughlin* did not contain specific examples of conduct which would expose an employee to potential discipline for conduct injuring the employer's reputation. *Tradesmen International*, 338 NLRB at 461; see *Lafayette Park Hotel*, 326 NLRB at 824–827; *Ark Las Vegas Restaurant Corp.*, 335 NLRB at 1291–1292; *Flamingo Hilton-Laughlin*, 330 NLRB at 287–288, 295. The General Counsel also argues that the policy here is similar to a policy the Board found unlawfully restrictive in *Claremont Resort & Spa*, 344 NLRB 832 (2005). In that case, the Board held that a policy which prohibited "negative conversations about associates and/or managers" could be reasonably construed as restricting Section 7 activity. *Claremont Resort & Spa*, 344 NLRB at 832. However, the facts at issue here are dissimilar. The prohibition on "negative conversations" in that case was issued to employees as part of a list of 10 work rules, some of which addressed working conditions such as "clocking in and out procedures," so that the employees could assume that "negative conversations" regarding those conditions of employment were prohibited. *Claremont Resort & Spa*, 344 NLRB at 832 fn. 5. Here, by contrast, Respondent's Internet/Blogging policy appears directed toward maintaining the company's reputation with respect to the general public, as were the policies in the cases discussed above. Furthermore, the 10 work rules containing the unlawful restriction

[13] Although Respondent contends that it did not in fact maintain the policy, the evidence establishes that when Respondent began its operations in December 2009 the policies contained in Respondent's employee handbook were reviewed with Respondent's initial group of employees, including Sanzone, at a meeting. DelBuono also offered to provide the employees at this meeting with copies of the handbook. Given the foregoing, I find that the policy was maintained by Respondent, despite the fact that Sanzone and Spinella never had their own physical copies of the handbook.

on "negative conversations" were issued in the midst of an organizing campaign, and a previous administrative law judge's decision had determined that the Respondent had unlawfully prohibited employees from discussing organizing activities while at work. *Claremont Resort & Spa*, 344 NLRB at 834, 836. As a result, I find that the facts at issue in *Claremont Resort & Spa* are distinguishable.

For all of the foregoing reasons, I find that Respondent's maintenance of the Internet/Blogging policy in its employee handbook did not violate Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. The Respondent, Three D, LLC d/b/a Triple Play Sports Bar and Grille, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. Respondent violated Section 8(a)(1) of the Act by discharging Jillian Sanzone on February 2, 2011, in retaliation for her protected concerted activities.

3. Respondent violated Section 8(a)(1) of the Act by discharging Vincent Spinella on February 3, 2011, in retaliation for his protected concerted activities.

4. Respondent violated Section 8(a)(1) of the Act by threatening employees with legal action in retaliation for their protected concerted activities.

5. Respondent violated Section 8(a)(1) of the Act by informing employees that they were being discharged because of their protected concerted activities.

6. Respondent violated Section 8(a)(1) of the Act by threatening employees with discharge in retaliation for their protected concerted activities.

7. Respondent violated Section 8(a)(1) of the Act by coercively interrogating employees regarding their protected concerted activities.

8. Respondent did not violate Section 8(a)(1) of the Act by maintaining the Internet/Blogging policy in its employee handbook.

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

THE REMEDY

Having found that Respondent has violated the Act, I shall recommend that it cease and desist therefrom and take certain affirmative action necessary to effectuate the Act's purposes.

Having discriminatorily discharged Jillian Sanzone and Vincent Spinella in retaliation for their protected concerted activities, Respondent must offer Sanzone and Spinella full reinstatement to their former positions or to substantially equivalent positions. Respondent must also make Sanzone and Spinella whole for any loss of earnings or other benefits they may have suffered as a result of the discrimination against them, plus interest, in the manner prescribed in *F. W. Woolworth*, 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). Respondent shall also be required to remove from its files all references to Sanzone and Spinella's unlawful discharges, and to notify them in writing that this has been done and that the discharges shall not be used against them.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[14]

ORDER

The Respondent, Three D, LLC d/b/a Triple Play Sports Bar and Grille, Watertown, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

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

(b) Threatening employees with legal action in retaliation for their protected concerted activities.

(c) Informing employees that they are being discharged because they engaged in protected concerted activities.

(d) Threatening employees with discharge in retaliation for their protected concerted activities.

(e) Coercively interrogating employees regarding their protected concerted activities.

(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.

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

(a) Within 14 days of the date of this Order, offer Jillian Sanzone and Vincent Spinella full reinstatement to their former positions or, if those positions no longer exists, to substantially equivalent positions, without prejudice to their seniority or to any other rights and privileges previously enjoyed.

(b) Make Jillian Sanzone and Vincent Spinella 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 this decision.

(c) Within 14 days of the date of this Order, remove from all files any reference to the unlawful discharges, and within 3 days thereafter, notify Sanzone and Spinella in writing that this has been done and that the discharges will not be used against them in any way.

(d) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other 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.

(e) Within 14 days after service by the Region, post at its facility in Watertown, Connecticut, copies of the attached notice marked "Appendix."[15] Copies of the notice, on forms provided

[14] 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.

[15] 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 Na-

by the Regional Director for Region 34, after being signed by Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by e-mail, posting on an intranet or an internet site and/or other electronic means if Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by 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 July 9, 2010.

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

IT IS FURTHER ORDERED that the consolidated complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you because you engage in protected concerted activities.

WE WILL NOT threaten you with legal action in retaliation for your protected concerted activities.

WE WILL NOT inform you that you are being discharged because you engaged in protected concerted activities.

WE WILL NOT threaten you with discharge in retaliation for your protected concerted activities.

WE WILL NOT coercively interrogate you regarding your protected concerted activities.

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

WE WILL, within 14 days of the date of the Board's Order, offer Jillian Sanzone and Vincent Spinella 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 and privileges previously enjoyed.

WE WILL make Jillian Sanzone and Vincent Spinella whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges of Jillian Sanzone and Vincent Spinella, and WE WILL, within 3 days thereafter, notify Sanzone and Spinella in writing that this has been done and that the discharges will not be used against them in any way.

THREE D, LLC D/B/A TRIPLE PLAY SPORTS BAR AND GRILLE

---

tional 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."