Starbucks Corporation d/b/a Starbucks Coffee Company *and* Local 660, Industrial Workers of the World. Case 02–CA–037548

June 16, 2014

SUPPLEMENTAL DECISION AND ORDER[1]

BY MEMBERS MISCIMARRA, HIROZAWA, AND SCHIFFER

On August 26, 2010, the National Labor Relations Board issued a decision in this case, finding, among other things, that the Respondent violated Section 8(a)(3) and (1) of the Act by terminating employee Joseph Agins, an open union supporter.[2] Agins, while engaged in union activity during off-duty hours, uttered profanities at a Starbucks manager in the presence of customers. The Board adopted the administrative law judge's finding that, under the standard set forth in *Atlantic Steel Co.*, 245 NLRB 814 (1979), Agins' conduct was not so egregious as to lose him the protection of the Act.

Thereafter, the Board filed an application for enforcement in the United States Court of Appeals for the Second Circuit, and the Respondent filed a cross-petition for review. On review, the court "conclude[d] that the *Atlantic Steel* test is inapplicable to an employee's use of obscenities in the presence of an employer's customers."[3] The court remanded the issue of Agins' discharge to the Board for further proceedings consistent with the court's opinion.[4]

On October 31, 2012, the Board notified the parties that it had accepted the court's partial remand and invited all parties to submit statements of position concerning the issue raised by the remand. The General Counsel and the Respondent each filed a statement of position.

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

Having accepted the remand, we accept the court's opinion as the law of the case. Accordingly, without applying *Atlantic Steel*, we have reconsidered the lawfulness of Agins' discharge. Having done so, we reaffirm, for the reasons set forth below, that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging Agins, even assuming that Agins' conduct on November 21, 2005, lost the protection of the Act.

[1] Member Johnson is recused and did not participate in the consideration of this case.

[2] 355 NLRB 636 (2010), reaffirming 354 NLRB 876 (2009).

[3] *NLRB v. Starbucks Corp.,* 679 F.3d 70, 80 (2d Cir. 2012).

[4] Id. at 82.

Background

Between 2004 and 2007, the Charging Party Union engaged in a campaign to organize four of the Respondent's Manhattan stores. Agins was employed by the Respondent as a barista at its 9th Street store. Agins became an open and active supporter of the Union in 2005. He was identified as a likely supporter of the Union by District Manager William Smith in an April 25, 2005 e-mail. Subsequently, Agins handed out prounion flyers and participated in union protests and rallies outside the Respondent's stores.

On May 14, 2005,[5] Agins was involved in an incident with Assistant Store Manager Tanya James. Agins asked James to help him during a particularly busy period. James, who was otherwise occupied, told Agins he would have to wait. When James came to help, Agins said it was "about damn time." He then noisily shoved a blender in the sink. Agins also stated to James that "this is bullshit," and he told James to "do everything your damn self." James ordered Agins to punch out, and Agins was suspended for several days. The Respondent prepared a written warning that summarized the incident and stated, "[T]he aforementioned behavior, if repeated will result in termination of employment at Starbucks Corporation." The judge credited Agins' testimony that he never received this warning. Agins apologized for his outburst after he was called back to work.

District Manager Smith prohibited employees at the 9th Street store from wearing union pins. On November 20, Smith ordered those employees, including Peter Montalbano, to remove the pins on pain of being sent home. On November 21, Agins entered the 9th Street store while off duty, along with several other off-duty employees, in order to protest Smith's pin prohibition. Agins and the other off-duty employees were wearing union pins, and the protest was timed to coincide with Montalbano's shift.

Shortly after the group entered the store, Ifran Yablon, an off-duty assistant manager from a different Starbucks store who was a "regular customer" at the 9th Street store, approached Agins and asked him what the union button was for. The judge found from the credited evidence that Yablon's inquiry was "meant to be confrontational" and precipitated the ensuing incident. Agins believed that Yablon had previously made derogatory remarks to Agins' father about the father's support for the Union.[6] After some discussion about the Union and the

[5] All dates are 2005, unless otherwise stated.

[6] The Union had leafleted one of the Respondent's promotional events in the summer of 2004, and both Agins and his father were present. Agins testified that his father pointed Yablon out and reported that he had made derogatory remarks.

benefits offered by Starbucks to its employees, Agins brought up Yablon's insult to Agins' father, and the conversation escalated into a heated confrontation, during which both men spoke loudly and used hand gestures and obscenities. At some point, Agins told Yablon, "You can go fuck yourself, if you want to fuck me up, go ahead, I'm here."

Agins' friends intervened to stop the confrontation, and Agins withdrew to a table while Assistant Store Manager James told Yablon to "leave it alone." Yablon "chuckled" and left the store shortly thereafter. James then admonished Agins. Agins listened to James and remained seated with the group. He did not utter obscenities or make any threatening gestures toward James. James did not call the police or ask Agins to leave the store. Agins and his companions left the store about 10 minutes later.

Several weeks later, on December 12, the Respondent discharged Agins purportedly for disrupting business on November 21. The memorandum documenting the discharge, prepared by Store Manager Julian Warner, stated that Agins was ineligible for rehire because "[p]artner was insubordinate and threatened the store manager. Partner strongly support [sic] the IWW union."

The General Counsel argued that Agins' discharge violated the Act under two separate theories. First, he contended that Agins was engaged in protected, concerted activity at the 9th Street store on November 21 when he protested against the no-union button policy in support of employee Montalbano, and that the incident with Yablon during that protest was not so egregious as to deprive Agins of the protection of the Act under *Atlantic Steel,* above. Second, the General Counsel argued that the discharge was also unlawful under the test set forth in *Wright Line*.[7] Both theories were fully litigated, and the administrative law judge found the violation on both grounds. The Board adopted the judge's finding that Agins' discharge violated Section 8(a)(3) and (1) under an *Atlantic Steel* analysis, but did not reach the judge's *Wright Line* analysis and findings. 355 NLRB at 636 fn. 3.

The Second Circuit's Opinion

The court enforced the Board's order as to several unfair labor practices the Respondent did not challenge,[8] and granted the Respondent's cross-petition as to two others.[9] *Starbucks Corp.*, 679 F.3d at 82. Turning to Agins' discharge, the court found that the Board's analysis under *Atlantic Steel* "improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers." Id. at 79. The court stated that *Atlantic Steel*'s four-factor test was formulated in the context of employee outbursts on the factory floor or in a backroom office, where the primary concern is whether the outburst would impair employer discipline. Id. The court further stated that the first *Atlantic Steel* factor—the place of the outburst—"serves to distinguish outbursts in the presence of other employees from those away from other employees or in the course of grievance proceedings or contract negotiations. It has nothing to do with public venues where customers are present." Id. The court remanded the issue of Agins' discharge to the Board, stating that the Board should have the opportunity to decide what standard should apply when an employee, "while discussing employment issues, utters obscenities in the presence of customers." Id. at 80.

Discussion

As stated above, we have accepted as the law of the case the court's finding that the *Atlantic Steel* analysis is inapplicable in this case. Accordingly, we shall not apply that analysis here and shall assume that Agins' November 21, 2005 conduct lost the protection of the Act. Nevertheless, as more fully set forth below, we find that Agins' discharge violated Section 8(a)(3) and (1) under a *Wright Line* analysis. In particular, we find that the record establishes that the Respondent's discharge decision was motivated in part by Agins' prounion activities, which were clearly protected. In fact, as set forth above, the discharge form completed by Agins' store manager noted that Agins was ineligible for rehire in part because "Partner strongly support[s] the . . . union."[10]

[7] 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[8] Specifically, the court enforced the Board's unopposed findings that the Respondent violated the Act by (a) unlawfully prohibiting employees from discussing the Union while off duty; (b) discriminatorily prohibiting employees at its Union Square East store from using a company bulletin board to post items of a nonwork nature, including materials relating to the Union; (c) prohibiting off-duty employees employed at its Union Square East store from entering the back of the store; (d) promulgating and maintaining a rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions; (e) promulgating and maintaining a rule prohibiting employees from talking about terms and conditions of employment; (f) disciplining employee Tomer Malchi pursuant to its unlawful rule prohibiting employees from talking about the Union while allowing other nonwork-related discussions; and (g) discriminatorily preventing Malchi from working shifts at other Starbucks locations.

[9] Disagreeing with the Board, the court found lawful the Respondent's policy, implemented in 2006, limiting employees to wearing one union button, and the Respondent's discharge of employee Daniel Gross.

[10] Because we are assuming that Agins' conduct on November 21 lost the protection of the Act, we need not pass on the standard to be applied in deciding whether a retail employee engaged in misconduct in

Mixed motive cases are subject to the test set forth in *Wright Line*. To establish a violation of Section 8(a)(3) under *Wright Line*, the General Counsel must first show, by a preponderance of the evidence, that an employee's union activities were a motivating factor in the employer's decision to take adverse action against the employee. *Mesker Door, Inc.*, 357 NLRB No. 59, slip op. at 2 (2011). The elements required to support a finding of discriminatory motivation are union activity by the employee, employer knowledge of that activity, and antiunion animus by the employer. Id.

Here, as found by the judge, Agins openly participated in many union rallies and protests beginning in May 2005. The Respondent knew about that activity and suspected that Agins was a union supporter as early as April. The Respondent engaged in numerous unfair labor practices that demonstrate antiunion animus.[11] Moreover, as noted previously, the Respondent's written documentation regarding Agins' discharge, prepared by a store manager, expressly stated Agins' "strong[] support" for the Union as a reason he would be ineligible for rehire. Based on the foregoing evidence, we find that the General Counsel met his *Wright Line* burden of showing that Agins' union activities were a motivating factor in his discharge.

Once the General Counsel has met his initial burden under *Wright Line*, the burden of persuasion shifts to the employer to "demonstrate that the same action would have taken place even in the absence of the protected conduct." *Wright Line*, 251 NLRB at 1089. However, to meet its *Wright Line* defense burden, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), petition for review denied 70 F.3d 863 (6th Cir. 1995), enfd. mem. 99 F.3d 1139 (6th Cir. 1996).

The Respondent asserts that Agins' discharge was based on a final warning that it purportedly issued to Agins for his conduct on May 14, and that the discharge (on December 12) was consistent with its previous enforcement of valid, nondiscriminatory rules against other employees.[12] The record, however, does not support either of those claims.

First, the record reveals that the Respondent's discharge of Agins was inconsistent with the Respondent's more lenient treatment of other employees who engaged in similar or worse misconduct that, like Agins' November 21 outburst, occurred in the presence of customers.[13] Although the Respondent relies on evidence that other discharged employees engaged in similarly disruptive or insubordinate misconduct, Respondent's track record fails to establish that it would have terminated Agins in the absence of his protected prounion activities.[14]

Second, Agins' misconduct was provoked by Yablon, an off-duty supervisor who similarly used profanity during the confrontation.[15] There is no evidence that Yablon received any discipline for the incident or that the Respondent considered this provocation in deciding whether to discharge Agins for his part in the incident. See *Crown Cork & Seal Co*., 255 NLRB 14, 39 (1981) ("It is also significant in assessing Respondent's motivation in imposing the discipline that the employees and supervi-

the presence of customers loses the protection of the Act. Accordingly, we do not endorse our concurring colleague's articulation of a new standard, his interpretation or application of *Restaurant Horikawa*, 260 NLRB 197, 198 (1982), or any of his rationale for finding that Agins lost the protection of the Act under that standard.

[11] See above fn. 8.

[12] The Respondent cites rules prohibiting harassment of employees, customers, or vendors; prohibiting violence or threatened violence; and requiring employees to "provide a great work environment and treat each other with respect and dignity."

[13] Employee Troy Bennett received only a written warning for cursing on the selling floor in the presence of customers and yelling at his supervisor. Employee Claudia T. received a written warning for arguing and cursing in the customer area. Employee Noah Francis received a final written warning for making sexually suggestive comments "about a partner's/customer's body or dress," but was not discharged and instead received another warning when, 2 weeks later, he engaged in "unwanted physical conduct by grabbing a customer and dancing with her," leaving the customer and her husband visibly upset. Employee Kevin Bruckner received only warnings for a series of incidents in which he told a coworker what a bad job she was doing in front of a customer and said "you can fucking write me up if you like" to an assistant store manager in front of customers and other employees.

[14] An employer does not sustain its *Wright Line* defense burden "simply by showing that examples of consistent past treatment outnumber the General Counsel's examples of disparate treatment." *Avondale Industries*, 329 NLRB 1064, 1066 (1999). Rather, the Respondent "must prove that the instances of disparate treatment . . . were so few as to be an anomalous or insignificant departure from a general consistent past practice." Id. The record in the instant case is insufficient to support a finding that Respondent satisfied this burden. See *Septix Waste, Inc.*, 346 NLRB 494, 496-497, 505–506 (2006); *Synergy Gas Corp.*, 290 NLRB 1098, 1103 (1988) (one anomalous instance of disparate treatment insufficient).

[15] We note that, in contrast to the recitation of facts by our concurring colleague, the administrative law judge found, based on the credited evidence, that Agins and several other employees entered the store wearing union buttons in support of a worker there who had been required to remove his on pain of being sent home. The group engaged in no acts of protest except wearing union buttons while seated at the rear of the facility. Then Yablon, a manager from another store, "precipitated" a heated discussion with Agins in which "both men made hand gestures and used profanity." After ten minutes, the group left.

sors who engaged in the actually 'disruptive' activities for which [the employee] was held 'responsible' were never themselves disciplined" and supervisor "who sought to exacerbate the 'disruption'" by using foul and abusive language towards another employee "was never questioned or disciplined . . . ."), enfd. mem. 691 F.2d 506 (9th Cir. 1982).

Third, the Respondent was unable even to identify the Respondent official(s) who made the decision to terminate Agins. District Manager Smith, who normally makes discharge decisions, testified that he did not make the decision and was not present when the decision was made. Smith also testified that the decision was made when Director of Partner Resources Traci Wilk felt they "had enough," but he could not recall the details of the termination. Wilk herself testified that her role was solely to provide a recommendation. The Respondent's failure to identify the decision maker and present his or her testimony concerning the reason or reasons for the termination further weakens its *Wright Line* defense.[16] See *Boston Mutual Life Insurance*, 259 NLRB 1270, 1282 (1982) (where discipline normally imposed by regional management, termination of employee by corporate vice president supported inference that protected activity played a role in discharge decision), enfd. 692 F.2d 169 (1st Cir. 1982).

Fourth, the Respondent presented an exaggerated version of Agins' actions on November 21 that the judge largely discredited.[17] The judge similarly found that the Respondent's characterization of Agins' history of interpersonal issues was "exaggerated, at best." As the judge observed, the proffer of false reasons for Agins' discharge permits an inference that the real reason was an unlawful one that the Respondent seeks to conceal. *Key Food*, 336 NLRB 111, 114 (2001).

Finally, the judge credited Agins' testimony that he never received a warning (final or otherwise) regarding the May 14 incident. This critically undermines the Respondent's argument that Agins can only be considered comparable to discharged employees who engaged in misconduct following the issuance of a final warning. In addition, although Agins received a suspension in connection with the May 14 incident, it was more than 6 months before his discharge. Moreover, even taking into account the May 14 incident, the Respondent's explicit reference to Agins' strong union support in the discharge documentation casts considerable doubt on the Respondent's claim that Agins would have been discharged for the November 21 conduct in the absence of his protected activity.

In light of the foregoing considerations, and especially given the direct, documentary evidence of unlawful motivation, we find that the Respondent failed to meet its burden to show that it would have terminated Agins in the absence of his protected union activity. We accordingly conclude that even assuming Agins' actions on November 21 lost the protection of the Act, his discharge violated Section 8(a)(3) and (1).

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. Specifically, having found that the Respondent violated Section 8(a)(3) and (1) by discriminatorily discharging employee Joseph Agins, we shall order the Respondent to offer Agins full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed. In addition, we shall order the Respondent to make Agins whole for any loss of earnings and other benefits suffered as a result of the unlawful action against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

The Respondent shall compensate Agins for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

[16] The Respondent's documentary evidence was similarly incomplete or unworthy of credence. Assistant Store Manager James testified that she prepared an incident report outlining the events of the evening of November 21 on a form maintained by the Respondent. When she was shown a page containing five lines of handwritten narrative, James testified she was pretty sure she had written more. No other document alleged to be James' initial statement was offered into evidence. Instead, the Respondent offered into evidence an email containing a narrative of what purportedly had occurred. However, that email was sent from the 9th Street store's generic email account with no indication of its author or sender, and no witness, including James, testified that he or she had written or sent it. The judge properly found that this document's "creation and maintenance by the Respondent raises questions about who authored it and what its ostensible purpose might have been."

[17] As more fully set forth in the judge's decision, the Respondent claimed that Agins resisted the efforts of his companions to intervene in the argument, that Agins continued to follow Yablon to the door, that James tried to calm Agins down but that Agins continued to move towards the door yelling profane comments, and that Agins made threatening gestures at James. The judge explicitly discredited all of these assertions. *Starbucks*, above, 354 NLRB at 905.

The Respondent shall also be required to remove from its files any references to the unlawful discharge of Agins, and to notify him in writing that this has been done and that the discharge will not be used against him in any way.

ORDER

The National Labor Relations Board orders that the Respondent, Starbucks Corporation d/b/a Starbucks Coffee Company, New York, NY, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting Local 660, Industrial Workers of the World or any other labor organization.

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

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

(a) Within 14 days from the date of this Order, offer employee Joseph Agins full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

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

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

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Joseph Agins, and within 3 days thereafter, notify Agins in writing that this has been done and that the discharge will not be used against him in any way.

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

(f) Within 14 days after service by the Region, post at its 9th Street facility in New York, New York, copies of the attached notice marked "Appendix."[18] Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since December 12, 2005.

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

Dated, Washington, D.C. June 16, 2014

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

MEMBER MISCIMARRA, concurring.

My colleagues find that the Respondent engaged in antiunion discrimination that violated Section 8(a)(3) and (1) of the Act by discharging employee Joseph Agins. Although Agins engaged in a November 21 outburst that precipitated his discharge, the Respondent's discharge documentation expressly indicated, in part, that he "strongly support[ed] the . . . union." Even if Agins'

[18] The notice has been modified to conform with *Durham School Services*, 360 NLRB No. 85 (2014). 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."

November 21 outburst lost the Act's protection, my colleagues find that (i) the record contains direct evidence that the Respondent was motivated, in part, by Agins' other prounion activities that were protected under the Act; (ii) the General Counsel under *Wright Line* established that protected activity was at least a "motivating factor" in the Respondent's decision to discharge Agins;[1] and (iii) although some employees were discharged for misconduct similar to Agins' November 21 outburst, other employees engaged in similar or worse misconduct without being discharged, and the latter examples (among other things) prevent the Respondent from satisfying its burden, under *Wright Line*, to prove it would have discharged Agins in the absence of antiunion motivation.

The facts recited above are undisputed, including the discharge documentation that expressly referred to Agins' prounion activities, and examples of other employees who received more lenient treatment for comparable or worse misconduct. Consequently, I join in my colleagues' finding that the record supports the judge's finding that Agins' employment termination violated the Act.[2]

[1] In *Wright Line*, the Board explicitly characterized the General Counsel's initial burden as requiring proof that the challenged adverse action was motivated by antiunion animus. The Board stated that the General Counsel must, as an initial matter, make "a prima facie showing sufficient to support the inference that protected conduct *was a 'motivating factor' in the employer's decision*." 251 NLRB at 1089 (emphasis added). Contrary to the three-element formulation set forth in the majority opinion in this case, generalized antiunion animus does not satisfy the initial *Wright Line* burden absent evidence that the challenged adverse action was motivated by antiunion animus. See, e.g., *Roadway Express*, 347 NLRB 1419, 1419 fn. 2, 1422–1424 (2006) (evidence of union's generalized animus towards financial core payers insufficient under the circumstances to sustain General Counsel's burden of proof); *Atlantic Veal & Lamb, Inc.*, 342 NLRB 418, 418–419 (2004) (finding that employer harbored animus against union activity, but that there was insufficient evidence to establish that animus against employee Rosario's union activity was a motivating factor in the decision not to recall him), enfd. 156 Fed. Appx. 330 (D.C. Cir. 2005). See also *Valley Health System, LLC*, 352 NLRB 112, 112 fn. 2 (2008) (Member Schaumber notes that the Board and courts sometimes characterize the initial *Wright Line* burden as "adding as an independent fourth element the necessity for there to be a causal nexus between the union animus and the adverse employment action" [citations omitted]). More generally, the Board's task in all cases that turn on motivation "is to determine whether a causal relationship existed between employees engaging in union or other protected activities and actions on the part of the employer which detrimentally affect" their employment. *Wright Line,* above, 251 NLRB at 1089.

[2] Unlike my colleagues, however, I do not rely on the Respondent's failure to introduce evidence that it disciplined Assistant Manager Ifran Yablon as support for this violation. Even assuming Yablon was not disciplined, that fact would be relevant to the *Wright Line* analysis only if Yablon and Agins were similarly situated, despite the fact that they held different positions and worked in different stores under different immediate supervision. Given the weight of the other evidence summarized above, I find it unnecessary to resolve that issue.

In light of that finding, my colleagues do not make any findings regarding whether Agins' conduct on November 21 actually lost the Act's protection. For the same reasons, they find it unnecessary to pass on the standard we should apply to decide whether a retail employee who engages in misconduct in the presence of customers loses the protection of the Act. However, the Second Circuit remanded the case specifically for the Board to make these determinations. Accordingly, I would resolve both of those issues. Doing so, I would find that Agins' conduct was unprotected, and the Respondent's decision to terminate Agins' employment would have been lawful had the Respondent acted based on that incident alone.

This case is on remand from the Second Circuit, which criticized the judge's finding that Agins' November 21 outburst—though inappropriate—was nonetheless protected under the Act. The court of appeals noted that employee misconduct in the presence of customers is not subject to the standard articulated in *Atlantic Steel Co.*, 245 NLRB 814, 816 (1979). As the court of appeals reasoned:

> We think the analysis of the ALJ and the Board *improperly disregarded the entirely legitimate concern of an employer not to tolerate employee outbursts containing obscenities in the presence of customers.* When the Board formulated its four-factor test in Atlantic Steel for determining whether an employee's obscenities would cause the employee to lose the protection of the Act, *it was not considering obscenities in a public place in the presence of customers.* The context was the workplace, e.g., the factory floor or a backroom office, and the concern was whether the outburst would impair employer discipline.

679 F.3d at 79 (emphasis added).

Apart from concluding that *Atlantic Steel* "is inapplicable to an employee's use of obscenities in the presence of an employer's customers," id. at 80, the court posed an additional question for resolution by the Board. In reference to Agins' off-duty status when his November 21 outburst occurred in the Respondent's store, the court stated that the Board should address "whether an employee's outburst in which obscenities are used in the presence of customers loses otherwise available protection *if the employee is off duty* although on the employer's premises." Id.

I agree with the court that the central concern underlying an *Atlantic Steel* analysis is the potential for workplace outbursts to undermine an employer's authority,

and that such an analysis is ill-suited to determining whether employee outbursts in the presence of customers lose the Act's protection because of their potential to harm the employer's business. Thus, I find that the judge incorrectly relied on *Atlantic Steel* when evaluating Agins' November 21 outburst. In my view, the correct standard, as the Board previously held in *Restaurant Horikawa*, 260 NLRB 197 (1982), is that retail employees lose the Act's protection if their conduct causes disruption of or interference with the business.[3] The Board has indicated that "different rules" apply to retail establishments, including restaurants, based on the unique challenges associated with their business:

> The Board has traditionally acknowledged the necessity for applying different rules to retail enterprises from those to manufacturing plants with respect to the right of employees to engage in union activity on their employer's premises. Specifically, the Board has recognized that *the nature of retail establishments, including restaurants, requires that an atmosphere be maintained in which customers' needs can be effectively attended to and that, consequently, a broad proscription of union activity in areas where customers are present is not unlawful*. As a result, the Board has allowed retail establishments to impose no-solicitation rules which preclude soliciting in areas frequented by customers so as to prevent disruption of the customer-salesperson relationship. See *Marshall Field & Company*, 98 NLRB 88, 92 (1952), enfd. as modified 200 F.2d 375 (7th Cir. 1952). Although a no-solicitation rule is not involved in the instant case, we find the principles which underlie the broad proscription of union solicitation in a retail setting are equally applicable to conduct of this kind. . . . *[W]e conclude that this uninvited invasion of Respondent's restaurant premises transgressed the boundaries by which concerted activity, even that which, as here, was nonviolent, and in protest of Respondent's unlawful conduct, is deemed protected by the Act. Consequently, the demonstrators inside the restaurant did not enjoy the Act's protection*.

260 NLRB at 198 (emphasis added; footnotes omitted).

Regarding the additional question posed by the court of appeals, I would find that retail employees lose the Act's protection, to the extent it is "otherwise available," if they enter a retail establishment while off-duty and, while inside the store, engage in disruptive conduct in the presence of customers. Preliminarily, the Act does not confer protection upon employees, whether or not they are on duty, to occupy an employer's premises and disrupt or interfere with normal operations. *NLRB v. Fansteel Metallurgical Corporation*, 306 U.S. 240 (1939); *Quietflex Manufacturing Co*., 344 NLRB 1055 (2005); see also *Restaurant Horikawa,* 260 NLRB at 198-199 (off-duty employee's disruptive protest inside restaurant found to be unprotected, and Board "attach[es] no significance" to individual's status as an employee and whether any rules prohibited employees from entering the restaurant while not working).

Moreover, the relevant standard—where an employee's actions lose protection if they cause actual or likely disruption to the business—is satisfied in the instant case because of the November 21 actions by Agins, regardless of whether he was on duty or off duty, and whether or not customers were aware of his employee status. Although the Respondent's employees prepare beverages, process payments, and clean and stock the store, the "business" of Starbucks—like most retail establishments—clearly requires maintenance of a retail environment that is appealing to customers. Indeed, the Respondent's Employee Handbook indicates that providing "a comfortable and upbeat meeting place" is an essential part of its business model.

In the instant case, off-duty employee Agins entered a Starbucks store with "several other individuals" for the purpose of conducting a protest; there was a "heated" angry exchange with a "regular customer" at the store (Ifran Yablon, who was an off-duty manager from another store); and Agins stated in a raised voice: "You can go fuck yourself, if you want to fuck me up, go ahead, I'm here."[4] According to the judge, "Agins became involved

[3] In *Restaurant Horikawa*, above, 30 individuals—including employee Kubota—engaged in a protected demonstration outside the restaurant, but then entered the restaurant and "paraded boisterously about" during the dinner hour for 10 to 15 minutes. In these circumstances, the Board found that Kubota lost the Act's protection and was lawfully discharged. The Board has applied this "disruption and interference" standard in subsequent cases involving retail establishments. See, e.g., *Saddle West Restaurant*, 269 NLRB 1027, 1042–1043 (1984) (single comment in front of a customer about boycotting the restaurant not so disruptive as to lose the protection of the Act); *Thalassa Restaurant*, 356 NLRB No. 129, slip op. at 1 fn. 3 (2011) (Board majority, with Member Hayes dissenting, finds that an employee who "briefly" entered restaurant with group of nonemployees during off-peak time to deliver a letter protesting alleged labor law violations did not lose the protection of the Act where there was no evidence that the group disturbed the handful of patrons present, blocked ingress or egress of any individual, was violent or caused damage, or prevented any employee from performing his work).

[4] While Yablon may have initiated the encounter by asking Agins what his union button was for, the encounter escalated into a heated, obscenity-laced confrontation only after Agins brought up Yablon's earlier insult to Agins' father, as my colleagues acknowledge. Thus, I need not decide whether Agins would have lost the Act's protection under *Restaurant Horikawa* were it shown that Yablon instigated the disruption.

in an altercation with a customer in Respondent's retail facility," and "the argument . . . carried with it a likelihood that it could have resulted in a disruption in business as both employees and customers may have overheard the exchange." The judge—though finding that Agins' conduct was not as extreme or prolonged as described by the Respondent's witnesses—described Agins' actions as "disruptive conduct" that included the "use of profanity."

Here, as in *Restaurant Horikawa,* the employee conduct "interfered with Respondent's ability to serve its patrons in an atmosphere free of interruption and unwanted intrusion; and it is likely that such conduct infringed on the customers' dining enjoyment. Such an invasion of an employer's premises might be hard to find warranted even in an industrial setting. In a restaurant or other retail establishment it is wholly unwarranted and cannot be justified regardless of purpose or origin." 260 NLRB at 198 (footnote omitted). Because Agins entered the Respondent's retail store for the purpose of conducting a protest, and considering the "business" of the Respondent and the judge's conclusion that Agins engaged in "disruptive conduct" with a "likelihood" that it "could have resulted in a disruption in business," I would find Agins' actions to be unprotected by the Act.

For these reasons, I concur in the majority's decision.

Dated, Washington, D.C. June 16, 2014

Philip A. Miscimarra, Member

NATIONAL LABOR RELATIONS BOARD

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting Local 660, Industrial Workers of the World or any other labor organization.

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

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

WE WILL make Joseph Agins whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest compounded daily.

WE WILL compensate Joseph Agins 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 discharge of employee Joseph Agins, and WE WILL, within 3 days thereafter, notify Agins in writing that this has been done and that the discharge will not be used against him in any way.

STARBUCKS CORPORATION D/B/A STARBUCKS COFFEE COMPANY

The Board's decision can be found at www.nlrb.gov/case/02-CA-037548 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.