Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills *and* Alexis Hanson

Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, *and* Jamie West

Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, *and* Chanelle Panitch. Cases 31–CA–104872, 31–CA–104874, 31–CA–104877, 31–CA–104892, 31–CA–107256, and 31–CA–107259

September 1, 2015

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS MISCIMARRA AND HIROZAWA

On May 19, 2014, Administrative Law Judge William Nelson Cates issued the attached decision. The Respondents filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to adopt the judge's rulings, findings, and conclusions regarding the Respondents' arbitration agreement and to adopt his recommended Order as modified and set forth in full below.[1]

1. The judge found, and we agree, that the Respondents violated Section 8(a)(1) of the Act by maintaining a mandatory arbitration agreement that would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. It is well settled that a work rule violates Section 8(a)(1) if employees would reasonably believe that the rule interferes with their ability to file Board charges, even if the policy does not expressly prohibit access to the Board. See *Murphy Oil USA, Inc*., 361 NLRB No. 72, slip op. at 19 fn. 98 (2014); *D. R. Horton, Inc*., 357 NLRB No. 184, slip op. at 2 fn. 2 (2012), enf. denied on other grounds 737 F.3d 344 (5th Cir. 2013), petition for rehearing en banc denied (2014); *U-Haul Co. of California*, 347 NLRB 375, 377–378 (2006), enfd. mem. 255 Fed. Appx. 527 (D.C. Cir. 2007). Furthermore, it is settled that production of extrinsic evidence, such as testimony showing that employees interpreted the rule to preclude access to the Board, is not a precondition to finding that a rule is unlawful by its terms. See, e.g., *Murphy Oil*, supra, slip op. at 13 fn. 79; *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 1–2 (2014) (citing *Lutheran Heritage Village-Livonia*, 343 NLRB 646, 646–647 (2004); *Claremont Resort & Spa*, 344 NLRB 832, 832 (2005)).

Here, the parties stipulated, and the judge found, that the Respondents required employees to sign an arbitration agreement as a condition of employment. The arbitration agreement requires that all "claims" between the employee and the Respondents shall exclusively be decided by arbitration. The term "claims" encompasses

> all disputes arising out of or related to your application for employment, the application and recruitment process, the interview process, the formation of the employment relationship, your employment by the Company, or your separation from employment with the Company. The term "Claims" includes, but is not limited to, any claim whether arising under federal, state, or local law, under a statute such as Title VII of the Civil Rights Act of 1964, under a rule, under a regulation or under the common law, including, but not limited [to] ANY CLAIM OF DISCRIMINATION, SEXUAL OR OTHER TYPE OF HARASSMENT, RETALIATION, WRONGFUL DISCHARGE, ANY CLAIM FOR WAGES, COSTS, INTEREST, ATTORNEYS' FEES OR PENALTIES. "Claim" does not include any dispute that cannot be arbitrated as a matter of law.

(Emphasis in original.)

Although the arbitration agreement does not explicitly prohibit employees from filing charges with the Board, we agree with the judge's finding that employees would reasonably read it to do so—particularly in light of the breadth of the provision quoted above, its reference to "any claim" under "federal law" or "under a statute," and its specific inclusion of claims of discrimination, retaliation, or discharge or for wages. See *U-Haul Co. of California*, supra, 347 NLRB at 377.

The Respondents point out that the arbitration agreement includes an express exemption for "any dispute that

[1] Following the judge's decision in this case, the parties executed an informal Board settlement agreement and a non-Board settlement agreement resolving all alleged violations other than those pertaining to the maintenance of the arbitration agreement. On October 22, 2014, the Board granted the parties joint motion to sever and remand the settled allegations. Accordingly, the only issue before us is whether the Respondents' arbitration agreement violates Sec. 8(a)(1) of the Act. There are no exceptions to the judge's finding that the Respondents are joint employers.

We shall modify the recommended Order to reflect the settlement and remand of the other allegations and to conform to the Board's standard remedial language. We shall substitute a new notice to conform to the Order as modified.

cannot be arbitrated as a matter of law." That provision, however, does not save the arbitration agreement from violating Section 8(a)(1). Although unfair labor practice charges must be filed with the Board, they may be resolved through arbitration. See *Murphy Oil*, supra, slip op. at 13, 18–19 & fn. 98. Accordingly, we affirm the judge's conclusion that the arbitration agreement violated Section 8(a)(1) because employees would reasonably believe it prohibited the filing of charges with the Board. See id.; *U-Haul Co. of California*, supra, 347 NLRB at 377–378.

2. Applying the Board's decision in *D. R. Horton, Inc.*, supra, the judge also found that the arbitration agreement violated Section 8(a)(1) because it required employees to waive their right to engage in class or collective action in all forums, whether arbitral or judicial. We agree.

In *Murphy Oil*, supra, the Board thoroughly examined and reaffirmed the rationale of *D. R. Horton*. Specifically, the Board found that class or collective litigation by employees of claims relating to the terms and conditions of their employment is protected concerted activity, and that a policy prohibiting such activity in both arbitral and judicial forums violates Section 8(a)(1). As in *Murphy Oil* and *D. R. Horton*, the Respondents here required employees to sign, as a condition of employment, an arbitration agreement that barred each employee from litigating claims against the Respondents on a class, representative, or collective basis in any forum, arbitral or judicial.[2] Thus, we agree with the judge that the Respondents' maintenance of that arbitration agreement violated Section 8(a)(1) of the Act.[3]

[2] In their statement of facts, the Respondents quote a section of the agreement, entitled "Arbitrators' Authority," which states in part that the arbitration agreement "shall not be construed to deprive a party of any substantive right preserved by law." The Respondents do not otherwise address or rely on that provision. In any event, we find that the provision does not change the result here. At most, it creates ambiguity as to an employee's right to file charges with the Board, and it is insufficient to counteract the broadly worded language requiring individual arbitration of all claims arising under Federal law. It is well established that any ambiguity in a work rule that may restrict protected concerted conduct "must be construed against the [employer] as the promulgator of the rule[ ]." *Ark Las Vegas Restaurant Corp.,* 343 NLRB 1281, 1282 (2004).

[3] For the reasons stated in his partial dissent in *Murphy Oil USA, Inc.*, 361 NLRB No. 72, slip op. at 22–35 (2014), Member Miscimarra does not believe that Sec. 8(a)(1) of the Act prohibits employees and employers from entering into agreements that waive class procedures in litigation or arbitration. Accordingly, he would find that the Respondents did not violate Sec. 8(a)(1) by maintaining a class waiver agreement. Member Miscimarra agrees with his colleagues, however, that employees would reasonably read the agreement to require arbitration of disputes arising under the NLRA and thus to prohibit the filing of charges with the Board. To that extent, he agrees that the language of the agreement violates Sec. 8(a)(1). See id., slip op. at 23 fn. 4.

ORDER

The National Labor Relations Board orders that the Respondents, Hoot Winc, LLC and Ontario Wings, LLC d/b/a/ Hooters of Ontario Mills, Joint Employers, Ontario, California, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Maintaining a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

(b) Maintaining a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain joint, class, or collective actions in all forums, whether arbitral or judicial.

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

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

(a) Rescind the unlawful arbitration agreement in all of its forms, or revise it in all of its forms to make clear to employees that the agreement does not constitute a waiver of their right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict employees' right to file charges with the National Labor Relations Board.

(b) Notify all current and former employees who were required to sign the unlawful arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

(c) Within 14 days after service by the Region, post at their Ontario, California facility, and at all other facilities where the unlawful arbitration agreement is or has been in effect, copies of the notice marked "Appendix A."[4] Copies of the notice, on forms provided by the Regional Director for Region 31, after being signed by the Respondents' authorized representative, shall be posted by the Respondents 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 Respondents customarily communicate with their employees by such means. Reasonable steps shall be taken by the Respondents to ensure that the notices are

[4] 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."

not altered, defaced, or covered by any other material. If the Respondents have gone out of business or closed the facility involved in these proceedings, the Respondents shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Respondents at any time since April 15, 2013.

(d) Within 21 days after service by the Region, file with the Regional Director for Region 31 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondents have taken to comply.

Dated, Washington, D.C. September 1, 2015

Mark Gaston Pearce, Chairman

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

(SEAL) 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 a mandatory arbitration agreement that employees reasonably would believe bars or restricts the right to file charges with the National Labor Relations Board.

WE WILL NOT maintain a mandatory arbitration agreement that requires employees, as a condition of employment, to waive the right to maintain joint, class, or collective actions in all forums, whether arbitral or judicial.

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 rescind the unlawful arbitration agreement in all of its forms, or revise it in all of its forms to make clear that the agreement does not constitute a waiver of your right to maintain employment-related joint, class, or collective actions in all forums, and that it does not restrict your right to file charges with the National Labor Relations Board.

WE WILL notify all current and former employees who were required to sign the unlawful arbitration agreement that it has been rescinded or revised and, if revised, provide them a copy of the revised agreement.

HOOT WINC, LLC AND ONTARIO WINGS, LLC D/B/A HOOTERS OF ONTARIO MILLS, JOINT EMPLOYERS

The Board's decision can be found at http://www.nlrb.gov/case/31-CA-104872 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Juan Carlos Gonzalez, Esq. and *Amanda Dixon, Esq.,* for the General Counsel.
Justin J. Johl, Esq., for the Respondent Hoot Winc, LLC.
Michael Barnett, Esq., for the Respondent Hooters of Ontario, LLC
Burton F. Boltuch, Esq., for the Charging Party Alexis Hanson.

DECISION

STATEMENT OF THE CASE

WILLIAM NELSON CATES, Administrative Law Judge. This case was tried before me in Los Angeles, California, on January 29 and 30, 2014.[1] Charging Party Alexis Hanson, an individual, filed the charges in Cases 31–CA–104872 and 31–CA–104874 initiating this matter on May 9,[2] and the General Coun-

[1] All dates are 2013, unless otherwise indicated.

[2] I do not allude to the other charges as Hanson's discharge is the only discharge before me. Other allegations are, however, alleged, considered, and decided here.

sel (Government) issued an order consolidating cases, consolidated complaint, and notice of hearing (complaint) on September 27 and amended on December 12 against Hoot Winc, LLC (Hoot Winc) and Hooters of Ontario, LLC d/b/a Hooters of Ontario Mills (Hooters of Ontario). The Government alleges Hoot Winc an Oceanside, California company providing restaurant management services and Hooters of Ontario, an Ontario, California company operating a public restaurant selling food and beverages are joint employers of the employees of Hooters of Ontario. I shall refer to Hoot Winc and Hooters of Ontario collectively as the Company. The complaint also alleges the Company has maintained certain rules in an employee handbook, and, a confidential information agreement, that infringe upon employees Section 7 rights in violation of Section 8(a)(1) of the Act. It is also alleged the Company maintains an arbitration policy, an agreement to arbitrate and an acknowledgement of receipt of arbitration agreement that infringes upon employees Section 7 rights in violation of Section 8(a)(1) of the Act. It is also alleged the Company on April 23 suspended and on April 26 discharged Charging Party Hanson because she concertedly complained to the Company regarding wages, hours, and working conditions of the Company's employees, and conditions surrounding an upcoming competition involving the employees and such actions of the Company are alleged to interfere with, retrain, and coerce employees in the exercise of rights protected by Section 7 and in violation of Section 8(a)(1) of the Act.

The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of the witnesses as they testified and I rely on those observations here. I have studied the whole record, and based on the detailed findings and analysis below, I conclude and find the Company violated the Act as outlined below.

FINDINGS OF FACT

I. JURISDICTION AND RELATED ISSUES

A. Jurisdictional Status of Hoot Winc and Hooters of Ontario

Hoot Winc has been, and continues to be, a limited liability company with an office and place of business in Oceanside, California, providing restaurant management services. During the calendar year ending December 31, 2012, Hoot Winc in conducting its business operations, performed services valued in excess of $50,000 in states other than the State of California. The parties admit, and I find, Hoot Winc is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Hooters of Ontario, has been and continues to be, a limited liability company with an office and place of business in Ontario, California, operating a public restaurant selling food and beverages. During the calendar year ending December 31, 2012, Hooters of Ontario derived gross revenues in excess of $500,000 and bought and received at its Ontario, California facility products, goods, and materials in excess of $5000 directly from points outside the State of California. The parties admit, and I find, Hooters of Ontario is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

B. Joint Employer Status

It is alleged that Hoot Winc and Hooters of Ontario have, at all times here, been joint employers of Hooters of Ontario's employees at the Hooters Restaurant of Ontario, California. It is also alleged Hoot Winc has exercised control over the labor relations policies of Hooters of Ontario and administered a common labor policy for employees of Hooters of Ontario. It is admitted that Hoot Winc has provided human resources services to Hooters of Ontario, but Hoot Winc denies they are joint employers.

The Government contends Hoot Winc had a joint employer relationship with Hooters of Ontario and the relationship existed at the time Hoot Winc suspended and terminated Hooters of Ontario employee Charging Party Hanson.

Hoot Winc and Hooters of Ontario contend they are not joint employers but separate distinct entities with Hoot Winc simply providing human resources, management, accounting, and similar expertise to not only the Ontario restaurant but 18 other Hooters' restaurant locations in California. Hoot Winc and Hooters of Ontario argue the following shows they were and are not joint employers, namely: (1) they are separate entities; (2) Hooters of Ontario is owned by a holding company not Hoot Winc and Hoot Winc is not a member of the holding company that owns Hooters of Ontario; (3) neither is a subsidiary of the other; (4) Hooters of Ontario engages Hoot Winc to provide restaurant management services through a written fee-for-services agreement; and (5) Hanson was an employee of and paid by Hooters of Ontario not Hoot Winc.

A joint employer relationship may be found to exist where there is sufficient evidence that one company has immediate control over the other company's employees. The Board in *Aim Royal Insulation, Inc*., 358 NLRB No. 91, slip op. at 7–8 (2012), stated:

> The test for joint-employer status is whether two entities "share or co-determine those matters governing the essential terms and conditions of employment." *Laerco Transportation,* 269 NLRB 324, 325 (1984). To establish a joint-employer relationship, there must be evidence that one employer "meaningfully affects matters relating to the employment relationship such as, hiring, firing, discipline, supervision, and direction of the other employer's employees." Id.

In *Capital EMI Music,* 311 NLRB 997, 999 (1993), enfd. 23 F.3d 399 (4th Cir 1994), a case which I cannot deny familiarity with, the Board noted:

> Joint employers are businesses that are entirely separate entities except they both "take part in determining essential terms and conditions" of a group of employees. *Manpower, Inc.*, 164 NLRB 287, 288 (1967). Accord: *NLRB v. Browning-Ferris Industries*, 691 F.2d 1117, 1122–1123 (3d Cir. 1982), and cases there cited.

In *NLRB v. Browning-Ferris Industries,* supra, the court specifically found that where two separate entities share or codetermine those matters governing the essential terms and condi-

tions of employment they are considered joint employers for the purpose of the Act.

Did Hoot Winc participate meaningfully in exercising control over matters governing the terms and conditions of employment of Hooters of Ontario employees, and, more specifically with respect to Charging Party Hanson's employment? The evidence establishes Hoot Winc did. Hoot Winc Vice President of Human Resources Herrmann, when notified of the situation at the Hooters of Ontario bikini contest, directed Hooters of Ontario General Manager Vidauri to suspend employees Hanson and Panitch and to conduct an investigation to see what action would be taken. Herrmann personally investigated the situation at the Ontario restaurant. Thereafter, Herrmann notified both Panitch and Hanson she was terminating their employment. Herrmann testified she determined to fire Panitch before she spoke with her and determined to fire Hanson while speaking with her. Herrmann signed the discharge notices provided to Hanson and Panitch and only mentioned her termination decisions to Regional Director Peterson and General Manager Vidauri.

During material times here, Hoot Winc Regional Director Peterson disciplined (oral and written) Ontario General Manager Vidauri and Bar Manager Ramirez. Both Vidauri and Ramirez are management personnel but it further demonstrates the direct control Hoot Winc exercised over Hooters of Ontario. The discipline given Vidauri and Ramirez was based on comments they made about Hooter Girl employees at Hooters of Ontario.

Hoot Winc developed and provides the "Employee Handbook" given to each Hooters of Ontario employee. The Hoot Winc name, appears on each page of the handbook. The Employee Handbook (GC Exh. 18) addresses conduct, dress, allowable grooming practices, open door policy, nonharassment policy, restaurant work rules, company philosophy, employee relations, employee meals, alcohol consumption, safety, discipline, pay, benefits, vacation, absences, substance abuse, and other policies. A number of the policies inform Hooters of Ontario employees to contact Hoot Winc directly. The open door policy, for example, directs employees to first address work-related concerns with their immediate supervisor or general manager but if the matter is not resolved to then report their concerns to a regional supervisor and if appropriate report their complaint directly to Hoot Winc human resources via telephone or email. Hoot Winc issues to each Hooters of Ontario employee its standard operating procedure booklet (GC Exh. 20) which addresses various policies and procedures for Hooters of Ontario employees. For example, with respect to the anti-harassment and discrimination procedures it is specifically noted that Hoot Winc Vice President of Human Resources (in this case Herrmann) was ultimately responsible for hearing complaints, conducting investigations, documenting information, and determining what action would be taken regarding those procedures. Other procedures are addressed such as what employees at Hooters of Ontario must wear, meal and rest break guidelines and requirements, when and how employees will be paid, tip allocations, communications with employees, medical reimbursement, and work schedules.

It is clear Hoot Winc has immediate and effective control in determining the terms and conditions of employment of Hooters of Ontario employees.

Hoot Winc and Hooters of Ontario's contention, there is no joint employer relationship here, is invalid, because, among other reasons, the contentions are grounded on corporate structure and separate entities and not on control, or lack thereof, by one entity over employees of the other concerning essential terms of employment. The fact, for example, that Hanson's and Panitch's paychecks were drawn from Hooters of Ontario accounts does not require a different result than I conclude here, namely, that a joint employer relationship exists.

As noted elsewhere here, I shall refer to Hoot Winc and Hooters of Ontario jointly as the Company.

C. Supervisory and Agency Status

It is admitted that Vice President of Human Resources Amber Herrmann (Herrmann or Vice President of Human Resources Herrmann) and Regional Director Scott Peterson (Peterson or Regional Director Peterson) were supervisors within the meaning of Section 2(11) of the Act and/or agents of Hoot Winc or Hooters of Ontario within the meaning of Section 2(13) of the Act. It is, however, denied that Marketing coordinator/key employee Pamela Noble and Key employee Alicia Wade (Strohman) are supervisors and/or agents within the meaning of the Act.

1. Facts

Marketing Coordinator Noble and employee Wade both were, at applicable times, "key employees" for the Company. As the name implies key employees are provided keys to the restaurant and cash registers. No other nonmanagement employees have keys either to the restaurant or cash registers. Charging Party Hanson explained that if a "Hooters Girl" had a problem with a customer's check (bill), that is, something was rang up incorrectly, or the customer had, for example, a discount coupon, the key employee on duty could delete items from a customer's bill or give the customer credit for a promotional coupon. Key employees may go to the bank or take inventory for the Company.

Key employees sometimes conduct "jumpstart" sessions at the beginning of the workday or shift. Hanson described "jumpstart" sessions as "just a little meeting we have before our shift every day." Upcoming events and specials at the restaurant, sales for the day, merchandise sales, and section assignments are discussed and/or made.

Key employees sometimes "cut the floor." Cutting the floor happens when there are more workers present than the customer base justifies. Key employee Noble explained "we have to check labor every hour. And if it's over ten percent, we're supposed to cut accordingly. That way we can save money on labor, so normally we ask who wants to stay and go." If volunteers do not resolve who goes "Hooter Girls" name tags are collected and it is decided who will leave work that shift by drawing name tags. Noble testified employees were never just selected because that would not be fair.

There were times at the restaurant when key employees were present while managers were not. If anything occurred on a shift, with no manager present, the key employee would leave a

note for the general manager. Key employee Wade stated if an issue arose she could coach or counsel the employee, and had, on a couple of occasions, filled out a computer generated document on which she recorded what had occurred. Wade viewed the computer form as basically a type of written warning letter. She explained the computer generated document "is not considered at issue, nor valid, unless it is given by upper management." Wade could not recall whether upper management actually issued the warnings she had drafted. General Manager Vidauri testified key employees could not hire, fire, or suspend other employees.

Marketing coordinator and key employee, Noble, when also functioning as marketing coordinator, had the additional duty of setting up promotional events such as the April 22 bikini contest at the Ontario location.

2. Analysis and applicable principles

Section 2(11) of the Act defines a "supervisor" as:

> Any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

To establish that Noble and Wade were supervisors, the Government must prove by a preponderance of the evidence: (1) that they held authority to engage in any one of the 12 enumerated supervisory functions listed above; (2) that their "exercise of such authority [was] not of a merely routine or clerical nature, but require[d] the use of independent judgment"; and (3) that their authority was held "in the interest of the employer." See, e.g., *NLRB v. Kentucky River Community Care,* 532 U.S. 706, 710–713 (2001); *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). The Government can prove they had the requisite supervisory authority either by demonstrating they actually performed a supervisory action or by showing they effectively recommended it be done. *Oakwood*, above. Further, "to exercise 'independent judgment' an individual must at minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." Id. at 692–693. A "judgment is not independent if it is dictated or controlled by detailed instructions, whether set forth in company policies or rules, the verbal instructions of a higher authority, or in the provisions of a collective-bargaining agreement." Id. at 693. Because the Government bears the burden of proving supervisory status any lack of evidence on an element necessary to establish supervisory status must be held against the Government. *G4S Regulated Security Solutions,* 358 NLRB No. 160, slip op. at p. 1 (2012).

Applying these principles here, I find the Government's evidence fails to establish Noble and/or Wade possessed *any* indicia of supervisory authority.

The fact an employee is given a literal key to the employer's facility and cash registers does not, in any way, establish the employee has authority to exercise any indicia of supervisory status as outlined above. At best, assigning an employee keys to the facility and cash registers may indicate a degree of trust by the employer in the employee but little else. The fact a key employee is authorized to correct a customer's bill where incorrect data has been entered into the company cash register or giving customers credit for valid promotion coupons does not establish key employees have or exercise any indicia of supervisory status. That key employees may take inventory or do banking transactions for a manager does not establish an indicia of supervisory authority.

Key employees may, when managers are not present, conduct jumpstart meetings at the beginning of shifts. The evidence in this regard only establishes that key employees notify employees concerning upcoming events at the restaurant, sales for the day including particular merchandise sales, and, advising "Hooter Girls" which tables and sections of the restaurant they will be assigned for that day. There is absolutely no showing, on this record, that key employees utilize independent judgment when making such announcements or assignments. It appears key employees simply followed a set routine in selecting employees to cover customer tables.

In cutting the floor or reducing the number of "Hooter Girls" in relation to customers key employees simply perform a routine check of labor every hour, and, on a specific percentage ratio of labor to customers, they cut or reduce the work force. Key employees do not independently select employees to be cut but rather ask for volunteers; or, collect "Hooter Girl'" name tags and conduct a drawing to determine which employee(s) are sent home for the remainder of the workshift. This activity does not establish key employees responsibly direct worktimes for employees of the restaurant.

The Government contends key employees prepare written disciplinary warnings for employees which are approved by the General Manager and issued. The Government further contends this procedure establishes key employees effectively issue discipline to other employees, because upper management follows the key employees' recommendations. I find the evidence here is insufficient to carry the Government's burden. A key employee may, if no managers are present on a shift, document an event that occurred on the shift which management might need to know about. Key employee Wade indicated she could coach and/or counsel an employee and that on a couple of occasions she documented what had occurred for the general manager. Key employee Wade considered the forms she prepared basically a type of written warning but added the document was not considered an issue or valid unless it was given to the employee involved by upper management. This evidence does not shed light on a key employees' disciplinary authority. It does not establish that Wade, or the other key employee, utilized independent judgment regarding a warning recorded about an incident. The fact the general manager may have issued some form of discipline, based, at least in part, on the event documented by a key employee does not establish an effective recommendation of discipline by the key employee such as to establish Wade, or the other key employee, to be supervisors within the meaning of the Act. The evidence does not demonstrate specific examples of independent judgment regarding discipline. I find the Government failed to establish Noble and

Wade were supervisors within the meaning of the Act.

The Government additionally, or alternatively, contends Noble and Wade are agents of the Company pursuant to Section 2(13) of the Act. Section 2(13) of the Act reads as follows:

> In determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his act, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

The Board looks to the common law principles of agency in determining who is an agent under the Act and those principles must be broadly construed when applied to labor relations. *Longshoremen ILA (Coastal Stevedoring Co.),* 313 NLRB 412, 415 (1993). The doctrine of apparent authority results from a manifestation by the principal to a third party that creates a reasonable basis for the latter to believe that the principal had authorized the alleged agent to perform the acts in question. The test is whether, under all the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and/or acting and speaking for management. *Hausner Hard-Chrome of Kentucky*, 326 NLRB 426, 428 (1998).

The evidence establishes Noble and Wade both were agents of the Company within the meaning of Section 2(13) of the Act. Wade for example prepared incident disciplinary type reports for management by which employees would reasonably believe she was reflecting company policy and spoke for management. Noble's April 3 message to the bikini contest participants, in which she explained if they signed up for the contest and did not show up they would be terminated, would cause employees to reasonably believe her memorandum reflected Company policy, especially in light of the fact upper management knew of the message. Additionally, the fact Noble and Wade both conducted jumpstart meetings with employees, opened the restaurant, and had keys to the cash registers, made banking transactions for the Company, corrected and adjusted customers' bills and checked labor rates and cut the work force would reasonably cause employees to conclude they were performing their duties on behalf of management. I find the evidence establishes Noble and Wade were, at applicable times, agents of the Company.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Suspension and Discharge of Alexis Hanson

1. The Government's evidence

The thrust of this case centers around the discharge of Charging Party Hanson. Hanson's discharge centers around the Company's annual bikini contest held at the Ontario Hooters location on April 22. Hanson was a participant in the contest. Hanson worked as one of approximately 40 "Hooter Girls" at the Ontario, California Hooters location. Her entire employment from April 2011, until her suspension on April 23, and discharge on April 26, was at that location. Hanson worked 5 days per week totaling 30 hours at $8.25 per hour plus tips. As a Hooter Girl, Hanson greeted customers, waited tables, and handled cash and credit payments by customers. In addition to her Hooter Girl duties she also served as a certified trainer, training new hires, and assisted in opening new Hooters locations.

Ontario General Manager Gerardo Vidauri, among others, conducted mandatory bartender meeting's and held such a meeting in April.

Bartender Panitch attended the April meeting and thereafter spoke with "Hooter Girls" and coworkers Hanson and Rochelle about what she considered inappropriate or disparaging remarks, about the two coworkers among others. Hanson told Panitch she should immediately telephone Regional Director Peterson and tell him everything that had happened that it was unprofessional. Panitch spoke with Hooter Girl Rochelle on the telephone. Rochelle "was very upset" and was going to speak with Regional Manager Peterson also and reported back to Panitch as soon as she had spoken to Peterson.

Hanson, who did not attend the meeting, but received a text message, with complaints, about the meeting, from bartender Chanelle Panitch, whom she met for lunch later that day. Panitch told Hanson everything that occurred at the bartenders meeting that day. Marketing coordinator and key employee, Noble, and key employee Wade were at the meeting at which General Manager Vidauri and Bar Manager Chris Ramirez talked about the Ontario Hooter Girls. Panitch testified the managers specifically spoke about five Hooter Girls; namely, Alexis Hanson, Jaime West, Jean Delroja, Kelli Rochelle, and Candyce Miller. Panitch told Hanson the first full hour of the meeting was spent talking about the Hooter Girls being fat along with other derogatory comments. Hanson testified Panitch explained that Gerardo, Ramirez, and Noble called one of the Hooter Girls, Lena Delroja, "stupid" and a "dumb blond," and, that bartender and Hooter Girl Kelli Rochelle's singing career was not going anywhere. Rochelle was not present at the meeting. Hanson testified Panitch told her General Manager Gerardo said Hooter Girl Angela was fat and looked that way in her uniform. Panitch told Hanson that Bar Manager Ramirez said Hooter Girl Candyce Miller, "scrunched her hair like a Mexican and had tattoos that they didn't like." Panitch explained to Hanson, she thought it was not a professional work environment and felt if they were saying these things about other employees, what were they saying about her when she was not present. Panitch told Hanson this upset and made her uncomfortable and unhappy. Panitch told Hanson her name was brought up at the bartenders meeting. Panitch said they were talking about promoting someone to bartender and Hanson's name was mentioned as a good candidate. Panitch told Hanson. General Manager Vidauri responded that Hanson just demanded and expected to be promoted and "if [she] didn't have an attitude problem then he would." Hanson told Panitch it wasn't right that her name was brought up without her being present and she wanted a direct meeting with Vidauri so if she had an attitude problem he could address it with her and not in front of all the other bartenders. Hanson testified it made her unhappy and she wanted to confront General Manager Vidauri in person, but Panitch thought it would make it uncomfortable for her (Panitch) because she was the one that had told Hanson what had taken place at the April bartenders meeting. Panitch asked Hanson not to do it.

Hanson testified she thereafter spoke with Hooter Girls Kelli Rochelle, Lena Delroja, and Panitch about what was said concerning specific Hooter Girls at the early April bartenders meeting. Hanson and Delroja complained about their names being brought up and Delroja said she would call Vice President of Human Relations Herrmann.

Hanson testified that about a couple of days after the April bartenders meeting, but still in early April, she and Rochelle met with General Manager Vidauri at the end of the bar in the restaurant. At the meeting Vidauri talked about Hooter Girl Angie saying; "Angie eats too many key lime pies after her shift and she needs to go to the gym, rather than laying around with her boyfriend. And that she's starting to look really bad in her uniform." Hanson testified; "me and Kelli did not respond to Gerardo [Vidauri]. We kind-of just gave him a look that indicated that we were tired of hearing them talk about our coworkers and turned our back towards him and walked away from the conversation."

Panitch testified she sent a text message to Regional Manager Peterson about the bartenders meeting and he immediately telephoned her. Panitch told Peterson all about the bartender meeting. She said he responded kind-of-like he had heard the story and said he would speak with General Manager Vidauri and Bar Manager Ramirez about it. Hanson testified Regional Director Peterson, sometime later, telephoned the restaurant and she happened to answer the phone and she discussed the bartenders meeting with him. Hanson told Peterson it was unprofessional and she had no one in management she could look up to or take her complaints to. Peterson told Hanson she could call him anytime and said he had received several complaints about the bartenders meeting.

At about this same time in early April flyers were placed in the employee breakroom announcing that the Hooters of Ontario bikini contest would be held on April 22. The annual bikini contest is one of 3 or 4 events drawing large numbers of customers to, and providing publicity for, various Hooter restaurants and the participants.

Panitch testified she had participated in approximately 10 bikini competitions before the April 22 Ontario contest. Panitch participated in early April in the West Covina and Costa Mesa, California contests as did Marketing Coordinator Noble. Panitch testified Noble's best friend, Krystle Lina, served as a judge at both contests. Noble finished in the top three at both contests. Panitch knew Lina was Noble's best friend from Nobles social media pages. Panitch testified that when in the second contest, the Costa Mesa one, Noble received second place, she (Panitch) telephoned Charging Party Hanson and said, "I told her that Pamela Nobles had got second place and that her best friend was a judge again." Panitch also spoke the next day with Hanson about Noble winning and Lina being one of the judges. Hanson suggested Panitch tell Regional Director Peterson. Panitch thought that was a good idea but told Hanson she felt uncomfortable doing so because she had already spoken to Peterson about the bartenders meeting and she "didn't want it to seem like [she] was complaining all the time."

The bikini contest is divided into two events. First there is a costume portion then a bikini portion. Cash prizes are awarded with $300 given for first place, $200 for second place, and $100 for third place. First and second place winners advance to regional and possibly the national contest where larger prizes are awarded and selections are made for the annual Hooter Girls calendar. Those pictured in the calendars are given a percentage of the profit from the calendar sales aside from the cash awards and other prizes and contestants gain exposure for possible careers in modeling and movies.

The flyer announcing the bikini contest at the Ontario location was provided by Marketing Coordinator Noble. Hanson testified Noble not only set the date for the contest but announced the theme for the costume portion and provided a sign-up sheet for those wishing to enter the contest. Hanson testified there was no mention, in the flyer, that after signing up to participate it was mandatory for those signing to do so. On prior occasions, employees were allowed to withdraw after signing up and could do so without penalty. Hanson had, in the past, withdrawn from the contest without penalty.

Hanson signed up for the contest at the time Noble first posted the contest details. Hanson testified Marketing Coordinator Noble told her in early April, "that she [Noble] would not be participating in the contest, because she was putting on the contest. And if she did so, she was worried that other employees and contestants would think that she was cheating."

After Hanson signed up for the contest she and other Hooter Girls received a "hot message" via their cell phones from Noble on Wednesday, April 3 which reads as follows:

> Hey Ladies, If you are not signed up for the contest you WILL be working that night. But to clarify if you have your name on the list and you plan on backing out cross your name off the list by Friday. If you are signed up for the contest and do not show up it will be a no call no show by our regional and GM and you WILL BE TERMINATED. Also you MUST be here by 8:30 p.m. if you are late you will not be allowed to enter the contest and you will work the floor that night like it was a scheduled shift. Any questions or if I'm not clear let me know.

Marketing Coordinator Noble did in fact participate in the bikini contest. Hanson testified that by the time she learned Noble would be participating in the contest it was too late to withdraw without being terminated. Hanson was upset and concerned the contest might be rigged. Hanson explained; "We had known that she was already participating in other contests, so it just made us not want to do it. Because we had known that [s]he put the whole event together."

Hanson's concerns grew the contest might be rigged when she saw certain pictures posted around April 15, by Noble on the social media site Instagram—an account where those who join can post and view pictures and related comments. Hanson and Noble followed each other on Instagram. Hanson saw pictures of Noble, one of which included Krystle Lina, identified by Noble in the comment section, as her best friend for life. The picture of Noble and Lina showed Noble winning second place at the Costa Mesa Hooters restaurant. Noble had also introduced Hanson to Linda as her best friend. According to Hanson, Lina served as a judge at other contest locations. Hanson knew at the time she saw the Instagram picture, Lina would be one of the judges at Ontario contest.

Hanson testified that before the April 22 bikini contest she and several employees discussed, Marketing Coordinator Noble having her friend serve as one of the judges at other contests at which Noble had won. Hanson spoke about this with Lena Delroja, Kelli Rochelle, Chanelle Panitch, and Jessy Wiles. Hanson testified Wiles started the conversation by saying she did not want to participate, "that it was going to be rigged, that we had to participate in something that we were not being paid for. We had to go purchase things for basically a rigged competition." Hanson agreed with Wiles. Hanson explained; "We all agree[d] that we were unhappy about participating in this unpaid competition." Hanson testified that although she, Panitch, and Delroja were unhappy having to compete, they were afraid they would be terminated if they did not and they did not like having to spend money to get ready for something they were not being paid for.

Hanson testified that at a jumpstart meeting before the bikini contest at Ontario, General Manager Vidauri reminded them "about our mandatory appearance in the competition." Hanson expressed her unhappiness about participating in the contest and asked Vidauri; "how can they force me to participate in something that I wasn't paid for, when [she] had to go and spend [her] own money on stuff for the competition and gas to drive down to the competition." General Manager Vidauri explained he did not make the mandatory decision that it came from corporate. Hanson also told Vidauri she was concerned the contest was rigged, "just like all the other one's were with Pamela [Noble] and her friend judging the contest." Vidauri "brushed" it off as corporate's decision.

Hanson testified that in the morning hours 1 or 2 days before the April 22 bikini contest she answered the telephone at the restaurant and it was Regional Director Peterson calling. According to Hanson this was the same telephone call from Peterson in which she had told Peterson about the several complaints she had received concerning the April bartenders meeting which she thought the meeting was unprofessional. Peterson asked Hanson if she was going to participate in the bikini contest. Hanson said she was but she was not looking forward to doing so. Peterson asked why. Hanson answered, "because we were forced to do it, we are not being paid and that it was rigged." Regional Director Peterson told Hanson he was looking into the competition being rigged, and added, "I will handle this for you, Alexis."

Panitch testified she spoke to Regional Director Peterson about the relationship between Nobles and Krystle Lina. Panitch explained she had Peterson's telephone number from when she previously called him about the bartenders meeting. Panitch told Peterson she did not think it was fair that Marketing Coordinator Noble had her best friend judge these competitions. Peterson told Panitch if she could prove they were friends or best friends he would not allow Lina to be a judge in the Ontario bikini competition. Panitch told Peterson she could prove it by providing him with a screenshot from her cell phone of an Instagram photograph depicting Lina and Noble together with the caption best friends for life.

Hanson testified Marketing Coordinator Noble sent a "hot schedules message" notifying all contestants they were to be at the restaurant April 22 at 8:30 p.m. although the contest did not start until 10 p.m. Hanson arrived at around 8 p.m., signed in and proceeded through the restaurant to a tent set up behind the restaurant for the contestants to change clothing.

Hanson and the other participants dressed in costume for the first portion of the contest. Hanson noticed Marketing Coordinator Noble's best friend, Krystle Lina, as well as Noble's boyfriend, were contest judges. Hanson did not recognize any of the other judges. Panitch observed Lina as a judge and that she "was whispering to the other judges." Hanson and the others later participated in the second, or bikini, portion of the contest. Panitch testified that between the costume and bikini portions of the contest she spoke with Regional Director Peterson about Lina being one of the judges. Panitch explained, "I asked him if he knew that Krystle Lina was still going to be a judge at our contest, and he said no." Panitch said Hanson was also present and asked Peterson if he knew who was going to win. Peterson shook his head and laughed. Hanson testified that when she and Panitch saw the two were still judges at the bikini portion of the contest Panitch told Regional Direction Peterson she was unhappy, "that he had said it would be dealt with and that it wasn't and then we were still forced to participate in a rigged competition." Hanson testified Peterson replied, "I know Chanelle. Know. It's okay," and put his arms around her to comfort her.

The contest ended around midnight. The winners were announced with Marketing Coordinator Noble winning first place and awarded $300 prize money. The three top finishers had their pictures taken near the changing tent. Hanson testified she, Panitch, and Kelli Rochelle congratulated the second and third place winners. Noble was present also. Hanson testified she told Noble "Congratulations, Pam, on cheating." Noble asked "What?" Hanson did not respond. Hanson testified she did not use any curse words at Noble nor did she threaten Noble in any manner. Panitch testified Hanson did not raise her voice nor use any curse words that night.

Panitch testified she was upset at the end of the contest, "not at the fact that I didn't win but at the fact that we were force[d] to do this contest that was obviously rigged." When Panitch saw Marketing Coordinator Noble in the photograph area wearing the first place sash she told Noble; "Thanks for Cheating." Panitch could not exactly remember what else she said but it was something to the effect, "you're a fucking bitch." Noble told Panitch she could leave. Hanson testified Marketing Coordinator Noble and Panitch started "yelling at each other" in back of the restaurant but not around customers. Hanson testified Noble and Panitch cursed at each other, explaining, "it was a heated exchange between both girls and there were curse words exchanged." Hanson said she and Kelli Rochelle told Panitch, "this is not the time or the place for this" and took Panitch inside the restaurant. Panitch acknowledged they may have told her to stop acting like she was, and acknowledged she went into the restaurant with Hanson. Hanson proceeded to speak with her (Hanson's) boyfriend.

Hanson testified key employee Wade approached and told Hanson she needed to leave and "if [she] didn't leave right now that she would terminate me." Hanson told Wade she had not done anything, that the conversation with Market Coordinator Noble that took place outside, was over and that she and Ro-

chelle were on their way out. Hanson also told Wade she had no right to threaten to take away her job that she had not done anything.

Hanson observed key employee Wade then approach Panitch and that a caddy—a container on each table holding paper towels, ketchup, salt and pepper—flew off the table onto the floor. Hanson thought Panitch pushed it off the table. Panitch testified Wade approached saying; "Sweetie, I know you're upset that you lost, but it's not worth your job." Hanson said she moved away from that confrontation because she did not wish anyone to think she had anything to do with it. Hanson next noticed that key employee Wade had her arms around Panitch who was telling Wade to let go of her. Panitch testified that as she was trying to leave the restaurant key employee Wade "bear hugged" her and she told Wade to, "Get the fuck off me." Panitch may also have said "I know she is your fucking friend but this isn't right." Panitch testified Hanson was speaking with her (Hanson's) boyfriend at the time then left the restaurant. Panitch denied pushing a chair against Wade.

Hanson and Rochelle left along the side of the restaurant and observed Regional Director Peterson, General Manager Vidauri, Marketing Coordinator Noble, and Noble's boyfriend. Peterson approached Hanson and asked that she not say anything to Noble. Hanson told Peterson, "Scott, I wouldn't say anything to Pamela. I haven't said anything to Pamela. Everything that has gone on tonight was Chanelle, and I apologize for that." Peterson thanked Hanson, and she and Rochelle left. Hanson testified that as she and Rochelle were in her car to leave Peterson approached and they discussed what had happened. Peterson told Hanson, "Thank you for not reacting the way that Chanelle did." Hanson told Peterson she would never do that. Peterson again thanked Hanson. Hanson told Peterson the whole thing could have been avoided. Peterson acknowledged; "I know. It's probably my fault." Hanson and Rochelle drove away.

Hanson specifically stated she was not escorted off Hooters' property by security after the bikini contest and never saw security interact with Panitch. Hanson said that as she left Hooters' parking lot she saw Noble 10 to 15 feet away but they never spoke.

Panitch testified she walked, unescorted, from the restaurant, and, as she walked toward her car she observed Marketing Coordinator Noble near Noble's car, which she had to pass getting to her car. Panitch yelled to Noble that she did not deserve to win; she was a cheater; and, "I called her a cunt" and "was basically yelling out profanities to her." Panitch was about 10 feet from Noble and Regional Director Peterson, Bar Manager Ramirez, and Former Manager Jackie. Panitch told Bar Manager Ramirez; "I know that's your friend, but what she did wasn't right." Panitch testified; "Jackie and Kelli Rochelle were just basically telling me to calm down and not to say anything." Panitch testified Hanson was not in the area at that time nor when Panitch drove away. Panitch testified she was not escorted to her car nor did she see or know if police came to the restaurant that evening. Panitch said she did, about 5 minutes after she left, receive a telephone call from Hanson checking on her. Panitch guessed Peterson was near Hanson when Hanson placed the call because she could hear Peterson in the background asking if Panitch wanted to be followed home.

Hanson was scheduled to work the next day, April 23, however, General Manager Vidauri telephoned telling her not to bother coming to work. She was suspended for what had happened the night before. Hanson asked Vidauri; "okay, well, what happened? I didn't do anything. I had nothing to do with that." Hanson testified Vidauri again stated they were investigating it and would get back with her in 2 or 3 days. Hanson asked if her job was at risk. Vidauri said it was.

Hanson received a telephone call, on or about April 26, from Vice President of Human Resources Herrmann who told Hanson, "I just want to let you know you are being discharged." Hanson asked for what. Herrmann replied, "For cursing at Pamela Noble the night of the bikini contest." Hanson told Herrmann she never cursed Noble that night. Herrmann acted surprised and stated, "Oh, you didn't?" Hanson testified Herrmann then replied, "Okay. Well, then you are being terminated for your negative social media posts." Herrmann asked if Hanson had anything to say. Hanson said she had been a good employee for Hooters and didn't understand why she was being discharged for something like this without even hearing her side of the story. Hanson reminded Herrmann she had worked for Hooters for 2 years and didn't deserve to be fired. Herrmann told Hanson, "I know, Alexis. You were always a good employee" and you are "eligible for rehire" later on.

On April 26, Vice President of Human Resources Herrmann notified Hanson in writing of her termination. The notification reads, in part, as follows:

> On April 22, 2013 after the Ontario Swim Suit Competition you got into a verbal altercation with other employees, as well as posting disparaging comments about coworkers and managers on Social Media. This behavior violated the following provisions of the "Discipline" section of the Hooters employee handbook (page 36):
>
> - Acts of violence, threats of violence, dishonesty toward guest or fellow employees of Hooters.
> - Insubordination to a manager or lack of respect and cooperation with fellow employees or guest.
> - Any off-duty conduct which negatively affects, or would tend to negatively affect, the employee's ability to perform his or her job, the Company's reputation, or the smooth operation, goodwill or profitability of the Company's business.
> - Any other action or activity which Hooters reasonably believes represents a threat to the smooth operation, goodwill, or profitability of the business.
>
> At this time we are releasing you from employment. Your final check is enclosed and includes all monies due you at this time for termination.
>
> _____ _____
> Alexis Hansen Date
>
> /s/Amber Herrmann 4/26/13

_____ _____
Amber Herrmann Date

Panitch was notified on April 23, she was suspended and approximately 5 or so days later received a telephone call from Vice President of Human Resources Herrmann. Herrmann told Panitch she was going to fire her, but she would hear her side of the story. Panitch, "told her everything from the bar meeting to the bikini contest." Panitch filed a charge with the Board regarding her discharge. The Board dismissed her charge. Panitch did not appeal the Board's dismissal.

2. The Company's evidence

General Manager Vidauri conducted a meeting in April with bartenders at the Ontario restaurant where he made comments about certain Hooter Girls not at the meeting. Thereafter Regional Director Peterson informed Vidauri there had been complaints about Vidauri's comments and he and Vice President of Human Resources Herrmann were conducting an investigation. Vidauri testified Peterson told him the complaints came from Hooter Girls and concerned bad things Vidauri had said about them. After the investigation, Vidauri was given a written disciplinary action, and, Vice President of Human Resources Herrmann told him his conduct could not be tolerated and if it reoccurred he could be further disciplined or terminated. On direct-examination Vidauri testified, neither Panitch or Hanson ever spoke with him about the comments he made at the bartenders meeting; however, on cross-examination he said he could not recall if he, on the day of the bartender's meeting, talked with Hanson about the meeting.

Regional Director Peterson received a telephone complaint from Hooters Girl Kelli Rochelle telling him she had been called a "diva" at the bartenders meeting at which General Manager Vidauri and Bar Manager Ramirez were present. Peterson told Rochelle he would take care of it and informed Vice President of Human Resources Herrmann. Peterson obtained documents regarding proper behavior for managers and how they would communicate with employees. Peterson visited the Ontario restaurant and gave both General Manager Vidauri and Bar Manager Ramirez verbal and written discipline. According to Peterson no other employees raised concerns with him about the bartenders meeting.

Although Peterson learned of comments made at the bartenders meeting from others he did not recall a telephone conversation with Hanson taking place anytime in which Hanson said the conduct at the bartender meeting was unprofessional.

Marketing Coordinator Noble performed "every last detail" setting up the bikini contest of April 22, at the Ontario store. Noble explained it included decorating the restaurant, finding a DJ, a photographer and obtaining celebrity and table judges. Noble worked as marketing coordinator the night of the contest; but, not as a key employee. Noble observed Hanson and Panitch that night but not much until after the first round of the contest because she was inside the restaurant ensuring everything for the contest was getting done. Noble testified that between the costume and bikini portions of the contest she heard Hanson and Panitch say it was unfair that Noble was cheating.

Marketing Coordinator Noble placed first overall in the contest and proceeded to the back lot for pictures with the second and third place winners. Noble testified Panitch and Hanson approached saying "Did it feel good to place first when you cheated? Noble told them, "I don't know why either of you guys are acting like this when I've been there for both of you." Noble said, "And that's when the ruckus kind of started." Noble testified Panitch and Hanson, "started coming after me saying I haven't been there for either of them and I'm a bitch . . . among other obscenities." Noble was upset and intimidated. She said other contestants were in the area as well as the photographer. Noble denied using any obscenities toward Panitch or Hanson. Noble testified Regional Director Peterson and Corporate Representative Rachel Maas said to Hanson and Panitch, "they needed to stop, and it was stopping." Peterson and Maas directed Hanson and Panitch away from the photograph area, and Hanson and Panitch went into the restaurant. Noble never heard Hanson try to clamp Panitch down. Noble said she had no further interaction with Hanson and Panitch until later in the restaurant parking lot near her car when "Chanelle [Panitch] and Alexis [Hanson] both came out of the building yelling more obscenities at me when security got in their way and basically pulled them away." Noble said when Panitch and Hanson started their obscenities they were "at least a hundred feet away." Noble testified she did not respond but stated Hanson called her a "bitch" and "cunt" and that she "cheated." Noble said she was intimidated and frightened and that employee Karen took her back to the restaurant and she never saw Panitch and Hanson again that evening. Noble said a police officer later came in the restaurant and asked if she was okay and she told him, "Fine, I guess."

Alicia Strohman (Alicia Wade)[3] worked as a "key employee" the night of the bikini contest. Wade's first interaction that evening with Charging Party Hanson concerned an issue, which was resolved, that related to where Hanson's boyfriend would be seated. Wade thereafter observed Panitch and Hanson, near the wait station, during the intermission between the first and second round of the contest. Wade testified Panitch said, "This shit is rigged and it's fucking bullshit" and that Panitch and Hanson went into the restroom. As they left the restroom Panitch pushed a dish rack onto the floor.

Wade distributed "goodie [gift] bags" after the bikini contest in the photo area where she observed Panitch, Rochelle, and Hanson, off to the side, talking. Wade heard Hanson ask Marketing Coordinator Noble, "Pam, do you feel good that you cheated? Do you feel good that you won first place because you cheated?" Wade testified Panitch started yelling at Noble, calling her a "bitch" and invading her personal space. Wade left to find General Manager Vidauri. When Wade returned she said Regional Director Peterson was putting his arms out to create space between Panitch, Hanson, and Noble saying this had to stop. Wade testified Panitch told her "Fuck this shit. No, I don't want a goodie bag" but Hanson took one. Panitch

[3] During the events here Ms. Strohman was known as Ms. Wade. I have, for ease of understanding, referred to her here as Ms. Wade.

and Hanson then went into the restaurant. Wade continued to hand out "goodie bags" but Regional Director Peterson asked her to go inside the restaurant "and speak to the girls and ask them to remain calm."

Wade first spoke with Hanson saying Regional Director Peterson had asked her to tell them to calm down. According to Wade, Hanson asked why she was not talking to Panitch. Wade said she would speak with Panitch and told Hanson it wasn't worth losing her job over. Wade testified Hanson told her, "they can't touch her, they can't fire her, that she didn't do anything wrong." Wade said restaurant guests, including Hanson's boyfriend, were in the area.

Wade testified that Panitch "came over and started yelling in my ear, saying . . . I know that she's your fucking friend, but fuck that bitch. It was rigged. This is fucking bullshit." Wade asked Panitch to calm down. Panitch slid a chair toward Wade. Wade testified she then went toward Panitch to usher her out of the building. Wade said Panitch pushed her back and she (Wade) "grabbed her, like wrapped my arms around her and started pushing her toward the exit of the building." Wade said Panitch left the restaurant with Hanson behind her. Wade reported the events to Regional Director Peterson and General Manager Vidauri. Wade told them she would not be comfortable working with Panitch and Hanson. General Manager Vidauri escorted Wade to her car and she left. Wade never heard Hanson use curse words that evening nor, curse at Noble, and, she never reported such to management. Wade did tell management Panitch yelled expletives at Noble.

The April 22 bikini contest at the Ontario location was the first such contest General Manager Vidauri ever worked. He testified that prior to the bikini contest neither Panitch nor Hanson spoke with him about the contest being rigged or fixed, but that about 60 percent of the staff did complain or mention their concerns to him. Vidauri determined the complaints lacked validity. Vidauri testified neither Panitch nor Hanson talked to him, on the day of the contest, about it being rigged.

Vidauri testified he told the Hooter Girls at a jumpstart meeting there would not be any cheating at his store and he did not want to hear anymore about it. Vidauri, however, said he repeated this at jumpstarts every day for 2 weeks and he was sure Hanson was present for at least one such meeting. Vidauri said complaints persisted. Vidauri said he selected the celebrity judges.

General Manger Vidauri testified neither Hanson nor Panitch talked with him on the day of the contest about not participating in the contest.

After the bikini contest ended, General Manager Vidauri retrieved "goodie bags" from Marketing Coordinator Noble's car for distribution. When he approached the area of the changing tent he noticed Panitch and Hanson waving their hands and talking to Noble. Vidauri testified he heard Panitch call Noble "a fucking bitch" but did not hear what Hanson may have said because, "he was too far away to hear that." Vidauri, however, never at any time the entire evening of the bikini contest, heard Hanson use any curse words. Vidauri heard Regional Director Peterson tell Panitch and Hanson to calm down. According to Vidauri, Panitch was saying, "this fucking bullshit . . . she cheated" and words of that nature. Vidauri said Peterson, Panitch, and Hanson walked rapidly to the back entrance to the restaurant. Peterson told key employee Wade to go inside the restaurant and talk to Panitch and Hanson about cooling off.

Vidauri thereafter was called into the restaurant and from about 20 feet away he heard Panitch screaming and yelling as she was being escorted by security out of the front door. He testified Panitch was "saying the same thing," "she cheated," "she's a fucking, I don't know . . . that kind of stuff." Vidauri testified Hanson was about 3 feet behind Panitch not saying or doing anything. General Manager Vidauri said he, at one point, got next to Panitch and Hanson and told them they needed to stop. Panitch told Vidauri, "she's a fucking bitch, she cheated." Vidauri told Panitch if she did not stop he was going to call the police. Vidauri testified when he went to Hanson she asked him how he felt about letting someone win that cheated. Vidauri told her she needed to leave. Vidauri testified Hanson said, "I didn't do nothing wrong, and there's nothing you can do about it." Vidauri again stated if they did not leave he would call the police.

Vidauri thereafter did call the police. Vidauri also checked on Noble who he described as upset and crying. Vidauri told Noble to calm down that everything would be okay. Vidauri then escorted key employee Wade to her car. Wade asked why this all happened and stated she wanted to go home, and, did not wish to return to work the next day if "these girls" are going to be there.

General Manager Vidauri and Regional Director Peterson decided to inform Vice President of Human Resource Herrmann about the contest and did so at around 12:30 a.m. that evening. Vidauri said he contacted Herrmann because, "It was bigger than in my genre with what was going to happen with the whole situation" and "the police" had arrived. Vidauri briefly explained to Herrmann what had happened. Herrmann instructed Vidauri to ensure everyone got home safely and they would talk about the situation the next day. Vidauri then spoke with a responding police officer telling him, "everything was good, everybody left, he said okay."

The next day, April 23, Vice President of Human Resources Herrmann asked General Manager Vidauri to prepare a statement of what happened and make sure statements were taken from all managers and employees regarding the situation. Vidauri asked Herrmann, "What we were going to do with the situation?" Herrmann wanted to determine what happened. Vidauri told her he did not feel safe having Panitch and Hanson working at the restaurant. Statements were taken and forwarded to Herrmann. Herrmann thereafter notified General Manager Vidauri she had decided to fire both Panitch and Hanson.

Regional Director Peterson testified he was present at the Ontario restaurant for the bikini contest to make sure things ran smoothly. Peterson could not recall any employee talking with him about the swimsuit competition or judging prior to the actual day of the contest. Peterson explained right before the contest started Charging Party Hanson had a brief and "very polite" conversation with him concerning the judges for the contest. Peterson testified that Hanson told him Marketing Coordinator Noble had a friend as a judge which she thought was unfair. Peterson said Panitch also expressed her concerns in a cordial and calm manner as well. Peterson told Panitch and

Hanson he would review the judging to see if he felt it was somehow inappropriate. Peterson testified the contest went well and nothing occurred that raised concerns for him as regional director. Immediately after the competition and the winners had been announced, Peterson followed the winners to the photo shoot area to keep customers from getting into the area. At that time Peterson heard behind him "some screaming" and "you fucking cunt, you fucking bitch, you fucking cheat." Peterson saw Panitch within inches of Marketing Coordinator Noble's face verbally bashing her. Peterson attempted to come between the two. Peterson did not know where Hanson was nor did he hear her say anything. Peterson specifically testified he did not hear Hanson curse at Noble nor did he witness any misconduct by Hanson at anytime the entire night of the bikini contest. Peterson asked Panitch to leave the area and she went into the restaurant. Peterson asked key employee Wade to go inside and see if everything was okay.

Peterson testified that a couple of minutes later he heard "yelling and screaming" and observed Panitch heading toward the changing tent behind the restaurant. Peterson approached Panitch and told her she had to get her car and leave. Peterson said Hanson "came over" to where he and Panitch were. Peterson could not recall Hanson saying anything, but Panitch was still calling Noble a "fucking cheat," "fucking cunt," and asking how it felt to win "by fucking cheating." Peterson said Hanson "was calm in talking to me." Peterson said he walked Panitch and Hanson to a car and they left the area. Peterson then went inside the restaurant to find out what happened. General Manager Vidauri told Peterson that Panitch threw a chair at key employee Wade. Wade said she wasn't going to put up with this and was going to quit. Peterson testified General Manager Vidauri told him Hanson was "instigating the situation getting everything worked up" and Panitch was just acting out what Hanson was saying.

Michael Gill, currently assistant manager at Hooters Restaurant in Costa Mesa, California, was on April 22, the owner of a two-person security company providing security for the Ontario bikini contest. Gill said he and his security helper, Robert Hatcher, kept the peace ensuring no customers approached the stage or messed with the Hooter Girls competing in the contest. More specifically Gill guided the contestants to and from the changing tent that was behind the restaurant. Gill also assisted each contestant on to, and off from, the stage or from "where they walk the catwalk." No security concerns were reported to Gill during the competition. Gill thereafter stationed himself outback where the photographer was and near the changing tent. Gill saw two females come into that area and heard the two say; "fuck you, bitch, you fucked the judges, I thought we were friends. . . ." Gill said both were talking but he did not know who said exactly what. Gill stated Regional Director Peterson started talking to the two and escorted them to the middle of the parking lot. Gill later asked Peterson who the two were for his report. Gill also talked with General Manager Vidauri about what had happened. Gill could not say which of the two, that he later learned were Panitch and Hanson, used the curse words he heard. Specifically, Gill could not say Hanson spoke any of the curse words.

Vice President of Human Resources Herrmann learned of the April 22 bikini contest incident in a text message from General Manager Vidauri on April 23. Herrmann telephoned Vidauri who instructed her Marketing Coordinator Noble had won the bikini contest and that Hooter Girls Panitch and Hanson had gotten into a verbal altercation with Noble and local police had been called and the two Hooter Girls had been escorted out of the building. Herrmann instructed General Manager Vidauri to suspend Panitch and Hanson and conduct an investigation.

Herrmann telephoned Regional Director Peterson who told her "the contest had been a mess." Herrmann told Peterson she had already instructed General Manager Vidauri to suspend the two Hooter Girls pending an investigation of the incident.

Herrmann went to the Ontario location on April 24, and spoke with Marketing Coordinator Noble whom she observed to still be upset. Noble told Herrmann both Panitch and Hanson accused her of cheating in winning the swimsuit contest and she did not want to work again with either of them. Herrmann testified General Manager Vidauri also told her he did not feel he could continue to work with Panitch and Hanson. Herrmann reviewed all statements gathered in the investigation and determined to discharge Panitch. Herrmann telephoned Panitch informing her she was terminated. Herrmann asked Panitch why she acted the way she did. Panitch told her they all felt Noble had rigged the contest with her best friend as a judge. Herrmann said Panitch identified "all" as she and Hanson. Herrmann told Panitch "you and Alexis [Hanson] went and verbally attacked Pamela [Noble]." According to Herrmann, Panitch replied, "Well, of course we did. We were pissed off and somebody needed to do it."

Herrmann then telephoned Hanson whom, she was 80 percent sure, she would terminate. Hanson told Herrmann the contest was rigged, unfair, and she hadn't wanted to participate. Herrmann told Hanson there was a right way and a wrong way for them to have responded and told Hanson they had cursed Noble. Hanson denied cursing. Herrmann told Hanson she had "multiple witness statements that said [she] did curse." Herrmann testified Hanson replied; 'Well, I may have, but I'm not the one that got physical. Chanelle was the one that got physical." Herrmann told Hanson she was discharged.

Herrmann testified, on direct examination, she based Hanson's termination on Hanson's cursing, that two of her coworkers and her manager did not feel comfortable continuing to work with her, and, on social tweets she had posted. On cross-examination, Herrmann acknowledged she had said elsewhere, under oath, she did not rely on Hanson's social tweets in firing her. Herrmann was uncertain exactly what curse words Hanson had used but she believed Hanson had used the words "fuck" and "bitch." On cross-examination Herrmann said neither Marketing Coordinator Noble nor key employee Wade specifically told her Hanson used the word "fuck" but did say she used the word "bitch." Herrmann concluded the curse words Hanson used, whatever those words were, was enough, standing alone, to discharge Hanson and she did so. Herrmann specifically acknowledged on cross-examination, the only reason she decided to terminate Hanson was "her cursing at a coworker . . . in front of guest."

B. Legal Principles, Credibility Determinations, Analysis, Discussion and Conclusions

1. Legal principles

It is helpful to review certain guidance of the Board and courts regarding concerted activity to include, under what circumstances, it will or will not be protected under the Act. Section 7 of the Act guarantees employees the right to engage in concerted activity for the purpose of collective bargaining or other mutual aid or protection. Section 8(a)(1) of the Act makes it an unfair labor practice "for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7." For an employee's activity to be "concerted" the employee must be engaged with or on the authority of other employees and not solely on behalf of the employee him/herself. *Meyers Industries (Myers I),* 268 NLRB 493 (1984), and *Meyers Industries (Meyers II),* 281 NLRB 882 (1986). The statute requires the activities under consideration be "concerted" before they can be "protected." *Bethany Medical Center*, 328 NLRB 1094, 1101 (1999). As the Board observed in *Meyers I "*Indeed, Section 7 does not use the term 'protected concerted activities' but only concerted activity." It goes, without saying, the Act does not protect all concerted activity. In *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), enfd. sub. nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), the Board made it clear that under the proper circumstances a single employee could engage in concerted activity within the meaning of Section 7 of the Act. The question of whether an employee has engaged in concerted activity is a factual one based on the totality of the record evidence. See, e.g., *EWinc v. NLRB*, 861 F.2d 353 (2d Cir.1988). The Board has found an individual employee's activities to be concerted when they grew out of prior group activity. *Every Women's Place*, 282 NLRB 413 (1986). An employee's activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.,* 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo,* 284 NLRB 1115 (1987), enfd. 853 F.2d 996 (1st Cir. 1988). It is clear the Act protects discussions between two or more employees concerning terms and conditions of employment. In a group meeting context, a concerted objective may be inferred from the circumstances. *Whittaker Corp.,* 289 NLRB 933, 934 (1988), citing *Jeannette Corp. v. NLRB,* 532 F.2d 916, 919 (3d Cir. 1976). The Board has long held, however, that for conversations between employees to be found protected concerted activity, they must look toward group activity and mere griping is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d Cir. 1964). Once the activity is found to be protected concerted activity an 8(a)(1) violation will be found if, in addition, the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act and the adverse employment action at issue (e.g., discharge) was motivated by the employee's protected concerted activity.

If an employee is discharged for alleged misconduct in the course of engaging in protected activity the applicable standard for determining whether the discharge was unlawful is that set forth in *NLRB v. Burnup & Sims*, 379 U.S. 21 (1964). The Court explained:

> [Section] 8(a)(1) [of the Act] is violated if it shown that the discharged employee was at the time engaged in protected activity, that the employer knew it was such, that the basis of the discharge was an alleged act of misconduct in the course of that activity, and that the employee was not, in fact guilty of that misconduct.

The employer then has the burden of showing it held an honest belief that the discharged employee engaged in the misconduct. If the employer meets its burden, the burden shifts to the government to show the employee did not, in fact, engage in this asserted misconduct. If the government meets its burden that the employee did not engage in the asserted misconduct the discharge violates Section 8(a)(1) of the Act. See *Roadway Express, Inc.,* 355 NLRB 197, 204, 215 (2010), enfd. 427 Fed. Appx. 838 (11th Cir. 2011).

2. Credibility resolutions

It is necessary to review the testimony and make certain credibility resolutions. In deciding whether employees, Hanson in particular, engaged in concerted activity prior to the bikini contest as well as on the day of the contest (April 22); and, if so, was it protected conduct, requires credibility determinations.

In making my credibility resolutions I was impacted by impressions I formed while watching the witnesses as they testified. The impressions I gather were based on a combination of the witnesses' mannerisms, how they spoke, and their overall bearing on the witness stand. I applied my observations as one, among other factors, in deciding whether witnesses' testimonies impressed me as candid, fair, and believable. I note crediting certain testimony will automatically discredit testimony of other witnesses without having to so state. Although I have not commented on every bit of testimony, nor resolved every possible credibility conflit, I have considered all the testimony and made necessary credibility resolutions.

It is essential to address the credibility of Charging Party Hanson. Some observations: Hanson sat on the forward edge of the witness chair, spoke directly to the person questioning her and responded in a clear, articulate, and calm manner. She appeared moved by a strong and eager desire to testify and to do so truthfully. She never shied away or recoiled from answering any questions on direct or cross-examinations. Her testimony demonstrated she had observed, and was directly familiar with, and remembered in detail, the events of her testimony. Simply stated she knew what she was testifying about and expressed herself in a fair and candid manner. Hanson's

demeanor was superior.[4] I credit her testimony rather than certain opposing witnesses.[5]

I find it helpful, if not essential, to expound upon my assessment of Panitch's testimony. I note, Panitch had filed charges with the Board regarding her own termination, but, the Board's Regional office dismissed her case—which dismissal she did not appeal. The outcome of the case here will not impact her dismissed charge with the Board. Panitch had nothing personally, regarding her discharge, to gain or lose by her testimony. Panitch readily acknowledged her command of a range of profanities and exercised the opportunity to express such related to events surrounding her and Hanson's discharge. Panitch's demeanor, while testifying, convinced me she was there to tell the truth whether it cast her in a favorable light or not. I credit her testimony.

3. Discussion, analysis, and conclusions

It is alleged that about April 20, Charging Party Hanson concertedly complained to the Company regarding wages, hours, and working conditions of the Company's employees by complaining to Regional Director Peterson about the disparagement of certain of the Company's employees, and conditions surrounding an upcoming competition involving the employees.

It is undisputed that in April, General Manager Vidauri, along with Bar Manager Ramirez, and key employees Noble and Wade conducted a bartenders meeting at which Panitch, among others, was present. Panitch immediately text messaged Hanson her concerns about the meeting and they met for lunch later that day to discuss those concerns. Panitch and Hanson discussed the fact five "Hooter Girls" had derogatory comments made about them by management. Comments were made that one Hooter Girl was getting fat; another was "stupid" and "a dumb blond"; another's singing career was going nowhere; another "scrunched her hair like a Mexican"; and yet another had an attitude problem and still another was a diva. Hanson spoke with three coworkers, namely, Rochelle, Delroja, and Panitch, about the comments made at the bartender's meeting. Hanson and Delroja complained their names were brought up and they were not present. Delroja said she would telephone Vice President of Human Relations Herrmann about their complaints. Panitch telephoned Regional Director Peterson and told him all about the bartender meeting, which Peterson seemed to already know about. Regional Director Peterson testified he had heard from Hooter Girl Rochelle concerning the meeting and was told what she had been called at the bartenders meeting. Peterson promised to take care of the matter. Hanson also spoke with Regional Director Peterson about concerns of unprofessional conduct on the part of managers at the April bartenders meeting.

It is clear from above, Hanson, Panitch, and other Hooter Girls concertedly discussed what they considered unprofessional comments by managers at the bartenders meeting. Their concerns directly involved working conditions; namely, a respectful and professional working environment. It is clear management knew of Hanson's, Panitch's, and other Hooter Girls concerns related to the bartenders meeting. Hanson and Panitch both spoke with Regional Director Peterson about their concerns. General Manager Vidauri acknowledged Regional Manager Peterson told him there had been complaints from Hooter Girls regarding comments made at the meeting and specifically comments Vidauri had made about some of the Hooter Girls. Vidauri and Bar Manager Ramirez were disciplined for their comments.

After Panitch observed Marketing Coordinator Noble win, in April, at two other Hooter restaurant locations with her (Noble's) best friend Lina as a judge, Panitch raised concerns about that with Hanson. Panitch and Hanson concluded it was unfair to the contestants at Hooters of Ontario for Noble to have her best friend as a judge at contests and then win the contests. Hanson spoke not only with Panitch but with coworkers Delroja, Rochelle, and Jessy Wiles about unfairness and possible rigging of the contests. The coworkers were unhappy about the situation with Wiles complaining "it was going to be rigged" that they "had to participate in something that we were not being paid for" and had to "purchase things for basically a rigged competition." These Hooter Girls concluded they did not want to participate in the contest but were concerned they would be fired if they did not. Hanson raised their concerns with Regional Director Peterson before the day of the contest at the Hooters of Ontario. Peterson, in their telephone conversation, asked Hanson if she was participating in the bikini contest. She told him she was but was not looking forward to it because, "we were forced to do it, we are not being paid and that it was rigged." Peterson told Hanson he was looking into the competition being rigged and would handle it.

Panitch also spoke with Regional Director Peterson, before the day of the bikini contest, that it was unfair for Marketing Coordinator Noble to be in the competitions with her best friend Lina as a judge. Peterson wanted to know if Panitch could prove Lina was Noble's friend or best friend, and if so, he would not have her as a judge. Panitch told Peterson she could send him a screenshot from her cell phone of an Instagram photograph showing Lina with Noble with a caption that stated they were best friends for life.

Hanson raised the concerns about fairness in judging the bikini contest at a jumpstart meeting in April with General Manager Vidauri. Hanson, in the presence of other coworkers and managers, expressed concern they were being forced to participate in the contest without being paid and that the contest was rigged just like the other contests Noble had won with her friend as a judge. General Manager Vidauri explained it was all coming from corporate not him. While Vidauri testified neither Panitch nor Hanson spoke with him about the contest being rigged or fixed he acknowledged 60 percent of the staff mentioned or raised concerns the contest was rigged. I specifically do not credit Vidauri's testimony that Hanson never raised the concerns with him. The concerns persisted. General Man-

[4] Although I have set forth a combination of mannerisms, manner of speaking, and overall bearing that triggered my inclination to accept Hanson's testimony as truthful; I however note, courts do not require fact finders to itemize a witness' characteristic or mannerisms when making a demeanor-based credibly resolution. See *Bloomington-Normal Seating Co .v. NLRB*, 357 F.3d 692, 695 (7th Cir. 2004).

[5] I note it is the weight of the credible evidence, not the numerical superiority of witnesses, which is controlling. See *Riley-Beaird, Inc.,* 259 NLRB 1339, 1367 fn.115 (1982).

ager Vidauri addressed those concerns every day for 2 weeks at the jumpstart meetings prior to the work shifts starting. Vidauri was certain Hanson was present at least at one of the jumpstart meetings at which the concerns about the contest being rigged were discussed. I am fully persuaded Hanson raised her concerns with Vidauri at a jumpstart meeting.

It is clear from the above that many Hooter girls discussed their concerns with each other concerning the bikini contest being rigged. Specifically Hanson and Panitch discussed these concerns with various coworkers and the concerns were raised with groups of employees at jumpstart meetings. Hanson specifically raised such concerns at a jumpstart meeting. General Manager Vidauri had concerns raised with him from 60 percent of the work force. Regional Manager Peterson was fully aware many employees had concerns about the contest. This is clearly concerted activity and was activity protected by the Act as well. The concerns raised by the employees related to wages, hours, and other terms and conditions of employment. The employees were concerned they were being forced to participate in the bikini contest without pay and were incurring out-of-pocket expenses for a contest they were concerned was rigged. Additionally, employees had the potential to win cash as well as other benefits if they could compete fairly at Ontario and the potential to advance to the regional and national contests. I need not, and do not, address whether the contest was actually rigged, nor, do I address the fairness or wisdom of allowing Marketing Coordinator Noble to participate in the contests. I need only conclude employees, including Hanson, thought the contest was rigged and discussed such among themselves and with management. I need only find it was a concern of the employees involving a working condition and it was discussed among the employees and raised with management.

I turn next to whether employees, Hanson in particular, engaged in concerted activity protected by the Act on the evening of the bikini contest at the Ontario location. Hanson and the other bikini contestants were directed by Marketing Coordinator Noble to be at the restaurant on April 22 at 8:30 p.m., and advised the contest would commence at 10:30 p.m. Hanson arrived around 8 p.m. and she, Panitch and the other contestants participated in the costume portion of the contest first. Hanson and Panitch observed that Marketing Coordinator Noble's best friend Lina as well as Noble's boyfriend were contest judges. Panitch observed Lina "whispering" to the other judges. Hanson and Panitch spoke with Regional Director Peterson between the costume and bikini portions of the contest. Panitch asked Peterson if he knew Lina was still going to be a judge. Peterson did not. Hanson asked Regional Director Peterson if he knew who was going to win. Peterson shook his head and laughed. Panitch told Peterson she was unhappy because Peterson had said he would deal with that matter and had not, and, they were still forced to participate in a rigged competition. Peterson told Panitch he knew, and, it would be okay and comforted her.

After the three winners had been selected and announced, Marketing Coordinator Noble had won first place. Hanson and Panitch, along with Rochelle, congratulated the second and third place winners. Hanson stated to Noble; "Congratulations, Pam on cheating." Although Noble asked what, Hanson did not respond, nor did she curse Noble or raise her voice. Regional Director Peterson testified he did not hear Hanson use curse words toward Noble nor did Hanson engage in *any* misconduct at *any* time that evening. General Manager Vidauri never heard Hanson use any curse words that evening. Key employee Wade never heard Hanson use any curse words at all that evening and never told anyone that she heard curse words by Hanson. Security company owner and current Assistant Manager, Gill, of Hooters Restaurant of Costa Mesa, California, heard cursing but could not say if Hanson spoke any curse words that evening.

Hanson and Panitch were continuing their concerted activity, protected by the Act, concerning wages and working conditions, when they addressed with Regional Director Peterson, at the contest, their continued concerns about Noble, having her best friend and boyfriend as judges at the contest.

I next outline and discuss the credited comments, events, and actions involving Charging Party Hanson that took place after the contest ended and until she left the Hooters of Ontario facility perhaps in the early morning hours of April 23.

Hanson, as set forth elsewhere here, commented to Marketing Coordinator Noble after the bikini portion of the contest, "congratulations, Pam, on cheating" but said nothing else. Hanson described Panitch and Noble as "yelling at each other" in a "heated exchange between both girls" and "curse words exchanged." Hanson and coworker Rochelle told Panitch, "this was not the time or the place for this" and took Panitch inside the restaurant. Hanson spoke with her (Hanson's) boyfriend who was also inside the restaurant. Key employee Wade approached Hanson telling Hanson to leave then or be terminated. Hanson explained to Wade she had not done anything and the conversation with Noble, outside the restaurant, had ended. Hanson also told Wade she had no right to threaten to take away her job that she had done nothing.

Hanson observed actions, and overheard an exchange, between key employee Wade and Panitch where Wade "bear hugged" Panitch attempting to remove Panitch from the restaurant. Panitch responded cursing at Wade. Hanson moved away from the Panitch–Wade exchange and actions because she did not wish anyone to think she was involved in those actions and that exchange.

Hanson then left the restaurant along with coworker Rochelle. She observed Regional Director Peterson, General Manager Vidauri, and Market Coordinator Noble as well as Noble's boyfriend in the parking lot. Peterson approached Hanson asking that she not say anything to Noble. Hanson told Peterson she had not and would not say anything to Noble explaining everything that had gone on involved Panitch. Hanson apologized for Panitch's actions and comments that evening. Peterson thanked Hanson and acknowledged the whole thing could have been avoided and it was probably his fault. Peterson also acknowledged Hanson was calm talking with him that entire evening. Hanson thereafter left the premises, unescorted by security, and never saw security interact with Panitch that evening. Although Hanson observed Noble as Hanson left the restaurant parking lot they never spoke. I specifically do not credit Marketing Coordinator Noble's testimony that when she

was in the restaurant parking lot after the contest, Hanson and Panitch came out of the restaurant "yelling more obscenities at me when security got in the way and basically pulled them away." I note Regional Director Peterson saw no misconduct by Hanson that night. General Manger Vidauri heard no curse words from Hanson that evening. Key employee Wade did not hear Hanson use any curse words that evening nor did she ever tell anyone she heard Hanson use curse words that evening. Security Guard Gill could not say Hanson spoke any of the curse words he heard that evening.

I note Panitch acknowledged that when she left the restaurant, unescorted, she observed Noble in the parking lot as Panitch passed Noble's car and yelled profanities at Noble telling her she did not deserve to win, and calling her a "cheater" and a "cunt." Panitch placed Regional Director Peterson along with Bar Manager Ramirez in the area but stated Hanson was not there nor when Panitch drove away.

Hanson was scheduled to work on April 23, but was notified by General Manager Vidauri not to bother coming to work. She was suspended for what had happened the night before. Hanson stated she had not done anything wrong the night before and asked if her job was at risk. Vidauri told Hanson it was.

On April 26, Vice President of Human Resources Herrmann telephoned Hanson informing her she was being discharged. Hanson asked why and was told "for cursing at Pamela Noble the night of the bikini contest."[6] When Hanson told Herrmann she never cursed at Noble, Herrmann then told Hanson she was "being terminated for your negative social media posts." I specifically do not credit Herrmann's testimony that Hanson told her she may have cursed. I am persuaded Hanson would not have consistently denied cursing or that many Company officials would have acknowledged and stated they never heard her curse and then admit to Herrmann she may have cursed. Hanson told Herrmann she had been a good employee for the Company and did not understand why she was being terminated without the Company ever hearing her side of the story. Herrmann told Hanson she knew she had always been a good employee and would be eligible for rehire later on.

Vice President of Human Resources Herrmann also notified Hanson in writing on April 26 that she was terminated for a verbal altercation with employees on April 22 after the Ontario swim suit competition, as well as posting disparaging comments about coworkers and managers on Social Media all of which violated certain Employee Handbook rules.[7] In her letter, Herrmann listed the rules violated as; acts of violence, threats of violence, dishonesty toward guest[s] or fellow employees of Hooters; insubordination to a manager or lack of respect and cooperation with fellow employees or guest[s]; off-duty conduct which negatively affects, or would tend to negatively affect, the employees ability to perform his or her job, the Company's reputation, or smooth operation, goodwill or profitability of the Company's business; and any other action or activity which Hooters reasonably believes represents a threat to the smooth operation, goodwill, or profitability of the business.

Did the Company violate the Act when it suspended and discharged Hanson? The evidence establishes the Company did. First, as set forth above, it is clear Hanson engaged in concerted activity protected by the Act. Second, it is just as clear the Company knew of Hanson's and others concerted protected activity. Hanson individually spoke with Regional Director Peterson and General Manager Vidauri about the concerns and Hanson also raised the concerns at a jumpstart meeting with coworkers and General Manager Vidauri. Vidauri acknowledged 60 percent of the staff raised concerns about the contest being rigged and he spoke about it every day for 2 weeks but the concerns persisted. Company management knew its employees concerns were about working conditions and possible additional wages if the employees could participate in a fair contest. Third, it is clear Hanson complained in a telephone conversation with Regional Director Peterson about managers' comments at the bartender meeting, and about the selection of judges for the bikini contest as well as the fact the outcome of the contest might be rigged. Hanson complained openly at a jumpstart meeting with other employees that the contest was unfair and might be rigged. The evidence indicates the Company knew it could rid itself of Panitch[8] and simply sought to lump Hanson's discharge in the mix and rid itself of both complaining employees. I find it clear Hanson's discharge was motivated by her protected concerted activity. Herrmann, in writing, gave several reasons for discharging Hanson; however, at trial she shifted and testified the sole reason for Hanson's discharge was that she cursed at Marketing Coordinator Noble. Herrmann was simply looking for any reason to terminate Hanson. The credited evidence establishes Hanson's only statement to Noble was "congratulations, Pam on cheating." Hanson did not curse at Noble.

As noted elsewhere, when the credited evidence establishes, an employer has discharged an employee for conduct during the course of protected activity, as here, the burden shifts to the employer to prove it acted with an honest belief the employee engaged in misconduct. When the employer has established such a good-faith belief, the burden shifts back to the government and if the government proves the asserted misconduct did not, in fact, occur, the discharge will be found to violate Section 8(a)(1). I am persuaded the Company did not establish a good-faith belief because many of its witnesses testified Hanson did not curse at Noble or anyone. A thorough investigation by the Company would have demonstrated such to the Company. Assuming arguendo, the Company did establish a good-faith honest belief Hanson engaged in misconduct the govern-

[6] Vice President of Human Resources Herrmann acknowledged, on cross-examination, she was uncertain what curse words Hanson used but stated that whatever words Hanson used were enough, standing alone, to discharge Hanson and that she did so for that reason. More specifically Herrmann acknowledged, on cross-examination, the only reason she decided to terminate Hanson was "Hanson's cursing at a coworker . . . in front of guest[s]."

[7] On cross-examination Herrmann, however, acknowledged she had stated under oath she did not rely on Hanson's social tweets in firing Hanson.

[8] Panitch, by her admitted actions (cursing and related conduct) afforded the Company an opportunity to rid itself of an employee that discussed with other employees actions of managers that resulted in two managers being disciplined.

ment, by credible evidence established the misconduct did not, in fact, occur. In summary, I find the Company violated Section 8(a)(1) of the Act when it suspended and thereafter discharged its employee Hanson.

C. The Arbitration Agreement and Related Documents

1. Arbitration agreement

It is admitted Hooters Employee Handbook contains the following "Hooters' arbitration policy (GC Exh. 18 p. 54) which reads as follows:

> Resolution matters, including charges of employment discrimination or harassment, may only be obtained by requesting arbitration under Hooters Agreement to Arbitrate. You will be required to sign an Agreement to Arbitrate as a condition of your employment with Hooters.

It is admitted that at all times material here the Company maintained agreement to arbitrate documents containing the following provisions:

> This Agreement requires you to arbitrate any legal dispute related to your application for employment, the application or interview process, your employment, or the termination of your employment with Hooters of Ontario, LLC[.]
>
> By signing this Agreement you and the Company each agree that all Claims between you and the Company shall be exclusively decided by arbitration[.]
>
> . . . .
>
> As used above, "claims" mean all disputes arising out of or related to your application for employment, the application and recruitment process, the interview process, the formation of the employment relationship, your employment by the Company, or your separation from employment with the Company. The term "Claims" includes, but is not limited to, any claim whether arising under federal, state, or local law, under a statute such as Title VII of the Civil Rights Act of 1964, under a rule, under a regulation or under the common law, including, but not limited ANY (sic) CLAIM OF DISCRIMINATION, SEXUAL OR OTHER TYPE OF HARASSMENT, RETALIATION, WRONGFUL DISCHARGE, ANY CLAIM FOR WAGES, COSTS, INTEREST, ATTORNEYS' FEES OR PENALTIES. "Claim" does not include any dispute that cannot be arbitrated as a matter of law.
>
> YOU AND THE COMPANY AGREE THAT EACH MAY BRING AND PURSUE CLAIMS AGAINST THE OTHER ONLY IN YOUR/ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF, CLASS MEMBER OR REPRESENTATIVE IN ANY PURPORTED CLASS, REPRESENTATIVE OR COLLECTIVE PROCEEDING. YOU AND THE COMPANY ACKNOWLEDGE AND AGREE THAT AT ALL TIMES YOU HAVE HAD AN AGREEMENT TO ARBITRATE WITH THE COMPANY AND HAVE UNDERSTOOD THAT THE AGREEMENT WAS AN AGREEMENT TO BRING AND PURSUE CLAIMS AGAINST THE OTHER ONLY IN YOUR/ITS INDIVIDUAL CAPACITY, AND NOT AS A PLAINTIFF, CLASS MEMBER OR REPRESENTATIVE IN ANY PURPORTED CLASS, REPRESENTATIVE OR COLLECTIVE PROCEEDING.
> (Emphasis in original.)

It is admitted that at all times material here the Company maintained an acknowledgement of arbitration agreement.

It is admitted that at all times material here the Company maintained an acknowledgement of execution of arbitration document, among others, containing the following provisions:

> I have freely and voluntarily agreed to bring and pursue claims only in my individual capacity and not as a plaintiff, class member or representative in any purported class, representative or collective proceeding.
>
> At all times I have had an agreement to arbitrate with the Company, I have always understood that the Company and I had agreed to only bring claims against each other in our individual capacities and that we had freely and voluntarily agreed not to bring or pursue claims in any purported class, representative or collective proceeding.

It is admitted Charging Party Hanson signed the Company's arbitration agreement; agreement to arbitrate, acknowledgement of receipt of arbitration agreement, and, acknowledgement of arbitration agreement on February 7, 2011.

2. Brief statement of the parties' position

The Government asserts the Company's mandatory agreement to arbitrate, precludes employees from filing joint, class, or collective action claims addressing wages, hours, or other working conditions in all forums arbitral and judicial and that *D. R. Horton,* 357 NLRB No. 184 (2012), is controlling here, and pursuant to *D. R. Horton Inc.,* the Company's arbitration agreement violates Section 8(a)(1) of the Act.

The Company contends its arbitration agreement and related policies are not unlawful because recent Supreme Court precedent, binding here, compels the conclusion that arbitration agreements containing class action waivers are enforceable and do not violate the Act.

3. Discussion, analysis, and conclusions

Simply stated the issue here is whether the Company's arbitration agreement and related documents contain restrictive provisions violating Section 8(a)(1) of the Act.

In evaluating whether a rule applied to all employees, as a condition of continued employment, including the mandatory arbitration agreement and related documents at issue here, violates Section 8(a)(1) of the Act, the Board, as noted in *D. R. Horton Inc.*, at pp. 4–6, applies its test set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), citing *U-Haul Co. of California,* 347 NLRB 375, 377 (2006), enfd. 255 Fed. Appx. 527 (D.C. Cir. 2007). Pursuant to *Lutheran Heritage* the inquiry, or test to be applied, is whether the rule explicitly restricts activities protected by Section 7 of the Act. If so, the rule is unlawful. If it does not explicitly restrict protected activity, the finding of a violation is dependent on a showing of

one of the following: (1) employees would reasonably construe the rule 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.

The Board concluded in *D. R. Horton* that as a condition of employment "employers may not compel employees to waive their NLRA right to collectively pursue litigation of employment claims in all forums arbitral and judicial." 357 NLRB No. 184, slip op. at p. 12 (2012). The arbitration agreement here, by its terms, restricts employees, as a condition of their employment, from acting concertedly by pursuing class arbitral and judicial litigation of employment claims, I find the arbitration agreement here is facially unlawful. The Board explained in *D. R. Horton, Inc.,* supra at 10 "The right to engage in collective action . . . is the core substantive right protected by the NLRA and is the foundation on which the Act and Federal labor policy rest."

Turning now to the Company contention it may not be found to have violated the Act by maintaining its arbitration agreement and related documents based on recent Supreme Court precedent, binding here, that compels the conclusion that arbitration agreements' containing class action waivers are enforceable and do not violate the Act. The Company notes all Federal Circuit Courts of Appeals, asked to address this issue, have declined to enforce the *D. R. Horton Inc.* decision invalidating arbitration agreements containing class waivers and asks I also reject the Board's substantive analysis in *D. R. Horton,* supra.

First, the Company expands its request that I reject the Board's substantive analysis in *D. R. Horton Inc.,* supra. Noting that three Federal Circuit Courts of Appeal in, namely, *Owen v. Bristol Care Inc*., 702 F.3d 1050, 1052–1055 (8th Cir. 2013); *Richards v. Ernest & Young,* 734 F.3d 871, 873–874 (9th Cir. 2013); and, the direct appeal of *D. R. Horton; D. R. Horton v. NLRB,* 737 F.3d 344 (5th Cir. 2013), have reviewed the Board's *D. R. Horton Inc.* decision, and all three have rejected the Board's substantive analysis. I, however, am bound by Board precedent unless and until the Supreme Court or the Board directs otherwise. *Iowa Beef Packers, Inc.,* 144 NLRB 615, 616 (1963). Neither has done so thus *D. R. Horton Inc.* is the applicable law here that I follow.

Second, the Company urges I reject *D. R. Horton Inc.*, supra, and rely on certain specific Supreme Court decisions applying the mandate that Federal law, namely the Federal Arbitration Act (FAA), favors arbitration and that class waivers in agreements to arbitrate executed by employees do not violate the Act. In support of this argument or contention the Company points, in part, to the Supreme Court's decisions in *AT&T Mobility, LLC v. Concepcion*, 131 S.Ct. 1740 (2011); *American Express v. Italian Colors Restaurants,* 133 S.Ct. 2304 (2013); and, *CompuCredit v. Greenwood*, 132 S.Ct. 665 (2012). I address below the three above-cited cases and find those cases do not compel that I reject the Board's *D. R. Horton Inc.* decision based on the cited Supreme Court decisions.

The Board in *D. R. Horton* considered the Supreme Court's holding in *AT&T Mobility LLC* and concluded that decision does not require a conclusion different from its holding in *D. R. Horton Inc.* Accordingly, I reject the Company's contention *AT&T Mobility LLC* controls and must be applied here. I apply here the Board's rational as set forth in *D. R. Horton Inc.* as explained below:

> A policy associated with the FAA and arguable in tension with the policies of the NLRA was explained by the Supreme Court in *AT&T Mobility v. Concepcion,* supra at 1748: The "overarching purpose of the FAA . . . is to ensure the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." The "switch from bilateral to class arbitration," the Court stated, "sacrifices the principal advantage of arbitration—its informality." Id. at 1750. But the weight of this countervailing consideration was considerably greater in the context of *AT&T Mobility* than it is here for several reasons. *AT&T Mobility* involved the claim that a class-action waiver in an arbitration clause of any contract of adhesion in the State of California was unconscionable. Here, in contrast, only agreements between employers and their own employees are at stake. As the Court pointed out in *AT&T Mobility*, such contracts of adhesion in the retail and services industries might cover "tens of thousands of potential claimants." Id. at 1752. The average number of employees employed by a single employer, in contrast, is 20 [footnote omitted] and most classwide employment litigation, like the case at issue here, involves only a specific subset of an employer's employees. A classwide arbitration is thus far less cumbersome and more akin to an individual arbitration proceeding along each of the dimensions considered by the Court in *AT&T Mobility*—speed, cost, informality, and risk—when the class is so limited in size. 131 S.Ct. at 1751–1752. Moreover, the holding in this case covers only one type of contract, that between an employer and its covered employees, in contrast to the broad rule adopted by the California Supreme Court at issue in *AT&T Mobility.* Accordingly, any intrusion on the policies underlying the FAA is similarly limited.

Thus, whether we consider the policies underlying the two statutes as part of the balancing test required to determine if a term of a contract is against public policy and thus properly considered invalid under Section 2 of the FAA, or a part of the accommodation analysis required by *Southern Steamship, Morton,* and other Supreme Court precedent, our conclusion is the same: holding that an employer violates the NLRA by requiring employees, as a condition of employment, to waive their right to pursue collective legal redress in both judicial and arbitral forums accommodates the policies underlying both the NLRA and the FAA to the greatest extent possible.

Next, I turn to the *American Express Co. v. Italian Colors Restaurant,* supra, a case, which was decided after *D. R. Horton,* to determine if, as the Company contends, the decision compels a finding that the class waiver in the agreement to arbitrate here does not violate the Act.

American Express Co. v. Italian Colors Restaurant involved merchants who contracted with American Express to accept American Express cards at their businesses and in their agreement with American Express agreed to arbitrate disputes arising between the merchant and American Express and further precluded any claims from being arbitrated as a class action. The merchants, nevertheless, filed a class action lawsuit against

American Express contending their agreement with American Express violated Federal antitrust statutes. The merchants contended waiving class arbitration made the agreement with American Express invalid and unenforceable because the cost of individually arbitrating a Federal statutory claim would exceed any potential recovery. In response to the merchants lawsuit, American Express moved to enforce the arbitration agreement terms calling for individually arbitrating claims pursuant to the provisions of the FAA. The Supreme Court rejected the merchants' position holding arbitration is a matter of contractual agreement between the parties and that the FAA precludes the courts from invalidating a contractual waiver of class arbitration simply because the cost of individually arbitrating a Federal statutory claim exceeds any potential recovery.

Next I turn to *CompuCredit Corp v. Greenwood*, supra, involved actions brought by consumers against the marketer of credit cards and the Federal Credit Repair Organization Act (CROA), to determine if, as the Company contends, the decision compels a finding that the waiver here does not violate the Act. The Court held CROA provisions requiring credit repair organizations disclose to consumers the right to sue over violations of CROA and prohibiting waiver of that right nonetheless did not preclude enforcement of an arbitration agreement the parties had also executed. The Supreme Court held the FAA requires that the parties' arbitration agreement be enforced according to its terms. The court specifically concluded that even when the claims at issue are Federal statutory claims, the FAA's mandate cannot be overridden unless "overridden by a contrary congressional command."

The two above Supreme Court cases address consumer rights and contract language, and, in my opinion, have absolutely nothing to do with unilaterally imposed arbitration agreements in the context of employee–employer relationships. The cases do not discuss how, if at all, the FAA may be applied to alter, by private arbitration agreement, the core substantive rights protected by the NLRA which are the foundation on which the NLRA and all Federal labor law rests. It goes without saying the core issue before me, on this portion of the case, is whether the Company may, by private arbitration agreement imposed on its employees, restrict the right of its employees to engage in concerted or class activities recognized and protected by Section 7 of the Act. I have elsewhere here concluded the Company cannot lawfully do so and nothing in the two subsequent Supreme Court decisions compels a different conclusion than I make.

The Company further notes that most recently, Board Administrative Law Judge Keltner W. Locke issued his decision in *Haynes Building Services, LLP,* JD(ATL)03-014 (February 7, 2014) in which Judge Locke recommended the Board dismiss allegations *Haynes Building Services'* arbitration agreement violated the Act. Judge Locke's decision is without authority here as it is an intermediate decision not yet ruled upon by the Board and may not be considered as precedent.

In summary, the agreement to arbitrate and related documents clearly inhibits and interferes with employees' Section 7 rights in that it requires employees to waive their right to engage in concerted activity for mutual aid and protection by prohibiting class or collective action in any forum and as such violates Section 8(a)(1) of the Act.

Additionally, I find the language of the Company's arbitration agreement would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the Board. Accordingly, I find the policy, for that reason alone, also violates Section 8(a)(1) of the Act. See *U-Haul Co. of California,* 347 NLRB 375, 377–378 (2006).

D. Employee Handbook Rules

It is admitted that at all times material here the Company has maintained the following rules in its Employee Handbook and it is alleged it has thereby been interfering with, restraining, and coercing employees in the exercise of rights guaranteed in Section 7 of the Act in violation of Section 8(a)(1) of the Act. The rules in issue are:

> (a) Remember: NEVER discuss tips with other employees or guests. Employees who do so are subject to discipline up to and including termination.
> (b) Insubordination to a manager or lack of respect and cooperation with fellow employees or guests [might result in discipline up to, and including immediate termination.]
> (c) Disrespect to our guests including discussing tips, profanity or negative comments or actions [might result in discipline up to, and including immediate termination.]
> (d) The unauthorized dispersal of sensitive Company operating materials or information to any unauthorized person or party [might result in discipline up to, and including immediate termination.] This includes, but is not limited to, recipes, policies, procedures, financial information, manuals or any other information in part or in whole as contained in any Company records.
> (e) Any other action or activity which Hooters reasonably believes represents a threat to the smooth operation, goodwill or profitability of its business [might result in discipline up to, and including immediate termination.]
> (f) Any off-duty conduct which negatively affects, or would tend to negatively affect, the employee's ability to perform his or her job, the Company's reputation, or the smooth operation, goodwill or profitability of the Company's business [might result in discipline up to, and including immediate termination.]
> (g) Employees shall not discuss the Company's business or legal affairs with anyone outside of the Company. Information concerning claims or lawsuits brought by the Company or against the Company shall be treated as confidential. Employees shall not discuss matters related in any way to litigation or claims. Any employee who violates this rule shall be subject to discipline up to and including termination of employment.
> (h) Information published on your social networking sites should comply with the company's confidentiality and disclosure of proprietary information policies. This also applies to comments posted on other blogs, forums, and social networking sites.
> (i) Be respectful to the Company, other employees, customers, partners, and competitors. Refrain from posting offensive language or pictures that can be viewed by co-workers and clients. Refrain from posting negative comments about Hoot-

> ers or co-workers. In all cases, NEVER publish any information regarding a co-worker or customer.

I address each of the above rules in the same order as set forth above.

First, in determining whether the maintenance of a work rule violates Section 8(a)(1) of the Act the Board analyzes the rule according to the following framework set forth in *Crowne Plaza Hotel,* 352 NLRB 382, 383 (2008), quoting from *Lutheran Heritage Village-Livonia,* 343 NLRB 646 (2004).

> [A]n employer violates Section 8(a)(1) when it maintains a work rule that reasonably tends to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998). In determining whether a challenged rule is unlawful, the Board must, however, give the rule a reasonable reading. It must refrain from reading particular phrases in isolation, and it must not presume improper interference with employee rights. *Id* at 825, 827. Consistent with the foregoing, our inquiry into whether the maintenance of a challenged rule is unlawful begins with the issue of whether the rule *explicitly* restricts activities protected by Section 7. If it does, we will find the rule unlawful.
>
> If the rule does not explicitly restrict activity protected by Section 7, 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-Livonia*, 343 NLRB 646 (2004). Where a rule is ambiguous regarding its application to Section 7 activity and no examples or violative conduct or limitation language is set forth that would clarify to employees the rule does not restrict Section 7 rights such a rule is unlawful under the Act.

The Board noted in *Flex Frac Logestics, LLC*, 358 NLRB No. 127, slip op. at p. 2 (2012):

> Board law is settled that ambiguous employer rules—rules that reasonably could be read to have a coercive meaning—are construed against the employer. This principle follows from the Act's goal of preventing employees from being chilled in the exercise of their Section 7 rights—whether or not that is the intent of the employer—instead of waiting until that chill is manifest, when the Board must undertake the difficult task of dispelling it.

1. Discussing tips

The Company's policy forbidding employees from discussing tips with each other explicitly restricts activities protected by Section 7 of the Act and thereby violates Section 8(a)(1) of the Act. Discussing tips between employees is essentially discussing wages. See, e.g., *Wynn Las Vegas, LLC,* 358 NLRB No. 80, slip op. at p. 3 (2012). Nothing is more basic "terms and conditions" of employment than wages. *Parexel International, LLC*, 356 NLRB 516, 518 (2011). The portion of this rule that forbids employees from discussing tips with guests is unlawfully over broad. The rule precludes employees from exercising their right to discuss their terms and conditions of employment, such as wages, with nonemployees. See generally *Mastec Advanced Technologies,* 357 NLRB No. 17 (2011).

2. Insubordination by employees

The Company's insubordination rule is impermissible. In *University Medical Center*, 335 NLRB 1318, 1322 (2001), the Board prohibited a rule, applying the *Lafayette* standard, in an employee handbook prohibiting "insubordination, refusing to follow directions, obey legitimate requests or orders, or other disrespectful condition towards a service integrator, service coordinator, or other individual." Id. The Board held the rule was overly broad because it prohibited all disrespectful conduct towards others and "[d]efining due respect, in the context of a union activity, seems inherently subjective." Id. Further, potential employee advocates could reasonably surmise that members of their target audience would screen them from expressing views not welcomed or agreed with. Id. at 1323. Thus, the rule would have a chilling effect on employees in the exercise of their Section 7 rights. Similarly, here, the Company's rule prohibiting 'insubordination to a manager or lack of respect and cooperation with fellow employees or guest [might result in discipline up to, and including immediate termination]" is as broad as the "disrespectful conduct" clause in *Community Hospitals of Central California* in that it does not go on to define what "insubordination," "lack of respect," or "cooperation" means and thus are subjective. These broad terms could have the same chilling effect the Board was concerned with in *Community Hospitals*. There is also no limiting language here like in *Lafayette*, which held permissible the rule "[b]eing uncooperative with supervisors, employees, guest[s] and/or regulatory agencies or otherwise engaging in conduct that does not support the Lafayette Park Hotel's goals and objectives." The rule limited the conduct as to the company's "goals and objectives." And thus was permissible. There are no such limiting terms here, thus the rule is unlawful.

3. Disrespect to guests

This rule on disrespect is unlawfully over broad and unqualified.[9] The prohibitions against "profanity or negative comments or actions" are also over broad in that no examples or clarifications are provided. The rule reasonably tends to chill employee exercise of Section 7 rights and violates Section 8(a)(1) of the Act. See *Claremont Resort & Spa,* 344 NLRB 832, 836 (2005), citing *Lafayette Park Hotel,* supra.

4. Unauthorized dispersal of sensitive company materials

This nondisclosure or nondispersal rule is unlawfully overbroad because employees would reasonably believe they are prohibited from discussing wages or other terms and conditions of employment with nonemployees, such as, for example, union representatives—an activity clearly protected by Section 7 of the Act. See *Flex Frac Logistics, LLC,* 358 NLRB No. 127 (2012), citing *Hyundai American Shipping Agency Inc.,* 357 NLRB No. 80, slip op. at 12 (2011) (finding rule unlawful that prohibited "[a]ny unauthorized disclosure from an employee's

[9] The portion of the rule concerning not discussing tips with customers has been addressed above in "Discussing Tips" and will not be restated here.

personnel file"); *IRIS U.S.A. Inc*., 336 NLRB 1013, 1013 fn. 1, 1015, 1018 (2001) (finding rule unlawful that stated all information about employees is strictly "confidential" and defined "personnel records" as confidential). Additionally, as noted by counsel for the Government, nothing about the rule limits or qualifies the prohibition on disclosing "policies, procedures, and manuals" to exclude wages thus reinforcing the likely inference the rule prescribes wage discussions with outsiders.

5. Conduct affecting the Company's smooth operation, goodwill, or profitability of it business

As discussed below this rule is overbroad and restricts rights protected by the Act. In *Costco Wholesale Corp*., the Board found the following paragraph unlawful because employees would reasonably construe the rule as regulating and inhibiting Section 7 conduct.

> Any communication transmitted, stored or displayed electronically must comply with the policies outlined in the Costco Employee Agreement. Employees should be aware that statements posted electronically (such as [to] online message boards or discussion groups) that damage the Company, defame any individual or damage any person's reputation, or violate the policies outlined in the Costco Employee Agreement may be subject to discipline, up to and including termination of employment. 358 NLRB No. 106 (2012).

The Board found statements that: "damage the company, defame any individual or damage any person's reputation" clearly encompasses protests that respond to respondent's treatment of its employees. Id. There is also nothing in the company's rule that suggests that protected communications are excluded. Id. The Board held that employees could reasonably conclude that the rule required them to not partake in protected communications. Id.

Here, the Company has an arguably broader rule than the rule in *Costco Wholesale Corp.* The rule here states: "[a]ny other action or activity which Hooters reasonably believes represents a threat to the smooth operation, goodwill, or profitability of its business [might result in discipline up to, and including immediate termination.]" As in *Costco Wholesale Corp.,* supra, there is nothing to suggest that protected communications or activities are excluded as the rule says "any other action or activity." Though the Company limits the text to what it reasonably believes; *employees* could reasonably conclude the rule prohibits protected activities and communications. See *Southern Maryland Hospital*, 293 NLRB 1209, 122 (1989), enfd. in relevant part 916 F.2d 932, 940 (4th Cir. 1990) (rule prohibiting "derogatory attacks on . . . hospital representative[s] found unlawful); *Claremount Resort Spa,* 344 NLRB 832 (2005) (rule prohibiting "negative conversations about associates and/or managers" found unlawful); *Beverly Health & Rehabilitation Services*, 332 NLRB 347, 348 (2000), enfd. 297 F.3d 468 (6th Cir. 2002). Thus this rule in the Company's handbook is unlawful.

6. Off-duty conduct

This rule is overly broad and invalid essentially for the reasons stated immediately above in number five. More specifically off-duty conduct such as discussing working conditions with fellow employees, third party persons such as employees of other employers, and union representatives could be construed as violating this rule. Thus employees could reasonably conclude the overbroad language in this rule encompassed Section 7 activity. The rule is invalid.

7. Discussing the Company's business or legal affairs outside the company

This rule is overbroad and invalid. Prohibiting employees from discussing legal affairs including claims or lawsuits brought by the Company or against the Company or in any way discussing matters related in any way to such litigation interferes with employee rights under the Act in that employees would reasonably construe the rule language to prohibit or limit their exercise of rights guaranteed by Section 7 of the Act. For example, it would preclude discussing terms and conditions of employment related to lawsuits addressing wage and hour issues, protected age issues, race discrimination issues, fair labor standard issues, California Labor Code issues, and even Board litigation issues with third parties such as union representatives.

8. Information on employee social networking sites

I find this rule invalid for the reasons explained hereinafter where I conclude the Company's confidential information agreement and its nondisclosure agreement are unlawful because employees' would construe that these two policies interfere with the employees ability to engage in activities protected by Section 7 of the Act.

9. Being respectful to the Company, employees, customers, partners and competitors; post no offensive language or pictures that can be viewed by coworkers and clients; post no negative comments about the Company or coworkers; and, never post any information regarding a coworker or customer

I find the "Being respectful to the Company," other employees, customers, partners, and competitors rule, in conjunction with the prohibition regarding posting negative comments about the Company or coworkers, as encompassing protected Section 7 activity, such as employees' statements made to coworkers, supervisors, and third parties, who deal with the Company, about terms and conditions of employment they object to and seek support from in improving their working conditions. Additionally there is nothing in the rule that would reasonably suggest to employees that employee communications protected by Section 7 of the Act are excluded from the rules reach. See *Knauz BMW,* 358 NLRB No. 164, slip op. at pp. 1–2 (2012); *Hills & Deals General Hospital,* 360 NLRB No. 70 (2014); and, *First Transit, Inc.,* 360 NLRB No. 72, slip op. at p. 3 (2014).

E. Confidential Information and Nondisclosure Agreement

It is admitted the Company maintains an agreement containing the following provisions:

> 1. Nature of the agreement and acknowledgement
>
> Employee acknowledges that:
>
> . . . .

(b) In the course of Employee's employment, Employee has or may become personally acquainted with information about The Company's employees and their job duties, payroll or accounting records and practices, or the Company's personnel policies and practices, including all matters related to employees training, selection, discipline and/or discharge, which is not generally known to the public;

(c) In the course of Employee's employment, Employee has or may become personally acquainted with compensation data, . . . (or) employee relations or EEO strategies . . . which are not generally known to the public.

2. Nondisclosure

(a) Employee agrees to act as a trustee of the information described in Paragraph 1 of this Agreement which is not generally known to the public.

(b) Employee further represents to The Company that, as an inducement to The Company to employ or continue to employ Employee, Employee would hold such information in trust and confidence for the use and benefit solely of The Company.

(c) During Employee's employment by The Company, and for a period of two (2) years thereafter, Employee agrees that, without prior written permission from The Company's General Counsel, Employee shall not publish, communicate, divulge, or otherwise disclose such information to any person, firm, company, corporation, association, partnership, or other entity for any reason or purpose whatsoever, unless (1) such information has already become known to the public, or (2) Employee is required to disclose such information by legal process.

(d) Notwithstanding Paragraph 2(c), Employee agrees that, without prior written permission from The Company's General Counsel, Employee shall at no time publish, communicate, divulge or otherwise disclose any information (a) concerning a matter which Employee knows or has reason to know is privileged . . . , or (b) concerning the reasons for or circumstances surrounding, or Employee's understanding of those reasons for or circumstances surrounding, personnel actions taken by The Company with regard to other Hooters employers, including the hiring, firing, promotion, transfer, demotion, or discipline of any other Hooters employee.

Here employees are prohibited from disclosure of any information pertaining to terms and conditions of employment of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices including *all* matters related to employee training, selection, discipline and/or discharge, which is not generally known to the public. This nondisclosure rule is so broadly written employees would reasonably believe, if they did not clearly understand, they are prohibited from discussing wages and salary information, disciplinary and discharge policies and practices and other information they are entitled to discuss and share with coworkers and even with third parties that might be able to assist them with the terms and conditions of their employment. This is the type of information that may be shared with employees, unions, and even governmental agencies. The rule here has a clear chilling effect on employees in the exercise of their Section 7 rights. See *MCPc, Inc.,* 360 NLRB No. 39, slip op. at p. 1 (2014); *Hundai American Shipping Agency,* 357 NLRB No. 80, slip op. at p. 12 (2011); and *Flex Frac Logistics, LLC*, 358 NLRB No. 127, slip op. at p. 1.

CONCLUSIONS OF LAW

1. Hoot Winc, LLC is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Ontario Wings, LLC d/b/a Hooters of Ontario Mills is, and has been, an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

3. Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills are, and at all material times have been, joint employers of the employee of Ontario Wings, LLC d/b/a Hooters of Ontario Mills (hereafter I shall refer to the joint employers as the Company).

4. Key employee and marketing coordinator, Pamela Noble, and Key employee Alicia Wade, at all material times, have been agents of the Company within the meaning of Section 2(13) of the Act.

5. By suspending and then discharging Alexis Hanson because of her concerted activity of complaining to Company management regarding wages, hours, and working conditions of Company employees specifically about the disparagement of Company employees and conditions surrounding a competition involving employees, the Company has violated Section 8(a)(1) of the Act.

6 The Company, by restricting its employees' Section 7 rights, has violated Section 8(a)(1) of the Act by maintaining the following overly broad work rules:

(a) That prohibits employees from discussing tips with other employees or guest.

(b) That prohibits all insubordination to a manager or lack of respect and cooperation with fellow employees or guest.

(c) That prohibits employees from disrespecting guests by discussing tips with guest or making negative comments or actions to guests.

(d) That prohibits dispersal of sensitive Company operating materials including policies, procedures, financial information, and Company manuals.

(e) That prohibits any action or activity affecting the Company's smooth operation, good will, or profitability of its business.

(f) That prohibits off-duty conduct which would tend to negatively affect employees ability to perform their jobs or the smooth operation, good will, or profitability of the Company's business.

(g) That prohibits employees from discussing the Company's business or legal affairs with anyone outside the Company.

(h) That prohibits employees from publishing on their social networking sites any confidential or proprietary information of the Company.

(i) That prohibits employees from being disrespectful to the

Company, other employees, customers, partners, and competitors, posting no offensive language or pictures and no negative comments about the Company or coworkers or posting any information regarding a coworker or the Company.

7. The Company, by restricting its employees' Section 7 rights, has violated Section 8(a)(1) of the Act by maintaining an overly broad, confidential information and nondisclosure agreement rule, that prohibits employees from disclosure of any information pertaining to terms and conditions of employment of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices including all matters related to employee training, selection, discipline and/or discharge which is not generally known to the public.

8. By maintaining its mandatory agreement to arbitrate and related documents, that requires employees to waive their right to maintain class or collective actions in all forums, judicial or arbitral, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

9. By maintaining its mandatory agreement to arbitrate and related documents that would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the National Labor Relations Board, the Company has engaged in unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act and has violated Section 8(a)(1) of the Act.

REMEDY

Having found the Company has engaged in certain unfair labor practices, I shall recommend that it cease and desist therefrom and take certain affirmative actions designed to effectuate the policies of the Act.

Having found that the Company has violated Section 8(a)(1) by suspending and discharging Alexis Hanson, I recommend the Company be ordered to reinstate her to her former job, or if that job no longer exists, to a substantially equivalent job without prejudice to her seniority or other rights and privileges previously enjoyed, and make her whole for any lost wages and benefits as a result of her April 23 suspension and her April 26, 2013 discharge, with interest.

The backpay shall be computed as prescribed in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center,* 356 NLRB 6 (2010). Additionally, the Company is ordered to compensate Alexis Hanson for the adverse tax consequences, if any, of receiving a lump sum backpay award, and to file a report with the Social Security Administration allocating the backpay awards to the appropriate calendar quarters for Alexis Hanson. See *Latino Express, Inc.,* 359 NLRB No. 44 (2012). I also recommend the Company, within 14 days of the Board's Order, be ordered to remove from its files any reference to Hanson's suspension on April 23 and her discharge on April 26, 2013, and within 3 days thereafter notify Hanson in writing it has done so and that her suspension and discharge will not be used against her in any manner.

I also recommend the Company be ordered to rescind, modify, or revise its agreement to arbitrate, and related documents, to clearly inform its employees the agreement does not constitute a waiver in all forums of their right to maintain employment-related class or collective actions and to clearly inform its employees that the agreement does not prohibit the filing of unfair labor practices with the National Labor Relations Board, and notify its employees the agreement to arbitrate and related documents have been rescinded, modified, or revised and provide a copy of the modified or revised agreements to all employees.

Having also found certain rules in the Company's Employee Handbook infringes on its employees' Section 7 rights, I recommend the Company be ordered to rescind the following rules fully described elsewhere in this decision addressing; (1) discussing tips; (2) insubordination by employees; (3) disrespect to guests; (4) unauthorized dispersal of sensitive Company materials; (5) conduct affecting the Company's smooth operation, goodwill, or profitability of it business; (6) off-duty conduct; (7) discussing the Company's business or legal affairs outside the Company; (8) information on employee social networking sites; and (9) being respectful to the Company, employees, customers, partners, and competitions, post no offensive language or picture that can be viewed by coworkers and clients; and post no negative comments about the Company or coworkers and never post any information regarding a coworker or customer; and notify its employees in writing that it has rescinded these rules.

I also recommend the Company be ordered to rescind its confidential information and nondisclosure agreement.

On these finding of fact and conclusions of law and on the entire record, I issue the following recommended[10]

ORDER

The Company, Hoot Winc, LLC and Ontario Wings, LLC d/b/a Hooters of Ontario Mills, Joint Employers, their officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Suspending, discharging, or otherwise discriminating against employees for engaging in concerted activity protected by the Act.

(b) Maintaining its mandatory agreement to arbitrate, and related documents, that requires employees to waive their right to maintain class or collective actions in all forums; arbitral and judicial; and maintaining language in the agreement that would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the National Labor Relations Board.

(c) Maintaining an overly broad rule that prohibits employees from discussing tips with other employees or guests.

(d) Maintaining an overly broad rule that prohibits all insubordinations by employees to a manager or lack of respect and cooperation with fellow employees or guests.

(e) Maintaining an overly broad rule that prohibits employees from disrespecting guests by discussing tips with guests or

[10] 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 all the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

making negative comments or actions to guests.

(f) Maintaining an overly broad rule that prohibits employee's dispersal of sensitive Company operating materials including policies, procedures, financial information, and Company manuals.

(g) Maintaining an overly broad rule that prohibits employees from any action or activity affecting the Company's smooth operation, goodwill, or profitability of its business.

(h) Maintaining an overly broad rule that prohibits employees' off-duty conduct which would tend to negatively affect employees ability to perform their jobs or the smooth operation, goodwill, or profitability of the Company's business.

(i) Maintaining an overly broad rule that prohibits employees from discussing the Company's business or legal affairs with anyone outside the Company.

(j) Maintaining an overly broad rule that prohibits employees from being disrespectful to the Company, other employees, customers, partners, and competitors, posting no offensive language or pictures and no negative comments about the Company or coworkers or the Company.

(k) Maintaining an overly broad rule in its confidential information and nondisclosure agreement that prohibits employees from disclosure of any information pertaining to terms and conditions of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices including all matters related to employee training, selection, discipline and/or discharge which is not generally known to the public.

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

(a) Within 14 days from the date of the Board's Order, offer Alexis Hanson full reinstatement to her former job, or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Alexis Hanson whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful suspension and discharge of Alexis Hanson, and within 3 days thereafter, notify her in writing that this has been done and that her suspension and discharge will not be used against her 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 the records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(e) Within 14 days of the Board's Order rescind or revise the agreement to arbitrate, and related documents, that requires employees to waive their right to maintain class or collective action in all forums, whether arbitral or judicial, and language that would reasonably be read by employees to prohibit the filing of unfair labor practice with the National Labor Relations Board.

(f) Advise all current employees in writing that the agreement to arbitrate and related documents have been revised or rescinded and that employees are no longer prohibited from bringing and participating in class actions against the Company nor, are they prohibited from filing charges with the National Labor Relations Board.

(g) Within 14 days of the Board's Order rescind or revise the confidential information and nondisclosure agreement that prohibits employees from disclosure of any information pertaining to terms and conditions of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices including all matters related to employees training, selection, discipline and/or discharge which is not generally known to the public.

(h) Advise all current employees that the confidential information and nondisclosure agreement has been rescinded or revised and that they are not prohibited from disclosure of any information pertaining to terms and conditions of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices including all matters related to employees training, selection, discipline and/or discharge which is not generally known to the public.

(i) Within 14 days of the Board's Order rescind or revise the rules in the Employee Handbook listed in 1(c), (d), (e), (f), (g), (h), (i), and (j) of this Order.

(j) Furnish all current employees with inserts for the Employee Handbook that in (1) advises that the unlawful rules (listed in 1(c), (d), (e), (f), (g), (h), (i), and (j) of this Order) have been rescinded, or (2) provide the language of lawful rules; or publish and distribute a revised Employee Handbook that (1) does not contain the unlawful rules, or (2) provides language of lawful rules.

(k) Within 14 days after service by the Region, post at its facility in Ontario, California, copies of the attached notice marked "Appendix."[11] Copies of the notice, on forms provided by the Regional Director for Region 31 after being signed by the Company's authorized representative, shall be posted by the Company and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Company to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Company customarily communicates with its employees by such means. In the event that, during the pendency of these proceedings, the Company has gone out of business or closed the facility involved in these proceedings, the Company shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Company at any time since

[11] 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.

April 23, 2013.

(l) 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 the Company has taken to comply.

Dated, Washington, D.C. May 19, 2014

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 suspend or discharge you because of your protected activity of concertedly raising with Company management your concerns regarding wages, hours, and working conditions specifically your concerns about disparagement of employees and conditions surrounding a competition involving employees.

WE WILL NOT maintain or enforce our agreement to arbitrate and related documents that requires employees to waive their right to maintain class or collective actions in all forums; arbitral and judicial; and, language in the agreement that would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the National Labor Relations Board.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees from discussing tips with other employees or guests.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits all insubordination by employees to a manager or lack of respect and cooperation with fellow employees or guests.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees from disrespecting guests by discussing tips with guests or making negative comments or actions to guests.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees' dispersal of sensitive Company operating materials including policies, procedures, financial information, and Company manuals.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees from any action or activity affecting the Company's smooth operation, goodwill, or profitability of its business.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees' off-duty conduct which would tend to negatively affect employees ability to perform their jobs or the smooth operation, goodwill, or profitability of the Company's business.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees from discussing the Company's business or legal affairs with anyone outside the Company.

WE WILL NOT maintain or enforce a provision in our Employee Handbook that prohibits employees from being disrespectful to the Company, other employees, customers, partners, and competitors, posting no offensive language or pictures and no negative comments about the Company or coworkers of the Company.

WE WILL NOT maintain or enforce a provision of our confidential information and nondisclosure agreement that prohibits employees from disclosing any information pertaining to terms and conditions of employees such as their job duties, payroll or accounting records and practices, personnel policies and practices including all matters related to employee training, selection, discipline and/or discharge which is not generally known to the public.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of rights guaranteed you by Federal labor law.

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

WE WILL make Alexis Hanson whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Alexis Hanson for the adverse tax consequences if any, of receiving a lump sum backpay award, and WE WILL, file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

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

WE WILL revise or rescind our agreement to arbitrate, and related documents, that requires employees to waive their right to maintain class or collective actions in all forums; arbitral and judicial; and, maintaining language in the agreement that would reasonably be read by employees to prohibit the filing of unfair labor practice charges with the National Labor Relations Board.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employees from discussing tips with other employees or guests.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits all insubordination by employees to a manager or lack of respect and cooperation with fellow employees or guests.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employees from disrespecting guests

by discussing tips with guests or making negative comments or actions to guests.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employee's dispersal of sensitive Company operating materials including policies, procedures, financial information, and Company manuals.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employees from any action or activity affecting the Company's smooth operation, goodwill, or profitability of its business.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employees' off-duty conduct which would tend to negatively affect employees ability to perform their jobs or the smooth operation, goodwill, or profitability of the Company's business.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employees from discussing the Company's business or legal affairs with anyone outside the Company.

WE WILL revise or rescind the provision in our Employee Handbook that prohibits employees from being disrespectful to the Company, other employees, customers, partners, and competitions, posting no offensive language or pictures and no negative comments about the Company or coworkers or the Company.

WE WILL revise or rescind the provision in our confidential information and nondisclosure agreement that prohibits employees from disclosure of any information pertaining to terms and conditions of employees such as their job duties, payroll, or accounting records and practices, personnel policies and practices including all matters related to employee training, selection, discipline and/or discharge which is not generally known to the public.

HOOT WINC, LLC AND ONTARIO WINGS, LLC D/B/A HOOTERS OF ONTARIO MILLS,

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/31-CA-104872 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.