

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
SAN FRANCISCO BRANCH OFFICE

JOSEPPI'S LLC d/b/a ARCATA
THEATRE LOUNGE,

Respondent

and

Case 20-CA-292430

REBECCA MAYNARD, an Individual

Jason P. Wong, Esq.,
for the General Counsel.
Timothy Overturf, pro se, and
Frank Martin, Esq., on brief,
for Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. This case was tried in person on November 8, 2022, in Arcata, California. The complaint alleges that the Respondent violated Section 8(a)(1) of the Act by discharging Charging Party Rebecca Maynard because she engaged in protected concerted activity, that is, discussing Respondent's tightly controlled tipping policies with fellow employees and raising the matter with Respondent. Respondent filed an answer denying the essential allegations of the complaint. After the conclusion of the trial, the General Counsel and the Respondent filed briefs, which I have read and considered.

Based on the briefs and the entire record, including the testimony of the witnesses and my observation of their demeanor, I make the following

FINDINGS OF FACT

I. JURISDICTION

5 Respondent is a California limited liability company with a place of business in Arcata,
California, where it is operates an entertainment venue that shows movies, hosts concerts,
shows and private events and serves food and beverages to patrons. I find, as Respondent
admits, that Respondent is an employer engaged in commerce within the meaning of Section
2(2), (6) and (7) of the Act. Tr. 33-34.

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. Background

15 Respondent is owned by Timothy Overturf (Overturf) and employs some 15 to 18
employees, including about 5 or 6 bartenders, about half working on each of two shifts. Tr. 42,
44. Charging Party Rebecca Maynard was hired in late August 2021 to work as a bartender for
20 three days a week during weekends. She worked from the early evening until 1:30 or 2 am in the
morning. Tr. 43. She remained employed by Respondent until October 7, 2021, when she was
discharged. Tr. 67-68. Her supervisors included General Manager Monica Munoz (Monica) and
her brother, Bar Manager Mason Munoz (Mason). Tr. 44. Overturf and both of the Munoz's are
admitted supervisors, as are Floor Manager Ida Overturf (Ida), Timothy's sister, and Security
25 Manager Evan Edkin (Edkin). Bookkeeper and Human Resources Representative Yuma
Overturf (Yuma) is an admitted agent of Respondent. See Tr. 28, 34 and paragraph 4 of the
Complaint. G.C. Exh. 1(c).

2. Maynard Questions Respondent's Tipping Policy

30 On her first day at work, Maynard noticed that Floor Manager Ida removed all the cash
tips from the tip jar, and Maynard questioned Ida on that practice. Ida explained that it was
Respondent's policy to collect all the bartenders' cash tips, calculate the total and allot them to
the bartenders by way of their paychecks in a tightly controlled and managed manner by
35 Respondent. Tr. 45-46. In the following days, Maynard talked to other employees and
bartenders about the Respondent's controlled tip-sharing arrangement, with which she apparently
disagreed. Tr. 47-51, 57-58. Maynard discussed the tip-sharing policy with another bartender
named Katelyn one evening and when asked her opinion of the tip-sharing policy, Katelyn
opined to Maynard that she thought "she didn't think it was fair, and she thought it sucked." Tr.
40 47-48.) Katelyn next asked Maynard what she was going to do about this unfair tip-sharing
policy for bartenders and Maynard responded saying that there are things they could do about it,
they could work on finding a solution to this unfair policy. Id.

45 Maynard also talked to Ida about her concern that one of the other bartenders was not
receiving her tips appropriately and Ida responded that that other bartender would be
compensated appropriately. Tr. 52-53.

In late August or early September, Maynard attended a staff meeting with other employees, including bartenders and security staff. General Manager Monica led the meeting and other supervisors and agents were in attendance. Tr. 53-55, 118. Monica distributed Respondent's handbook policy at the meeting. Tr. 54-55. She read aloud the section dealing with "Company Tipping Policy," which states as follows:

The Arcata Theatre Lounge implements a tipping policy for all shows, events, & movies. Kitchen, Dish, Security and Barback are tipped out from the bar and concession pools based on the tip out sheet submitted by the bartenders or concessions. All employees have the right to be present when tips are counted. All cash and credit card tips will be paid out on your paycheck every Monday. Under the Publication 531 (2019) we are obligated to report all tips to the IRS. G.C. Exh. 2.

According to General Manager Monica, at the meeting, Maynard questioned why Respondent did not pay out the tips in cash and she was the only one who raised questions about the matter. Tr. 177-178, 180-181.

On September 20, Monica received a text from another bartender named Carla letting Monica know that Maynard was "counting cash at the end of the night," apparently referring to tips. R. Exh. 4. Monica viewed that as inappropriate because it was none of Maynard's business to count the "tip pool." Monica never specifically followed up with Maynard about this incident, but she had several conversations with Maynard about the Respondent's tip-sharing arrangement, and Monica told Maynard to talk with Yuma about the Respondent's tip pool process. Tr. 176-177.

Ethan Van Lent (VanLent) was a security guard for the Respondent. He and his girlfriend lived with Maynard for a short period in early October while he and Maynard were both working for Respondent. Tr. 123. Van Lent was promoted to a supervisory position in early October, one or two days before Maynard was fired. Tr. 126-127. According to Van Lent, he lived in Maynard's house for "a few days to about a week." Tr. 126. He did not recall whether he moved out before or after she was terminated (Tr. 126), but Maynard was clear in testifying that he moved out the day she was terminated on October 7. Tr. 75. I credit her account.

While living in Maynard's house, Van Lent heard a lot of talk about Maynard's problems with Respondent's tightly controlled tipping policy. Tr. 124-125, 127-128. According to Van Lent, he overheard Maynard talking to an attorney about Respondent's tipping policy. Maynard also told Van Lent about the call and that the attorney had some connection to Overturf's father. Tr. 129. A "few hours" later, Van Lent reported what he had overheard and what Maynard told him about the matter to Ida and Overturf. According to Van Lent, he told them "how [Maynard] was trying to take a legal route against the ATL and management for stealing tips." And, again according to Van Lent, "[Tim] was very upset by it, especially when I said that it—they were—she was also bringing his father into it while he was visiting." Tr. 130. I credit this testimony, which was not contradicted by either Ida or Tim. Its reliability is confirmed by the fact that, at the time of his testimony, Van Lent was a supervisor, who was called as a witness by the

Respondent. See Tr. 121-122. I also find, consistent with the testimony of both Van Lent and Maynard that Van Lent's report of Maynard's activities to Tim and Ida occurred on the day of Maynard's discharge.

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3. Maynard is Discharged

On October 7, 2021, at about 7 pm, Maynard met with General Manager Monica and Owner Overturf in an office at the facility. Overturf told Maynard she was being terminated for insubordination. His initial explanation to Maynard was that people were complaining about her and she was making them uncomfortable. When Maynard pressed Overturf for specifics, referring to her disagreement over Respondent's tightly controlled tipping policy, Overturf said, "you complain to everyone about how we pay you. You're not happy about how we pay you." Tr. 67-69. He also told Maynard that her talking about wages brought down morale and that amounted to insubordination. Tr. 69. The above is based on Maynard's uncontradicted testimony. Overstreet did not testify about this conversation or any other matter in this case, even though he represented his company and handled the questioning of witnesses at the trial. Monica testified, but she did not testify at all about what took place at the termination meeting. I find no reason to discredit Maynard's uncontradicted testimony about what happened at the termination meeting, and I therefore credit it.

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At 9:32 pm, on the night of October 7, Maynard texted Monica stating that she expected to work until midnight and asked that the necessary paperwork for the discharge be sent to her by email. Monica replied that she would have Yuma take care of that. Maynard then texted Monica the following:

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I guess I really feel bummed that I was terminated for questioning the tip pooling policy. I don't think I was being cruel or malicious. I was just trying to figure it all out as the tip pooling at Arcata Theatre Lounge didn't make sense . . . to me. That's all. Best to you. Anyhow, I can accept your decision. G.C. Exh. 3

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At 11:38 pm, that same night, Yuma sent Maynard an email with the subject line, "Last paycheck and tip out sheets." It confirmed that Maynard's last paycheck was being sent to her bank by direct deposit. The email also stated that Yuma was sending Maynard tip out sheets "with the full tip amount paid out to you for each show." Attached were the tip out sheets. G.C. Exh. 4.

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Four days later, on October 11, at 8:18 pm, Monica replied to Maynard's text to her on the night of the discharge as follows:

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I wanted to reach out to clarify, you were not let go because you were asking about tips. We had multiple complaints from different employees that you were saying inappropriate things in the workplace creating an uncomfortable work environment. You were repeatedly heard calling coworkers explicit names, painting while you were on the clock and were repeatedly late for shifts. Again, to clarify, ATL has an open door and open book policy for the voluntary tip

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5 pools and was reviewed in the last employee meeting last month. Yuma went over your paychecks with you and explained our tip pool process with you when you asked her for clarification. We have supplied you with the breakdown of every tip pool you were included in during your employment here. If you need any further clarification on tips, please ask, as we are more than willing to help you understand the process. You had every chance to come to me and talk to me about any questions you had about pay or tips and did not make any effort for clarification yet went to multiple workers to complain. G.C. Exh. 3

10 4. Evidence on Alleged Improprieties

15 As indicated above, nothing specific was said about the reasons for Maynard's discharge in the termination meeting of October 7, except that Maynard was talking to employees about wages; moreover, the October 11 text from Monica mentioned Maynard's complaints to multiple workers about Respondent's tipping policy. But both in the October 11 text and in trial testimony from some of its supervisors, Respondent mentioned other matters. In the October 11 text, Monica mentioned that Maynard was late for shifts, painted on work time and called employees explicit names. Other alleged improprieties that were not mentioned either in the termination interview or in the October 11 text came from Respondent's witnesses at the hearing. 20 Some of the allegations were vague and others lacked substance. But none of these supposed improprieties resulted in a written warning from Respondent prior to the discharge.

25 I assume that the charge of calling employees explicit names deals with the allegation that, on one occasion, Maynard hurled a profanity in Bar Manager Mason's way. He testified that he was working with Maynard after closing hours in the early morning hours of a date in mid-September.¹ When he asked her to take out the trash, she said, under her breath, "this little fucker's asking me to do this now." Tr. 164, 166. Mason did not respond and did not say anything to her about what Maynard had said. Tr. 167.² Nor is there any evidence that Maynard did not perform the assigned task. But Mason reported the matter to General Manager Monica, 30 stating that "Rebecca [Maynard] needed to be written up." Tr. 175. Mason met with Monica on the matter the next day. Tr. 175. Monica testified that she never followed up on the matter by speaking to Maynard about it. Tr. 182-183.

35 Head of Security Edkin also testified about the above incident, but I found his testimony about the matter unreliable. First, it is unclear from Edkin's testimony whether he observed the incident firsthand or simply related a hearsay account of the incident. In any event, his story was an exaggerated version of the testimony of Mason and Maynard related above. On direct, Edkin testified that, when Mason told Maynard to take out the trash, "she essentially told him to . . . 'Fuck Off' and was kind of mocking in doing so." Tr. 139. His opinion was that the statement 40 was "blatant insubordination to a supervisor," although he acknowledged that he was not Maynard's supervisor and not authorized to "give out punishment." Tr. 139-140. Thus, Edkin's

¹ Other evidence indicates that the date may have been October 2.

² Maynard basically supported Mason's version of the incident, except that she testified that Mason was drunk at the time. Tr. 187-189.

opinion or subjective view of the matter is irrelevant, particularly since Monica, the General Manager, never meted out punishment or even spoke to Maynard about the incident.

5 On cross-examination, Edkin embellished his story. He described Mason as “very upset”
at Maynard’s statement that Edkin testified was made to Mason’s “face.” Tr. 145. That was
contrary to Mason’s testimony, which described Maynard’s statement as being made under her
breath. Nor did Mason testify that he was upset or even that he talked about the matter with
Edkin. Indeed, there was no mention at all of Edkin in Mason’s testimony. And Edkin admitted
10 he was unable to recall specifics about any conversation he may have had with Mason about the
matter. Tr. 145-147. Moreover, when asked what he told Monica about the alleged
insubordination, Edkin vacillated and was evasive and somewhat unresponsive. Tr. 151-152.
But he eventually testified that she told him that she would “take care of it.” Tr. 152. Monica
confirmed that Edkin did notify her about the incident and asked to talk to her about the matter,
but she did not testify about whether they did talk about the matter or what was said. See Tr.
15 178. In these circumstances, I do not find Edkin’s testimony on this issue credible and because of
that finding, I cannot find any of his testimony on any relevant issue in this case credible.

I could find nothing in the record to support the allegation in the October 11 text that
Maynard was repeatedly late for shifts. If that were the case, the Respondent would have
20 introduced its own records to support that allegation. And no such records were provided.

In addition to the profanity in Mason’s presence, which was reported to Monica but not
followed up by her with a written warning or even a talk with Maynard, Monica also testified
about other complaints about Maynard’s conduct. Some were specific—for example, Maynard
25 asking Ida about dating her son, and painting during working hours. See Tr. 178-179. But
others were so general or vague that they cannot even be reliably analyzed. See Tr. 179-180.
She also vaguely and cryptically mentioned Edkin’s complaint about Maynard’s “conduct at
work and how inappropriate it was.” Tr. 178. I will assume that this dealt with Edkin’s
allegations of inappropriate touching, although it is a stretch to interpret Monica’s testimony that
30 way. Mason also testified about inappropriate touching by Maynard, but Monica did not
mention getting complaints from him about the matter. The important thing about all of these
alleged improprieties is this: Monica admitted that she, who was the General Manager of
Respondent and the official in charge of issuing written warnings (Tr. 175), never issued any
written warnings to Maynard about these alleged improprieties. (Tr. 181.) In addition, except
35 for the painting, Monica never even talked to Maynard about any of these complaints. Tr. 182-
183. Even as to the painting, it is unclear when Monica talked to Maynard about this matter
because she never put a date on that conversation. Tr. 179, 181. Nor does the record show that
Maynard’s painting continued after Monica told her not to do so. Indeed, had she defied
Respondent’s verbal warning, a written warning would surely have followed—and it did not.
40 Moreover, on the issue of Maynard asking Ida about dating her son, Monica said she learned
about this in late September, well before the discharge, but, here again, Monica never spoke to
Maynard about the matter. Tr. 182. The failure of Monica to issue written warnings or even talk
to Maynard about any of these matters, except for the painting, shows that it is unlikely that they
were viewed as serious by Respondent—certainly they were not considered dischargeable
45 offenses.

On rebuttal, Maynard again took the stand and credibly denied some of the allegations made by the Respondent's supervisory witnesses. As to a suggestion that she came to work sick, she related that she did so, but told Monica and Ida about how she thought she may have had Covid and would take a test and not come back until she tested negative. They both said that was a good idea and she left and came back to work the next day because she did indeed test negative. Tr. 191-193. This testimony by Maynard was not contradicted by Monica or Ida. She also denied inappropriately touching Edkin or Mason. Maynard also testified that she was never told by a top management official from Respondent that she was inappropriately touching employees or calling them names. Tr. 193-196. Nor, according to her uncontradicted testimony, was she told of any of these other alleged improprieties or that her work performance was poor in her termination meeting on October 7. Tr. 196. If these alleged improprieties had indeed been factors in the discharge decision, they would have been specifically mentioned in the termination interview.

B. Discussion and Analysis

The General Counsel asserts that Maynard was discharged for engaging in protected concerted activities, that is, talking with employees about her objections to Respondent's tightly controlled tipping policies and bringing those objections to the attention of management. In its brief, Respondent concedes that Maynard's complaints about Respondent's tipping policy amounted to concerted protected activity. See R. Br. at 7. And I so find. Such cases are analyzed under the dual motive causation test set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See also *Security Walls, Ltd.*, 371 NLRB No. 74, slip op. 3 (2022). Under *Wright Line*, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in a respondent's adverse action. If the General Counsel meets that initial burden, the burden shifts to the respondent to show that it would have taken the same action even absent the employee's protected activity. The respondent does not meet its burden merely by showing that it had a legitimate reason for its action; it must persuasively demonstrate that it would have taken the same action in the absence of the protected conduct. See *L.B.&B. Associates, Inc.*, 346 NLRB 1025, 1026 (2006). A showing of pretext also supports the initial showing of discrimination. See *Wright Line*, supra, 251 NLRB at 1088 n.12, citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (where a respondent's reasons are false, it can be inferred "that the [real] motive is one that the [respondent] desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference."). But a finding of pretext also dispenses with the need for the second part of the *Wright Line* analysis since that finding, by definition, shows that the action would not have been taken absent the protected activity. See *Rood Trucking Company, Inc.*, 342 NLRB 895, 898 (2004).

The evidence overwhelmingly supports the inference that Respondent fired Maynard for talking to employees in opposition to Respondent's tightly controlled tipping policy and bringing those concerns to the attention of management. Her activity in this regard was extensive and well known by management. Monica conceded that, in the staff meeting at which the tipping policy was specifically discussed, Maynard was the only employee who spoke out on the matter.

Indeed, at the termination meeting, Respondent's owner Overturf specified that the reason for the discharge was that "you complain to everyone about how we pay you" and told her that she brought down morale in a way that amounted to "insubordination." Monica confirmed that this was the reason in her October 11 text to Maynard, in which, after mentioning other reasons, she stated as follows:

Again, to clarify, ATL has an open door and open book policy for the voluntary tip pools and was reviewed in the last employee meeting last month. Yuma went over your paychecks with you and explained our tip pool process with you when you asked her for clarification. We have supplied you with the breakdown of every tip pool you were included in during your employment here. If you need any further clarification on tips, please ask, as we are more than willing to help you understand the process. *You had every chance to come to me and talk to me about any questions you had about pay or tips and did not make any effort for clarification yet went to multiple workers to complain.* (Emphasis added).

These statements essentially admit the violation.

Here, Maynard's questioning Respondent's tightly controlled employee tip-sharing policy extended to other employees thereby making the topic a group concerted activity. To be protected, a worker's action must be "concerted" and engaged in "for the purpose of ... mutual aid or protection." *Alstate Maintenance, LLC*, 367 NLRB No. 68, slip op. at 2 (2019). Actions are concerted when they're "sufficiently linked to group action," such as if they involve bringing "truly group complaints" to management or initiating, inducing or preparing for group action. *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985)(Meyers II), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), supplemented, *Meyers Industries*, 281 NLRB 882, 887 (1980), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In addition, it is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp.*, 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

Maynard cleared this bar by discussing concerns about Respondent's tightly controlled tip-sharing policy with other employees and during an employees' meeting called by Respondent and attended as a mandatory meeting by employees and Respondent's management. I find that Maynard's discussions with other bartenders and employees and her complaints to Respondent's management about Respondent unfair tightly controlled tipping policy was protected conduct involving a group grievance from bartenders and other employees working at Respondent regarding what Maynard and other employees thought were unfair payments of tips and wages.

Here, Maynard sought her coworker Katelyn's assistance in eliciting group concerns or action in obtaining more information from Respondent as to exactly how Respondent's tightly controlled tip-sharing policy worked and possibly seeking an alternative solution to share tips

among bartenders and other employees in a more equitable manner. This involved Maynard's communications with her coworkers with a concerted plan of action of approaching Monica and Yuma and eventually having a management meeting to have management explain Respondent's tightly controlled tip-sharing policy. Even under *Myers II*, and its progeny, Maynard's conduct in approaching her coworkers on from August through October 7, to seek their support of her efforts regarding fixing Respondent's unfair tip-sharing policy in this shared workplace concern would constitute concerted activity. Solicited employees do not have to agree with the soliciting employee or join that employee's cause in order for the activity to be concerted. See *Mushroom Transportation*, 330 F.2d at 685; *Circle K Corp.*, 305 NLRB at 933; *Whitaker Corp.*, 289 NLRB at 934; and *El Gran Combo*, 284 NLRB at 1117. Nor do the solicited employees have to share an interest in the matter raised by the soliciting employee for the activity to be concerted. See *El Gran Combo*, 284 NLRB at 1117; and *Hintze Contracting Co.*, 236 NLRB 45, 48 (1978), enfd. mem. 1979 WL 32447 (9th Cir. 1979). Further, the protected, concerted nature of an employee's complaint to management is not dependent on the merit of such a complaint. See *Spinoza, Inc.*, 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973).

Having found that Maynard's discussions with her coworkers about Respondent's tip-sharing policy were concerted activities based on the totality of the record evidence, I now turn to the issue of whether Maynard's concerted activities were engaged in for the purpose of "mutual aid or protection" under Section 7 of the Act.

The concept of "mutual aid or protection" focuses on the goal of the concerted activity; whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees. *Alstate Maintenance, LLC*, supra at 8 citing *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565-566 (1978). The analysis focuses on whether there is a link between employee activity and matters concerning the workplace or employees' interests as employees. Although personal vindication may be among the soliciting employee's goals, that does not mean that the soliciting employee failed to embrace the larger purpose of drawing management's attention to an issue for the benefit of all of his or her fellow employees. *St. Rose Dominican Hospitals*, 360 NLRB No. 126, slip op. at 4 (2014).

In this case, I find that Maynard's actions questioning Respondent's tip-sharing policy were for the purpose of mutual aid or protection under Section 7 of the Act by seeking the assistance and support of coworker Katelyn and other employees in their discussions that raised their shared complaint of Respondent's unfair tightly controlled tip-sharing policy. I find that Maynard's complaints for herself and other employees to management at Respondent questioning the propriety of Respondent's tightly controlled tip-sharing policy were protected concerted activities. See also *Thalassa Restaurant*, 356 NLRB 1000, 1016 (2011)(Board finds when employees pressed their demands for a tip book investigation at Employer, the employees were engaged in protected concerted activities).

Contrary to the Respondent's assertion at page 7 of its brief, the timing of the discharge proves that Maynard's protected activity and not the other asserted reasons was the motivating factor in the discharge. It is clear that timing alone may support animus as a motivating factor in an employer's adverse action. *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984). Maynard was discharged on the same day that Van Lent reported to management that Maynard was escalating her objections to Respondent's tipping policies by contacting a lawyer. Indeed,

Overturf was upset at the news, according to Van Lent. In contrast, the other reasons offered by Respondent for the discharge were of relatively long standing and occurred well before the discharge date and certainly before the Van Lent report to management of Maynard’s lawyer contact. Indeed, the arguably most serious matter—using a profanity under her breath in the presence of a supervisor—occurred on October 2, five days before the report to management by Van Lent that prompted the discharge. There was no follow up on the profanity incident by management and it was not specifically mentioned in the termination meeting.³

Because of the above admissions and the timing of Van Lent’s report to management with respect to the discharge, I find that Respondent’s other alleged reasons for the Maynard discharge were pretexts. This finding is confirmed by my analysis of these other reasons in the factual statement and because no written warnings were issued with respect to these other reasons; indeed, all but one, the painting, did not even result in talks between Monica, the General Manager, and Maynard. Many of the reasons given were vague and lacked the detail to justify their reliability as true reasons. The sheer number of alleged reasons for the discharge and their shifting nature also demonstrate that they were pretexts. See *David Saxe Productions, LLC and V Theater Group, LLC*, 370 NLRB No. 103, slip op. 21, 35 (2021) and cases there cited; see also *Shamrock Foods*, 366 NLRB No. 117 at p. 27-28 (2018), *enfd.* 779 Fed.Appx. 752 (D.C. Cir. 2019) (employer’s shifting, false, or exaggerated reasons for adverse employment action constitute evidence of unlawful motive).

Nor, contrary to Respondent’s contention at p. 9 of its brief, has Respondent shown that the Maynard discharge was consistent with past discharges. That contention rests upon the testimony of a discredited witness, but it is unpersuasive on its own terms. Head of Security Edkin testified that two former employees were fired for insubordination which he described as being “very vulgar to patrons coming through the door,” and “sexual favors on the clock in the venue.” According to Edkin, the first person discharged had been spoken to about his misconduct “multiple times.” Tr. 154-155. These are hardly insubordination, but I cannot make findings on this subject based solely on the word of the head of security who was not shown to be the deciding official concerning the discharges and who I observed to be quite flippant at hearing and not serious about providing reliable testimony. Indeed, no documentary evidence was submitted to support the testimony and Respondent stipulated that no documents existed, from October 1, 2018, through October 7, 2021, that showed terminations based on the same reasons given for Maynard’s termination. G.C. Exh. 14. Finally, even accepting Edkin’s testimony, the situations he describes are much more serious than any of the alleged improprieties committed by Maynard, especially because she was not issued written warnings on any of them and not even given verbal warnings in all but one. In these circumstances, Respondent has failed to meet its burden of proving persuasively that Maynard would have been discharged for reasons other than her protected concerted activities.

³ Nor was the complaint about the painting—the only one that resulted in a conversation between Monica and Maynard—timed not anywhere close to the discharge. And it too was not mentioned in the termination meeting.

Conclusions of Law

1. Respondent Joseppi's LLC d/b/a Arcata Theatre Lounge, has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By discharging employee Rebecca Maynard on October 7, 2021, because of her protected concerted activities, Respondent violated Section 8(a)(1) of the Act and committed an unfair labor practice within the meaning of the Act.

3. The unfair labor practice found affects commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that Respondent engaged in an unfair labor practice, I shall recommend that it be ordered to cease and desist from its unlawful conduct and take certain affirmative action designed to effectuate the policies of the Act, including the posting of an appropriate notice.

Since Respondent unlawfully discharged Rebecca Maynard, I shall recommend that it must offer her 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. The Respondent shall also make Maynard whole, with interest, for any loss of earnings and other benefits she may have suffered as a result of the unlawful discrimination against her. The make-whole remedy shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Maynard for search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings, with interest at the rate set forth above. In accordance with *Thryv Inc.*, 372 NLRB No. 22 (2022), Respondent shall also compensate Maynard for any other direct or foreseeable pecuniary harms incurred as a result of the unlawful discharge, if any, including, but not limited to, expenses, penalties, legal fees, late fees, or other costs, including lost investment income, flowing from the inability to make payment due to job loss or other adverse action regardless of whether these expenses exceed interim earnings. Compensation for these harms shall be calculated separately from taxable net backpay, with interest as prescribed above. Moreover, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall compensate Maynard for any adverse tax consequences of receiving a lump sum back pay award and shall, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, file, with the Regional Director of Region 20, a report allocating the backpay to the appropriate calendar year. In addition, in accordance with *Containerboard Packaging-Niagara*, 370 NLRB No. 76, as modified in 371 NLRB No. 25 (2021), Respondent is ordered to file, with the Regional Director for Region 20, a copy of Maynard's W-2 form reflecting the backpay award.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended⁴

5

ORDER

Respondent, Joseppi’s, LLC, d/b/a Arcata Theatre Lounge, its officers, agents, successors and assigns, shall

10

1. Cease and desist from

(a) Discharging or otherwise disciplining employees for engaging in protected concerted activity under Section 7 of the Act.

15

(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:

20

(a) Within 14 days from the date of this order, offer Rebecca Maynard 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 and privileges previously enjoyed.

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(b) Make Rebecca Maynard whole for any loss of earnings and other benefits, and for any other direct or foreseeable pecuniary harms, suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

30

(c) Compensate Rebecca Maynard for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years. Also file with the Regional Director for Region 20 a copy of Maynard’s W-2 forms reflecting the backpay award.

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(d) Within 14 days from the date of this order, remove from its files any reference to the unlawful discharge of Rebecca Maynard, and, within 3 days thereafter, notify her in writing that it has been done and that the unlawful action will not be used against her in any way.

40

(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 back pay due under the terms of this Order

⁴ If no exceptions are filed, as provided by Sec. 102.46 of the Board’s Rules and Regulations, the findings, conclusions, and recommended order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be waived for all purposes.

5 (f) Within 14 days after appropriate notification by the Region, post, at
its Arcata, California facility, copies of the attached notice marked “Appendix.”⁵ Copies of
the notice, on forms provided by the Regional Director for Region 20, after being signed by
the Respondent’s authorized representative, shall be posted by the Respondent and
10 maintained for 60 consecutive days, in conspicuous places, including all places where
notices to employees are customarily posted. In addition to physical posting of paper
notices, the notices shall be distributed electronically, such as email, posting on an intranet
or an internet site, and/or other electronic means, if the Respondent customarily
communicates with employees by such means. Reasonable steps shall be taken by the
15 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 March 16, 2022.

20 (g) 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 Respondent has taken to comply.

(h) Within 21 days after service by the Region, file, with the Regional
Director for Region 20, a copy of Maynard’s W-2 form reflecting the backpay award.

Dated at Washington, D.C., February 23, 2023.



Gerald Michael Etchingham
Administrative Law Judge

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

APPENDIX

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union.

Choose representatives to bargain with us or 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, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights listed above.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and **WE WILL NOT** do anything to interfere with your exercise of that right.

YOU HAVE THE RIGHT to freely bring matters and complaints about wages, hours and working conditions to our attention and **WE WILL NOT** do anything to interfere with your exercise of that right.

WE WILL NOT discharge or otherwise discipline employees for the exercise of the above rights or because of their other protected concerted activities under Section 7 of the Act.

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

WE WILL offer Rebecca Maynard immediate and 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 and privileges previously enjoyed.

WE WILL make Rebecca Maynard whole, with interest, for any loss of earnings and other benefits suffered as a result of our discrimination against her.

WE WILL also make Rebecca Maynard whole, with interest, for any direct or foreseeable pecuniary harm suffered as a result of the unlawful discharge, including reasonable search-for-work and interim employment expenses, plus interest.

WE WILL remove from our files any references to the unlawful action taken against Rebecca Maynard, and **WE WILL** notify her that this has been done, and that that unlawful action will not be used against her in any way; that we recognize her rights under Section 7 of the Act; that she has the right to communicate with coworkers about working conditions; and that we welcome her back.

WE WILL compensate Rebecca Maynard for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and **WE WILL** file with the Regional Director for Region 20, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years for her.

JOSEPPI'S LLC d/b/a ARCATA THEATRE LOUNGE
(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov

450 Golden Gate Avenue, 3rd Floor, Suite 3112, San Francisco, CA 94102-1735
(415) 356-5130, Hours: 8:30 a.m. to 5 p.m. Pacific Time

The Administrative Law Judge's decision can be found at www.nlr.gov/case/20-CA-292430 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.



THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE
THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE
OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY
OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OF COMPLIANCE
WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S
COMPLIANCE OFFICER, (628) 221-8875.