# APPENDIX

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**APPENDIX A**

**UNITED STATES COURT OF APPEALS**
FOR THE SIXTH CIRCUIT

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| M. KATHLEEN MCKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the National Labor Relations Board,<br>*Petitioner-Appellee*,<br>*v.*<br>STARBUCKS CORPORATION,<br>*Respondent-Appellant* | No. 22-5730 |

Appeal from the United States District Court for the Western District of Tennessee at Memphis.
No. 2:22-cv-02292–Sheryl H. Lipman, District Judge.

Argued: May 4, 2023

Decided and Filed: August 8, 2023

Before: SUTTON, Chief Judge; BOGGS and READLER, Circuit Judges.

**COUNSEL**

**ARGUED:** Arthur T. Carter, LITTLER MENDELSON, P.C., Dallas, Texas, for Appellant. Laurie Monahan Duggan, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Appellee. **ON BRIEF:** Arthur T. Carter, LITTLER MENDELSON, P.C., Dallas, Texas,

A. John Harper III, LITTLER MENDELSON, P.C., Houston, Texas, for Appellant. Laurie Monahan Duggan, Richard J. Lussier, Laura T. Vazquez, NATIONAL LABOR RELATIONS BOARD, Washington, D.C., for Appellee. Michael Schoenfeld, STANFORD FAGAN LLC, Atlanta, Georgia, Mary Joyce Carlson, WORKERS UNITED, Washington, D.C., Ryan E. Griffin, Daniel M. Rosenthal, Michael P. Ellement, JAMES & HOFFMAN PC, Washington, D.C., for Amicus Curiae.

BOGGS, J., delivered the opinion of the court in which SUTTON, C.J. and READLER, J., joined. READLER, J. (pp. 14–28), delivered a separate concurring opinion.

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**OPINION**

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BOGGS, Circuit Judge. Following news coverage of a unionization effort at one of its stores in Memphis ("Memphis Store"), Starbucks fired seven partners[1] who worked there ("Memphis Seven"). Workers United ("Union") filed an action with the National Labor Relations Board ("Board"), charging that Starbucks's firing of the Memphis Seven, and other anti-union actions, violated section 8 of the National Labor Relations Act ("Act"). Meanwhile, M. Kathleen McKinney, a regional director of the Board, petitioned the district court for temporary injunctive relief pending completion of the Board's proceedings. The district court found reasonable

[1] Starbucks refers to its employees as "partners." STARBUCKS, *Careers: Culture and Values*, https://www.starbucks.com/careers/working-at-starbucks/culture-and-values/.

cause to believe that Starbucks had violated the Act. It also concluded that, because of the chilling impact of the terminations on Union support, some of the requested interim relief, including temporary reinstatement of the Memphis Seven, was just and proper. For the following reasons, we affirm.

## I. BACKGROUND

### A. Facts

#### *1. Early Organizing Efforts*

In early January 2022, Nikki Taylor, a shift supervisor at the Memphis Store, reached out to partners at a Starbucks in Buffalo, New York, to discuss their union-organizing efforts. The Buffalo partners directed her to the Union. After speaking with Union representatives, Taylor shared her interest in unionizing the Memphis Store with coworkers, including Makayla Abrams, Reaghan Hall, Nabretta Hardin, Beto Sanchez, and Kylie Throckmorton. These conversations took place at work, where managers could overhear them. Managers interjected, at least twice, to ask what the conversations were about.

On January 14, District Manager Cedric Morton issued Taylor two corrective-action forms without warning. The first corrective-action form stated that Taylor had engaged in aggressive, insubordinate behavior towards a store manager on December 29, 2021, and January 12, 2022. Taylor denied doing so. The second corrective-action form recorded a clothing violation—wearing leggings to work—which Taylor also denied. A store manager, Elizabeth Page, had told Taylor that "in practice, [managers] would have a conversation with a partner" before disciplining them. Taylor also testified

that other Starbucks employees were not issued corrective-action forms for failing to comply with Starbucks's dress code.

Taylor continued her organizing efforts and, on January 17, facilitated a Zoom meeting between coworkers interested in forming a union-organizing committee—Hall, Hardin, Lakota McGlawn, Sanchez, Taylor, and Throckmorton—and Union representatives. During the meeting, the partners drafted a letter to Starbucks's then-CEO Kevin Johnson, announcing their intent to unionize.

*2. The Media Event*

On January 18, the letter to CEO Johnson was posted on social media. Hardin distributed union-authorization cards to coworkers. Although the store's schedule showed a full staff, Morton and Page decided to close the store early. Around 6 p.m., a news crew arrived at the Memphis Store, and Taylor opened the door for the crew to enter. Taylor, who was off duty at the time, did not have permission to invite the crew inside, but no partner expressed concern about the media's presence. The crew interviewed Florentino Escobar, Hardin, McGlawn, Sanchez, Taylor, and Throckmorton about their reasons for organizing and what they hoped to achieve and left the store around 6:20 p.m.

Before leaving, Hardin, Sanchez, Taylor, and Throckmorton went behind the counter. Sanchez opened the store's safe for McGlawn, the designated cash controller, because McGlawn lacked a personal access code. The partners testified that there was nothing unusual about their actions that night. They regularly came to the store—even while off duty—to check the work

schedule or retrieve their personal belongings, went behind the counter after work to make a free drink (a perk of the job), and helped partners who were responsible for accessing the safe, but who had not received a personal code to do so.

*3. Starbucks's Initial Response*

Store management learned of the media event the next day, and Starbucks launched an investigation. Meanwhile, the Union and the Memphis Store organizing committee scheduled a sit-in campaign for January 21 to 23. Following this announcement, Morton, who had only periodically visited the Memphis Store, began to visit almost daily. Morton announced that the lobby would be closed and that the store would operate as a drive-thru-only location from January 20 to 23, because of short-staffing. The lobby remained closed on those days, despite the store being fully staffed. On January 22, Hall and Sanchez attempted to reopen the lobby. Morton arrived and was confused as to why the lobby had been reopened, as he "was under the assumption that it was supposed to stay closed no matter what." Only on January 24, when the store was actually short-staffed, did it return to normal operations.

According to Hall, managers also began to remove pro-union material pinned to the store's community bulletin board. Hall reported that managers eventually removed all material from the bulletin board and repositioned a condiment bar to make the board less noticeable. Sanchez testified that Morton told him that such material violated company policy.

*4. Termination of the Memphis Seven*

On February 8, Starbucks fired five of the six

organizing-committee members—Hardin, McGlawn, Sanchez, Taylor, and Throckmorton—and two other partners who had engaged in pro-union activity—Escobar and Emma Worrell. Starbucks claimed that it fired these employees for violating company policy during the January 18 media event, including by: (1) being in the store while off duty; (2) entering the back-of-house or counter area while off duty; (3) unlocking a locked door to allow an unauthorized person to enter while off duty; (4) activating the safe and handling cash while off duty; and (5) supervising while these offenses were being committed. Two partners who were present during the January 18 media event, Aiden Harris and Kimora Harris, were not fired: Kimora had not committed any apparent violations and Aiden's violation—failing to ring up a beverage—was not deemed a terminable offense.

Acknowledging that their actions violated company policy, Taylor and Hall testified that management rarely, if ever, enforced these violations. Sanchez also testified that, in the past, Page had directed him to share his personal safe-access code with other partners, so that they could open the safe and handle cash.

*5. Effect of the Terminations*

After the firings, only one organizing-committee member still worked at the Memphis Store. The store operated only as a drive-thru over the next couple of weeks. Even with the lobby closed, Morton, Page, and managers from other Starbucks locations came to the store every day. The visiting managers did not explain why they were suddenly stationed there. And they remained there after the store reopened the lobby.

On the morning shift, every partner other than Hall

stopped wearing union pins to work. Ax Heiberg, a barista, testified that the firings caused him to stop wearing union pins because he felt that demonstrating open union support would make him a target. He eventually stopped discussing union matters with other partners unless he knew that they were pro-union and knew that no managers were around. Hall also testified that she did not feel comfortable discussing the organizing campaign with partners transferred from Page's previous store.

A senior Union organizer and a Union representative (who worked at a different Starbucks) both testified that the Memphis firings spread anxiety and fear among partners who were considering unionizing at other Starbucks locations. For example, partners at a store in Jackson, Tennessee, told one organizer that they were hesitant to unionize after what happened to the Memphis Seven, noting that Starbucks had posted a notice in the store detailing the discharges. A partner at a Starbucks in Florida said that his manager suggested that unionization would lead to a response from Starbucks similar to the one in Memphis.

On June 7, in an anonymous election, Memphis Store partners voted eleven-to-three in favor of joining the Union. The discharged partners remained involved in the bargaining process after the vote.

### B. Procedural History

Between February and April 2022, the Union filed charges with the Board, alleging that Starbucks had engaged in unfair labor practices, in violation of section 8(a)(1) and (3) of the Act. Following an investigation, the General Counsel of the Board issued a consolidated

complaint and notice of hearing against Starbucks for alleged violations of the Act. On May 10, 2022, McKinney, a regional director of the Board, petitioned the district court, pursuant to section 10(j) of the Act, for injunctive relief pending resolution of the Board's administrative proceedings. McKinney sought a cease-and-desist order and various forms of affirmative relief, including the interim reinstatement of the Memphis Seven.

The district court granted in part McKinney's petition for a temporary injunction and ordered Starbucks to reinstate the discharged partners. The court held that the Board had established "reasonable cause" to believe that Starbucks had committed each of the five unfair labor practices alleged by the Board. The court also found that injunctive relief, including reinstatement of the Memphis Seven, was "just and proper." In addition to reinstatement, it ordered Starbucks to: (1) rescind and expunge any unlawful discipline issued to Taylor; (2) post, and ensure access to, copies of the district court's order in the Memphis Store; and (3) confirm compliance with the court's order. Such relief, the court found, was necessary to restore the status quo that existed before the alleged violations, so as to preserve the remedial power of the Board pending resolution of its administrative proceedings.

Starbucks filed an emergency motion to stay the district court's order pending appeal. The district court denied Starbucks's emergency motion. The company then sought a stay of the order from a panel of this court, which the panel denied. *McKinney v. Starbucks Corp.*, No. 22-5730 (6th Cir. Sept. 6, 2022) (per curiam).

Starbucks timely appealed the district court's order granting injunctive relief, which we now review on the

merits.[2]

## II. ANALYSIS

### A. Legal Framework

The Act provides that "[e]mployees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining." 29 U.S.C. § 157. The Act further states that:

> It shall be an unfair labor practice for an employer–
>
> (1) To interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> …
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization.

*Id.* § 158(a). To preserve the Board's ultimate remedial powers while administrative proceedings are pending, the

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[2] On the same day that the parties presented oral argument, an administrative law judge (ALJ) issued a decision in the underlying administrative case. Starbucks Corp., Nos. 15-CA-290336 et al., (N.L.R.B May 4, 2023). Parties may file exceptions to the ALJ's decision with the Board within 28 days. Here, the Board granted the parties an extended deadline, June 30, 2023, to file exceptions. Starbucks Corp., Nos. 15-CA-290336 et al., (N.L.R.B. May 19, 2023). The ALJ's decision does not mark the end of the Board's proceedings, and we are not compelled to defer to it. *McKinney v. Ozburn-Hessey Logistics (Ozburn-Hessey), LLC*, 875 F.3d 333, 339–40 (6th Cir. 2017).

Act enables the Board to "petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred . . . for appropriate temporary relief." *Id.* § 160(j).

This court applies a two-factor test to determine whether such relief is warranted. *See Ahearn ex rel. NLRB v. Jackson Hosp. Corp.*, 351 F.3d 226, 236 (6th Cir. 2003) (noting that some circuits use the four-factor framework that is generally used for preliminary injunctions). To obtain temporary relief, the Board must establish that (1) there is "reasonable cause to believe that unfair labor practices have occurred" and (2) injunctive relief is "just and proper." *Ozburn-Hessey*, 875 F.3d at 339 (first quoting *Ahearn*, 351 F.3d at 234; and then quoting *Schaub v. W. Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001)). Relief "is just and proper where it is 'necessary to return the parties to status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA.'" *Ibid.* (quoting *Gottfried v. Frankel*, 818 F.2d 485, 495 (6th Cir. 1987)). The district court must then determine "whether achieving [the] status quo is possible." *Ibid.* (quoting *Gottfried*, 818 F.2d at 495). "[T]he status quo is the state of affairs existing before the alleged unfair labor practices took place." *Schaub*, 250 F.3d at 972 (quoting *Frye ex rel. NLRB v. Specialty Envelope Inc.*, 10 F.3d 1221, 1226 (6th Cir. 1993)).

In reviewing the supporting facts, a district court may not resolve conflicting evidence or make credibility determinations. *Muffley ex rel. NLRB v. Voith Indus. Servs., Inc.* 551 F. App'x 825, 830 (6th Cir. 2014); *see Ahearn*, 351 F.3d at 237 ("[F]act-finding is inappropriate in the context of a district court's consideration of a 10(j)

petition."). We review a district court's just-and-proper finding for abuse of discretion and reverse only where the court "relies upon clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard." *Kobell ex rel. NLRB v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1410 (6th Cir. 1992) (quoting *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 (6th Cir. 1988)).

**B. Just-and-Proper Analysis**

Notably, Starbucks does not challenge the district court's holding that there is reasonable cause to believe that Starbucks violated the Act in terminating the Memphis Seven. We thus consider only whether interim relief was just and proper and conclude that the district court did not abuse its discretion in ordering interim restatement, among other related relief, to preserve the status quo pending completion of the Board's proceedings.

Consider the context. In early January 2022, Taylor contacted Union representatives and discussed the prospect of unionizing the Memphis Store with fellow partners. Morton then issued Taylor two debatable corrective-action forms without warning—an irregular procedure. On January 17, a seven-partner organizing committee posted a letter indicating its intent to unionize the Memphis Store. After the media covered the story, Starbucks alleged that seven partners had violated company policy and fired them. But, as the record indicates, violations such as these were rarely, if ever, punished. On occasion, management appears to have even encouraged them. The next week, when committee members scheduled a sit-in campaign to garner union support, management closed the Memphis Store lobby under the pretense of being short-staffed.

Under these circumstances, Starbucks's termination of the Memphis Seven—including six of the seven members of the organizing committee[3]—mere weeks after the media event would almost certainly chill other partners' exercise of rights protected by the Act. *See Ahearn*, 351 F.3d at 239 (upholding reinstatement as just and proper because of the "inherently chilling effect" of the firing of employees directly after they had engaged in a union strike); *see also Frankl v. HTH Corp.*, 650 F.3d 1334, 1363 (9th Cir. 2011) ("[T]he discharge of active and open union supporters risks a serious adverse impact on employee interest in unionization and can create irreparable harm to the collective bargaining process." (quoting *Pye v. Excel Case Ready*, 238 F.3d 69, 74 (1st Cir. 2001))). The district court did not err in concluding that the termination of 80% of the organization committee during a unionization campaign could lead to injury to the union movement that subsequent Board intervention would not be able to remedy.

And, as the district court noted, the record contains actual evidence of chill. After the firings, Heiberg stopped wearing a union pin for fear of being targeted. He was not alone: other than Hall, every partner on his shift stopped wearing a pin. Heiberg also feared that he would be targeted by management if he were to express open support for the protests or other union activities. He refrained from discussing pro-union sentiments with anyone unless he "knew for a fact that they were pro-union and that no managers could overhear [him.]" Hall similarly felt uncomfortable discussing organizing efforts with employees transferred from Page's previous location.

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[3] Hall, the only member of the original organizing committee who was not terminated, was not at the store on January 18.

Other evidence in the record indicated that the terminations chilled unionization efforts in Tennessee and Florida. Starbucks argues that the district court abused its discretion in ordering reinstatement because the Union's election victory indicates that any chilling effect had abated. As the district court explained, a successful union election does not preclude the continuance of a chilling impact on employees' willingness to exercise other rights safeguarded by the Act. Union elections are conducted anonymously, allowing employees to participate without fear of retaliation. Conversely, collective bargaining requires a demonstration of open support, which employees such as Heiberg might well not engage in for fear of reprisal.

Starbucks fails to cite any authority suggesting that a successful union election precludes injunctive relief. And it might seem odd that only successful attempts at intimidation warrant relief, even though the unjustly fired employees are still out of luck if their fellows win a secret-ballot election. Our precedent indicates that a district court may consider prospective harm to other rights protected under the Act, including collective bargaining, in ordering temporary injunctive relief. In *Ahearn*, a hospital fired six employees soon after they had participated in a strike organized by their union. 351 F.3d at 230–33. Several non-discharged employees testified that the firings had "a chilling effect on union activity, inasmuch as the employees stopped wearing union buttons, spoke in hushed tones about union activities, and feared reprisal." *Id.* at 239. The district court ordered reinstatement, finding that such injunctive relief was necessary because the employer's anti-union animus, followed by actual firings, "was inherently chilling" and

testimony from non-discharged employees suggested that the firings produced an actual chilling effect on union support. *Id.* at 233–34, 240. In affirming, this court noted that the "the Union was quite new and had not even signed its first contract, 'making bargaining units highly susceptible to management misconduct.'" *Ibid.* (quoting *Arlook ex rel. NLRB v. S. Lichtenberg & Co.*, 952 F.2d 367, 373–74 (11th Cir. 1992)).

Here, as in *Ahearn*, the new Union faces a critical juncture. Fear of retaliation will exist unless the Memphis Seven, apparently terminated for their union support, are reinstated. Likewise, the organizing committee faced a severe encumbrance on its ability to unionize effectively when all but one of its number were terminated. And while the Memphis Store voted to unionize after the firings, a failure to reinstate the Memphis Seven (who now lead the bargaining committee) would similarly undermine the Union's bargaining strength as it seeks its first collective-bargaining agreement. *See ibid.*; *see also Ozburn-Hessey*, 875 F.3d at 341 (affirming the district court's ordered temporary relief as "necessary" because a failure to do so "might undermine the Union's strength on the eve of its first collective bargaining opportunity"); *Pascarell v. Vibra Screw*, 904 F.2d 874, 880 (3d Cir. 1990) (finding that termination of the entire bargaining committee rendered the chilling effect on other employees "patent").

As the district court pointed out, reinstatement is further supported by the fact that without employment at the Memphis Store, the discharged members of the bargaining committee are limited in their capacity to communicate with and advocate for their fellow Union members. Although Memphis Store partners have since

voted to unionize, sufficient evidence of inherent and actual chill supports the district court's holding that the ordered temporary relief is necessary to preserve the status quo pending resolution of the Board's proceedings.

### C. Starbucks's Remaining Arguments

Starbucks presents other challenges to the ordered relief, none of which is availing.

*Whether a Return to the Status Quo Is Possible.* Starbucks argues that the district court abused its discretion in ordering reinstatement because the election irrevocably altered the legal bargaining status of the parties, making a return to the status quo "impossible." In doing so, Starbucks offers an overly narrow view of what makes a return to the status quo possible. Starbucks's reading of the Act would allow employers who violate labor laws to have their cake and eat it too: they could either engage in misconduct and successfully discourage unionization or engage in misconduct and fail to prevent unionization, secure in the knowledge that an election victory would absolve them of their sins. It would also place undue weight on the outcome of an anonymous election in determining whether workers can freely exercise their rights under the Act.

Once this court has decided that a return to the status quo is necessary, the appropriate question becomes whether a return to the status quo is, in fact, possible. *See Gottfried*, 818 F.2d at 495–96. This is not a metaphysical inquiry. Rather, we have asked: are the employees "still able . . . to return to their old jobs[?]" *Ozburn-Hessey*, 875 F.3d at 341. If the Memphis Store closed, for example, a return to the status quo would be impossible. As it has not, the reinstatement of the Memphis Seven remains

possible and, as discussed above, is necessary to restore the status quo that existed prior to Starbucks's alleged misconduct—that is, a work environment where employees can express union support without fear of retaliation.

*Unclean Hands.* Starbucks also argues that the district court failed to consider that the Union was primarily responsible for any chill. Particularly, Starbucks claims that the Union "publicized the separations and created a narrative that they were retaliatory." The company points to an Eleventh Circuit case, *Arlook*, 952 F.2d 367, to support the notion that a court may deny section 10(j) injunctive relief "on the basis of inappropriate union conduct (such as spreading rumors or sensationalizing wholly unsubstantiated charges against a company)."

*Arlook* does not help Starbucks. There, the Eleventh Circuit reversed a district court's denial of temporary injunctive relief. *Arlook*, 952 F.2d at 375. It held that the lower court had clearly erred in finding "that the Union was as responsible for the 'chilling' of organizational activities as the Company." *Id.* at 374. "To justify the denial of . . . equitable relief on the basis of inappropriate union conduct (such as spreading rumors or sensationalizing wholly unsubstantiated charges against a company)," the court said, "the conduct must be documented in the record." *Ibid.* And the record lacked any such evidence. *Ibid.*

Here, too, there is no evidence in the record to suggest that the Union "spread[] rumors or sensationalized wholly unsubstantiated charges against" Starbucks. *Arlook*, 952 F.2d at 374. Starbucks does not identify any rumors or unsubstantiated charges made by the Union. Nor, as

noted above, does it contest the district court's reasonable-cause findings. Rather, Starbucks merely points out that the Union publicized the actual facts of the termination of the Memphis Seven and, on that basis, faults the Union as primarily responsible for a chill that, Starbucks claims, no longer exists. But Starbucks fails to identify any authority suggesting that a union that informs its members of anti-union activities should be precluded from obtaining temporary injunctive relief. And Starbucks's crude attempt at scorekeeping fails to explain how its own publication of the terminations immediately after the event (and again two weeks later) to partners at the Memphis Store and nationwide should not be counted against it. Starbucks's unclean-hands challenge fails.

*Proper Standard for Section 10(j) Relief.* Finally, relying on *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), Starbucks argues that the district court should have applied the traditional four-factor test for preliminary injunctions rather than the two-factor reasonable-cause/just-and-proper test it applied in ordering injunctive relief here. *Winter*, however, did not involve a section 10(j) injunction; it merely restated the traditional four-factor test's applicability to preliminary injunctions in general. *Id.* at 20. We, however, have consistently applied the two-factor test for section 10(j) injunctions. *See Ahearn*, 351 F.3d at 234–35 (noting that a number of "other circuits have retained the [two-factor] standard").

And we have continued to do so post-*Winter*. *See Ozburn-Hessey*, 875 F.3d at 343. Absent an intervening en banc or Supreme Court decision, we may not overrule the decision of a prior panel. *See Ahearn*, 351 F.3d at 234–

36 (citing *United States v. Moody*, 206 F.3d 609, 615 (6th Cir. 2000)).

*Remaining Injunctive Relief.* Starbucks stakes its challenge to the remainder of the order on the success of its challenge to the reinstatement. Because the district court did not abuse its discretion in ordering reinstatement, and Starbucks presents no independent argument contesting the remainder of the order, we affirm the order in its entirety.

## III. CONCLUSION

The record contains sufficient evidence to support the district court's order of temporary injunctive relief as necessary to return the parties to the status quo pending resolution of the Board's proceedings. We **AFFIRM** the judgment of the district court.

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## CONCURRENCE

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CHAD A. READLER, Circuit Judge, concurring. When a party seeks a preliminary injunction, we apply a familiar test. Four factors in all, the key ingredients include the moving party's likelihood of success and the threat of irreparable injury. *Winter v. Nat. Res. Def. Council*, 555 U.S. 7, 20 (2008). Together, these considerations–both legal and equitable–channel our discretion to issue injunctive relief. *See Salazar v. Buono*, 559 U.S. 700, 714 (2010) ("An injunction is an exercise of a court's equitable authority, to be ordered only after taking into account all of the circumstances that bear on the need for prospective relief.").

Why, then, do we deviate from this trusted practice when the National Labor Relations Board invokes § 10(j) of the Taft-Hartley Act to preliminarily enjoin a company's alleged unfair labor practices during the pendency of Board proceedings? As far as I can tell, there is no particularly good answer. In § 10(j) proceedings, we apply a test borrowed long ago from other circuits. When we adopted that approach, we failed to explain why we cast aside the traditional, demanding, four-factor test in favor of a meek two-part version. And we conspicuously failed to deploy the textualist principles that govern today's means of statutory review. That decision, in short, was suspect from the start.

Nor has it aged gracefully. The standard we apply for § 10(j) proceedings is in tension with intervening Supreme Court precedent. *See Weinberger v. Romero-Barcelo*, 456 U.S. 305, 313 (1982). And it is directly contrary to the developing trend in our sister circuits. *See Muffley ex rel. NLRB v. Spartan Mining Co.*, 570 F.3d 534, 542–43 (4th Cir. 2009); *Sharp v. Parents in Cmty. Action*, 172 F.3d 1034, 1038–39 (8th Cir. 1999); *Miller ex rel. NLRB v. Cal. Pac. Med. Ctr.*, 19 F.3d 449, 456–60 (9th Cir. 1994) (en banc), *abrogated on other grounds by Winter*, 555 U.S. at 7; *Kinney v. Pioneer Press*, 881 F.2d 485, 490–91 (7th Cir. 1989). Not only that, but our test also produces uneven results, tilting the field in the Board's favor. Until this misguided approach is corrected, however, we are left to follow our prior decisions. As the majority opinion faithfully does so, I reluctantly concur in that decision.

A. Is there a more identifiable four-part test than the one federal courts apply when assessing whether preliminary injunctive relief is warranted? Litigators can no doubt recite the formula from memory: (1) the movant's

likelihood of success on the merits; (2) the extent of irreparable harm to the movant; (3) the balance of the equities; and (4) the public interest. *Winter*, 555 U.S. at 20; *see also Kentucky v. Biden*, 57 F.4th 545, 550 (6th Cir. 2023); *Sisters for Life, Inc. v. Louisville-Jefferson County*, 56 F.4th 400, 403 (6th Cir. 2022); *Doster v. Kendall*, 54 F.4th 398, 410 (6th Cir. 2022). Adherence to this legal quartet harmonizes our approach to preliminary relief, ensuring we exercise our authority "consistent with traditional principles of equity." *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388, 394 (2006). Over and over, the Supreme Court has emphasized that each of the four benchmarks deserves consideration before relief may be granted. *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) (per curiam) (affirming the denial of a preliminary injunction on the last two factors); *Glossip v. Gross*, 576 U.S. 863, 876 (2015) ("[T]his case turns on whether petitioners are able to establish a likelihood of success on the merits."); *Sampson v. Murray*, 415 U.S. 61, 88 (1974) (emphasizing the importance of irreparable injury). It likewise has reminded us that a preliminary injunction is "extraordinary" and "never awarded as of right." *Winter*, 555 U.S. at 24. Consistent with these admonitions, federal courts apply the four *Winter* factors in the early stages of a wide range of constitutional and statutory disputes. *See, e.g.*, *Ramirez v. Collier*, 142 S. Ct. 1264, 1275 (2022) (Religious Land Use and Institutionalized Persons Act); *Trump v. Hawaii*, 138 S. Ct. 2392, 2403, 2423 (2018) (Establishment Clause); *Winter*, 555 U.S. at 19 n.4, 20 (National Environmental Policy Act); *eBay*, 547 U.S. at 391 (Patent Act); *Amoco Prod. Co. v. Village of Gambell*, 480 U.S. 531, 534, 544 (1987) (Alaska National Interest Lands Conservation Act); *Romero-Barcelo*, 456 U.S. at 306, 320 (Federal Water Pollution Control Act); *Liberty*

*Coins, LLC v. Goodman*, 748 F.3d 682, 685, 689–90 (6th Cir. 2014) (First Amendment).

1. Yet in assessing whether it is necessary to allow the Board to direct a business's operations through a § 10(j) injunction, our Court long ago jettisoned the *Winter* standard in favor of a less rigorous one. That decision has serious ramifications for private employers and unions alike, and thus deserves a second look.

Begin with some observations on the current state of play. The Board's § 10(j) activity is on the rise. In the first 15 years of § 10(j)'s life, it was deployed on average "only three times per year." Bruce W. Burns, *Section 10(j) of the National Labor Relations Act: A Legislative, Administrative and Judicial Look at a Potentially Effective (But Seldom Used) Remedy*, 18 Santa Clara L. Rev. 1021, 1022 (1978) (footnote omitted). Times, it seems, have changed. The Board now puts § 10(j) to work more than six times as often as it did before. Nat'l Labor Rels. Bd., Performance and Accountability Report FY 2022, at 86 (publication date unknown); *see also* Memorandum from Jennifer A. Abruzzo, NLRB General Counsel to Regional Directors, Officers-in-Charge, and Resident Officers 1–3 (Feb. 1, 2022).

Now consider a reality of NLRB unfair labor practice investigations: they do not happen overnight. Complaints often take a year for the Board to resolve, and months more to bring the matter to completion. Performance and Accountability Report FY 2022, at 149 (showing FY 2021 averages of 286 days between issuance of a complaint and an administrative law judge's decision, 305 days between the issuance of that decision and the Board's order, and 869 days between the issuance of a Board order and the case's closing); *see also Lineback ex rel. NLRB v. Irving*

*Ready-Mix, Inc.*, 653 F.3d 566, 570 (7th Cir. 2011) (noting the "'glacial' pace of Board proceedings") (quotation omitted)); *Cal. Pac. Med. Ctr.*, 19 F.3d at 453 ("The Board took nearly 28 months to resolve [the] unfair labor practice charge[.]"). This case is no exception. The Board issued its operative complaint on July 8, 2022. An administrative law judge rendered a decision 10 months later. The parties were then afforded nearly two months to file exceptions to the order. 29 C.F.R. § 102.46(a). Eventually, the Board itself will review Starbucks's case, *id.* § 102.48(b), at which point federal court litigation will likely ensue. *See generally UAW of Am., Loc. 600 v. NLRB*, 956 F.3d 345 (6th Cir. 2020) (appeal of Board petition to enforce order).

2. As this lengthy process unfolds, should the Board be able to constrain the employer's operations? Congress has answered that question, at least in part. Section 10(j) of the Taft-Hartley Act of 1947 authorizes the Board to seek preliminary injunctive relief. 29 U.S.C. § 160(j) ("The Board shall have power . . . to petition . . . for appropriate temporary relief or restraining order. . . ."); *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017). That command begs the question: what framework should courts use to assess the Board's request?

Turn to the statutory text. Congress gave district courts considering § 10(j) petitions a short instruction: enter "such temporary relief . . . as it deems just and proper." 29 U.S.C. § 160(j). Ordinarily, one would read the broad command "just and proper" as invoking the discretion we traditionally exercise when faced with requests for equitable relief. *See Spartan Mining Co.*, 570 F.3d at 542 ("'[J]ust and proper' is another way of saying 'appropriate' or 'equitable.'" (citation omitted)); *Pioneer*

*Press*, 881 F.2d at 491 ("Section 10(j) tells the district court to do what's 'just and proper[,]' which we read as a statement that traditional rules govern–the approach emphasizing the public interest applied when the government is the plaintiff."). Dictionary definitions confirm that instinct. The term "just" (both then and now) is a synonym for "equitable." *Just* (adj.), Webster's New International Dictionary (2d ed. 1949); *Just* (adj.), Oxford English Dictionary (Rev. 2013) (entry I.5.b.); *accord Cal. Pac. Med. Ctr.*, 19 F.3d at 458. To the same end, "proper" means "appropriate," "suitable," or "correct." *Proper* (adj.), Funk & Wagnalls New Standard Dictionary (1943 ed.); *Proper* (adj.), Oxford English Dictionary (Rev. 2007) (entry I.1.).

In practice, crafting "appropriate" or "suitable" equitable relief necessitates an exercise of discretion. Samuel L. Bray & Paul B. Miller, *Getting Into Equity*, 97 Notre Dame L. Rev. 1763, 1794 (2022) ("Judges in equity have discretion in determining whether, as a matter of substantive doctrine, petitioners have 'an equity' that warrants intervention . . . as well as in selecting and tailoring remedies[.]"). Discretion, in turn, is a hallmark of equity. *Romero-Barcelo*, 456 U.S. at 312 ("The essence of equity jurisdiction has been the power of the Chancellor to do equity and to mould each decree to the necessities of the particular case." (quoting *Hecht Co. v. Bowles*, 321 U.S. 321, 329 (1944))). Employing that discretion, courts "traditionally [have] had the power to fashion any remedy deemed necessary and appropriate to do justice in a particular case." *Carter-Jones Lumber Co. v. Dixie Distrib. Co.*, 166 F.3d 840, 846 (6th Cir. 1999). Putting "just" and "proper" together, then, leads us to the same conclusion the esteemed Judge Friendly reached years

ago: the NLRA incorporated traditional equitable principles. *Danielson v. Joint Bd. of Coat, Suit & Allied Garment Workers' Union*, 494 F.2d 1230, 1241–42 (2d Cir. 1974); *see also Cal. Pac. Med. Ctr.*, 19 F.3d at 458 (favorably citing the same decision).

So one would expect us to honor that "traditional equitable authority" when the Board seeks an injunction pursuant to § 10(j) of the Taft-Hartley Act. *See Miller v. French*, 530 U.S. 327, 340 (2000). "We presume that statutes conform to longstanding remedial principles." *Arizona v. Biden*, 40 F.4th 375, 396–97 (6th Cir. 2022) (Sutton, C.J., concurring). Absent the "clearest" congressional instruction or an "inescapable inference" that we should depart from those traditional equitable factors, we must apply them. *Miller*, 530 U.S. at 340 (citations omitted); *compare United States v. Miami Univ.*, 294 F.3d 797, 817 (6th Cir. 2002) ("Given the assortment of remedies available in the [statute], Congress by no means foreclosed the exercise of equitable discretion."), *with United States v. Szoka*, 260 F.3d 516, 523, 524 (6th Cir. 2001) (reading a statute's command that the court "shall enforce obedience to such order by a writ of injunction" to curtail discretion).

*Weinberger v. Romero-Barcelo* exemplifies the point. 456 U.S. at 305. There, a district court found that the Navy violated a statutory scheme prohibiting permitless discharge of certain pollutants. *Id.* at 307–08. The plaintiff asked the court to enter a preliminary injunction barring the Navy from further violations. The court declined to do so based on its weighing of traditional equitable factors. *Id.* at 309–10. On appeal, the First Circuit vacated the district court's order, believing that the Navy's violation of a "statutory obligation" entitled the

challengers to an injunction. *Id.* at 310–11. That approach, the Supreme Court later held, was contrary to the inherited, robust tradition, spanning "several hundred years," of judicial discretion over the propriety of injunctive relief. *Id.* at 313 (quotation omitted). The "comprehensiveness of this equitable jurisdiction," we were reminded, "is not to be denied or limited in the absence of a clear and valid legislative command." *Id.* (quoting *Porter v. Warner Holding Co.*, 328 U.S. 395, 398 (1946)). And because the statute at issue lacked a clear command curtailing that discretion, whether injunctive relief was appropriate turned on an assessment of the "great principles of equity." *Porter*, 328 U.S. at 398 (approving the district court's exercise of equitable discretion) (citation omitted).

Requests for injunctive relief under the Taft-Hartley Act should follow suit. Section 10(j) authorizes a district court to grant injunctive relief when it is "just and proper" to do so. This is "a limited exception to the federal policy against labor injunctions . . . reserved for 'serious and extraordinary' cases." *Parents in Cmty. Action*, 172 F.3d at 1037 (quotation omitted). As the statute gives no indication that the traditional equitable factors governing an injunction ought to be disregarded, we must apply them in § 10(j) proceedings. I am not alone in that view. In the wake of *Romero-Barcelo*, at least four other circuits have said the same. *See Spartan Mining Co.*, 570 F.3d at 542; *Parents in Cmty. Action*, 172 F.3d at 1038 ("[T]he reference to 'just and proper' in § 10(j) incorporates traditional equitable principles."); *Cal. Pac. Med. Ctr.*, 19 F.3d at 456 (same); *Pioneer Press*, 881 F.2d at 490–91 (Easterbrook, J.) (noting that "[d]eviations from [the] traditional equitable balancing exist, but are rare," and

holding that "just and proper" incorporates the four traditional *Winter* factors (citing *Romero-Barcelo*)). The Fourth Circuit perhaps put it best. "In light of *Romero-Barcelo*, . . . in determining if a § 10(j) injunction should issue, the traditional four-part equitable test should govern what relief is 'just and proper.'" *Spartan Mining Co.*, 570 F.3d at 542. That being the case, our Circuit too should honor *Romero-Barcelo* by applying the traditional four *Winter* criteria in § 10(j) proceedings.

B. And yet we do not. We instead followed a winding path through the decisions of a handful of other circuits. What we found was a weak, two-part test: (1) reasonable cause and (2) just and proper relief, defined as only some notion of future harm. To see why, turn back the clock nearly 45 years to *Levine v. C & W Mining Co.*, one of our early cases addressing § 10(j). 610 F.2d 432, 435 (6th Cir. 1979). Things started off on the right note. To determine what standard the Board must meet to justify an injunction, we turned to § 10(j)'s text, specifically the "just and proper" requirement. *Id.* In analyzing those terms, however, we left our interpretive tools in the toolbox. More persuasive, it seems, was a "rumor chain" of rulings by other circuits. *Pioneer Press*, 881 F.2d at 492. At the time, we observed, other appeals courts had "consistently" held that the Board need only demonstrate "reasonable cause" to believe an unfair labor practice had occurred for a § 10(j) injunction to issue. *C & W Mining Co.*, 610 F.2d at 435 (citing decisions of the Second, Fifth, Eighth, and Tenth Circuits). Where, you might ask, did these courts discover that standard? Not in the text of § 10(j), which makes no "reference to 'reasonable cause.'" *Spartan Mining Co.*, 570 F.3d at 542. Rather, that benchmark was imported from a neighboring statutory section that

*mandates*, not merely permits (as does § 10(j)), that the Board seek an injunction in certain circumstances. *See* 29 U.S.C. § 160(*l*) ("If, after [its initial] investigation [of certain unfair labor practices], the [Board] has reasonable cause to believe . . . that a complaint should issue, [it] *shall* . . . petition . . . for appropriate injunctive relief[.]" (emphasis added)); *see also Cal. Pac. Med. Ctr.*, 19 F.3d at 456–57 (describing the differences between §§ 10(j) and (*l*)); *Pioneer Press*, 881 F.2d at 489 (same); Note, *Temporary Injunctions Under Section 10(j) of the Taft-Hartley Act*, 44 N.Y.U. L. Rev. 181, 187–89 (1969) (same). An unusual approach, to be sure. After all, we presume Congress makes an intentional decision "when it uses particular language in one section of a statute but omits it in another." *Dep't of Homeland Sec. v. MacLean*, 574 U.S. 383, 391 (2015) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). Yet by judicial fiat, we overrode Congress's choice to differentiate between §§ 10(j) and (*l*). No rationale for this approach was offered, other than the observation that reasonable cause was "an implicit prerequisite for relief." *See Angle v. Sacks ex rel. NLRB*, 382 F.2d 655, 658 (10th Cir. 1967); *McLeod ex rel. NLRB v. Compressed Air Workers, Loc. No. 147*, 292 F.2d 358, 359 (2d Cir. 1961) (similar). And with that, we entrenched "reasonable cause"–rather than the more demanding "likelihood of success" standard–as the one the Board must meet to secure an injunction.

Having adopted the "reasonable cause" standard, we next needed to define it. Again, we peered over the horizon. What we discovered was the supposition in other circuits that reasonable cause places a "relatively insubstantial" burden on the Board. *C & W Mining Co.*, 610 F.2d at 435 (citing *Hirsch v. Bldg. & Constr. Trades*

*Council*, 530 F.2d 298, 302 (3d Cir. 1976)). That "insubstantial" obligation soon became a fixture in our case law. *E.g.*, *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 29 (6th Cir. 1988); *Kobell ex rel. NLRB v. United Paperworkers Int'l Union*, 965 F.2d 1401, 1406 (6th Cir. 1992); *Schaub v. W. Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001); *Muffley ex rel. NLRB v. Voith Indus. Servs., Inc.*, 551 F. App'x 825, 830 (6th Cir. 2014). As advertised, the burden is not a heavy one. On the law, "the [Board] need not convince the court of the validity of the Board's theory of liability, as long as the theory is substantial and not frivolous." *Gottfried ex rel. NLRB v. Frankel*, 818 F.2d 485, 493 (6th Cir. 1987) (citing other circuits). Absent legal frivolity on the Board's part, in other words, it will satisfy the reasonable cause requirement. And on the facts, the Board must show merely that "facts exist which *could* support" its theory of liability. *Ozburn-Hessey Logistics*, 875 F.3d at 339 (emphasis added) (quotation omitted).

That leaves the second inquiry in our two-part test: is injunctive relief "just and proper?" Repeating our atextual ways, we departed from the straightforward meaning of that statutory phrase. *Frankel*, 818 F.2d at 494; *Sheeran ex rel. NLRB v. Am. Com. Lines, Inc.*, 683 F.2d 970, 979 (6th Cir. 1982) (quoting *Angle*, 382 F.2d at 660). Traditionally, a movant who has demonstrated a likelihood of success on its claim must also show that it would be irreparably injured without an injunction (as well as why the equities and public interest favor relief). *Winter*, 555 U.S. at 20; *see also Cal. Pac. Med. Ctr.*, 19 F.3d at 456. But for the Board, we had other ideas. Influential was the Tenth Circuit's holding that the "just and proper" inquiry amounted to asking only whether the

"efficacy of the Board's final order" could be "nullified" without preliminary judicial intervention. *Am. Com. Lines*, 683 F.2d at 979 (quoting *Angle*, 382 F.2d at 660). That line of reasoning too had suspicious origins–it was the product of divining the law's purpose from its legislative history, a now disfavored method of interpretation. *Angle*, 382 F.2d at 660; *see also Kobell ex rel. NLRB v. Suburban Lines, Inc.*, 731 F.2d 1076, 1090 (3d Cir. 1984) (analyzing "just and proper" as "an instance where courts do better not so much to focus upon the particular words of the governing statute, but upon the general communication the law-making bodies were attempting to send to the courts and the public in passing the relevant act"). Regrettably, we followed this misguided lead. *Am. Com. Lines, Inc.*, 683 F.2d at 979. Over time, we have whittled down the "just and proper" criterion to mean that the mere potential for future impairment of the Board's remedial power is enough to justify injunctive relief. *E.g.*, *Nixon Detroit Diesel*, 859 F.2d at 30 (allowing 10(j) injunctions when "the enforcement of a Board order after the Board's normal processes" may be "ineffective to undo the effects of unfair labor practices").

Where does that leave things? Step one of our § 10(j) test requires a meager showing of "reasonable cause." Step two is no more demanding. It compels only a possibility of future harm to the Board's remedial power. Some 20 years after adopting these benchmarks, and in the aftermath of *Romero-Barcelo*, we expressly declined an invitation to replace them with the traditional four-part test from *Winter*. *Ahearn ex rel. NLRB v. Jackson Hosp. Corp.*, 351 F.3d 226, 234–35 (6th Cir. 2003). As far as I can tell, *Ahearn* turned more on the volume of our earlier

decisions than it did their veracity. That is, the number of cases we had decided since *Romero-Barcelo* coupled with the sheer passage of time seemingly was enough to justify our continued adherence to the two-part test. *Id.* And so we have marched on, dutifully applying that precedent. *E.g.*, Maj. Op.; *Ozburn-Hessey Logistics*, 875 F.3d at 339; *Voith Indus. Servs., Inc.*, 551 F. App'x at 830, 833; *Glasser ex rel. NLRB v. ADT Sec. Servs., Inc.*, 379 F. App'x 483, 485 (6th Cir. 2010). Over four decades, we entrenched a body of law far out of line with traditional equity jurisprudence, an approach others have now jettisoned. With two decades of added perspective, our approach to § 10(j) injunctions should be overhauled.

C.1. Today's case helps demonstrate why. Had the Board's request for injunctive relief been evaluated under the *Winter* factors, victory would have been far less certain. That reality is evident at every turn, starting with the touchstone for injunctive relief–whether a plaintiff is "likely" to succeed on its claims. *Winter*, 555 U.S. at 20. Not only the first of the four factors, the likelihood of success often carries the most weight. *Kentucky*, 57 F.4th at 550.

Applying that guidepost here would have required a thorough probing of the facts as well as the Board's legal theories. *McNeilly v. Land*, 684 F.3d 611, 615 (6th Cir. 2012) (requiring "stringent" proof to make out a likelihood of success in a preliminary posture). Consider, for example, the issue of Starbucks's motive. The Board's theory of anti-union retaliation rested on the notion that Starbucks was aware of organizing activity when it fired Taylor and when it closed its store before planned union-related activities. During the district court proceedings, however, the store managers denied both allegations. The

Board countered with contrary testimony. Were this a traditional equitable inquiry, the district court would have been obligated to settle these disputes of material fact, at least on a preliminary basis. *See Certified Restoration Dry Cleaning Network, LLC v. Tenke Corp.*, 511 F.3d 535, 552–53 (6th Cir. 2007) (requiring an evidentiary hearing on a preliminary injunction motion when material facts are disputed); *Cobell v. Norton*, 391 F.3d 251, 261–62 (D.C. Cir. 2004) (holding that a district court abuses its discretion when it fails to hold an evidentiary hearing where credibility determinations are required). I cannot say for certain that Starbucks would have prevailed. But nor, without factfinding, am I certain that the Board would have triumphed. Resolving credibility determinations is the district court's bread and butter. *Eagle Supply & Mfg., LP v. Bechtel Jacobs Co.*, 868 F.3d 423, 430 (6th Cir. 2017) (citing *Anderson v. City of Bessemer*, 470 U.S. 564, 575 (1985)). Yet it was never asked to do so.

That is the case because the factual analysis in § 10(j) proceedings is largely superficial. Employing the reasonable cause standard, the district court contented itself that the Board had shown "sufficient evidence" of unlawful anti-union retaliation. A searching review? Hardly. But a passable one under our imported reasonable cause standard. To clear that hurdle, remember, all the Board had to do was (1) illustrate a non-frivolous legal theory and (2) claim facts consistent with that theory. *Ozburn-Hessey Logistics*, 875 F.3d at 339 (quoting *W. Mich. Plumbing & Heating*, 250 F.3d at 969).

The first prong, in truth, is no real obstacle. By all accounts, it is chiefly concerned with the ability of the Board's attorneys to research labor law and pair it with a complaint. *See id.* at 340 (substantial legal theory existed

where the Board correctly identified a statute prohibiting labor discrimination); *Jackson Hosp. Corp.*, 351 F.3d at 238 (same). Assuming a case has been brought in good faith, it is hard to imagine how the Board could not articulate a "substantial legal theory." Proving as much, respondents often decline to challenge the Board's showing, a tack Starbucks took here. Maj. Op. at 8; *see also*, *e.g.*, *W. Mich. Plumbing & Heating*, 250 F.3d at 969; *Nixon Detroit Diesel*, 859 F.2d at 29–30.

That leaves the second "reasonable cause" prong–claiming facts consistent with the Board's theory. It is no more demanding. In making this assessment, we prohibit the district court from any manner of "fact-finding." That otherwise routine task becomes "inappropriate in the context of a district court's consideration of a 10(j) petition." *Jackson Hosp. Corp.*, 351 F.3d at 237 (citation omitted); *compare id.*, *with Sisters for Life*, 56 F.4th at 403 (noting the standard of review for a district court's factual findings in a preliminary injunction decision). In this way, we have allowed the Board to secure relief by saying little more than "trust me"–a standard that, at its apex, merely resembles our civil pleading requirements. *Compare Ozburn-Hessey Logistics*, 875 F.3d at 339 ("So long as facts exist which could support the Board's theory of liability, the district court's findings cannot be clearly erroneous." (cleaned up)), *with Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (accepting plausible factual allegations in complaint as true on a motion to dismiss). Were the § 10(j) "reasonable cause" standard applied in the traditional civil litigation setting, any complaint that could withstand Rule 12(b)(6) would automatically be deserving of injunctive relief as well, rendering the court

more a spectator than a referee when it comes to matters of equity.

Of course, § 10(j) proceedings are distinct from traditional civil litigation. And it is not our job to usurp the Board's role as primary enforcer of the NLRA. *Nixon Detroit Diesel*, 859 F.2d at 28–29. But why a preliminary determination of facts on our part would unduly interfere with or influence the Board, let alone bind it, is neither explored nor explained in our cases. *Cf. Robertson v. U.S. Bank, N.A.*, 831 F.3d 757, 761 (6th Cir. 2016) ("[A]ny findings of fact and conclusions of law at [the temporary injunction] stage do not bind the court when it reaches the merits." (citing *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981)).

In sum, "reasonable cause" at best boils down to a halfhearted version of the traditional likelihood of success test. "[R]elatively insubstantial," we have said. *Ozburn-Hessey Logistics*, 875 F.3d at 339 (quotation omitted). Likewise, it is neither expedient nor likely to produce consistent results. *Pioneer Press*, 881 F.2d at 490–91 (stating that reasonable cause "causes motion but not progress" and observing that "[t]rying to sort cases into bins according to the presence or absence of 'reasonable cause' has produced a complex body of law concerning standards of appellate review" across the circuits). We would be better served by casting it aside, as has the en banc Ninth Circuit and others, in favor of the customary four-factor test. *Cal. Pac. Med. Ctr.*, 19 F.3d at 457; *see also Pioneer Press*, 881 F.2d at 491–93 (departing from a prior interpretation of § 10(j)). Doing so would still respect Congress's decision to imbue the Board with investigative and adjudicative functions. *McKinney ex rel. NLRB v. S. Bakeries, LLC*, 786 F.3d 1119, 1123 (8th

Cir. 2015). And it would make the governing standard a contestable one, requiring the district court to assess the likelihood that the Board can actually prevail in the matter. That is not much to ask, given the stakes.

2. Turn next to the nature of the harm the Board needed to establish to justify the issuance of § 10(j) relief. Despite its own enforcement powers, the Board professed to need preliminary relief to ensure at the proceeding's close its ability to remedy the harm caused by Starbucks's conduct. *See* 29 U.S.C. § 160(a) (describing the Board's enforcement powers). Applying our "just and proper" jurisprudence, the district court asked only whether any *potential* injury could be inflicted on the Board's remedial power. *See Jackson Hosp. Corp.*, 351 F.3d at 239. Measuring with that diminutive ruler, the district court found that in the absence of injunctive relief, the Board might be curtailed in crafting remedies at the case's end.

Those proceedings would have been drastically different had the Board been asked to satisfy the *Winter* standard. *Winter* famously requires the movant to demonstrate an irreparable injury, an "indispensable" requirement for injunctive relief to issue. 555 U.S. at 21–22; *D.T. v. Sumner Cnty. Schs.*, 942 F.3d 324, 327 (6th Cir. 2019). The genre of irreparable harm at issue here is harm that the Board, entrusted with its own enforcement powers, would otherwise be powerless to fix. *Henderson ex rel. NLRB v. Bluefield Hosp. Co., LLC*, 902 F.3d 432, 440 (4th Cir. 2018); *Parents in Cmty. Action*, 172 F.3d at 1039 (applying the *Winter* test and describing the Board's task in showing the "rare situation[] in which the delay inherent in completing the adjudicatory process will frustrate the Board's ability to remedy" any resulting harm as a "high hurdle"). As compared to the just and

proper standard, this is the difference between the possible and the highly probable. *See United Paperworkers Int'l Union*, 965 F.2d at 1409 n.3 (contrasting the "just and proper" standard with "the traditional, more stringent requirement of irreparable harm"); *Nixon Detroit Diesel*, 859 F.2d at 30 n.3 (same); *see also Winter*, 555 U.S. at 22 (explaining that an irreparable injury is not demonstrated by proving the "possibility" of harm).

An irreparable injury is one that cannot be remedied through "money damages or other relief." 11A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2948.1 (3d ed.) (footnotes omitted). Had the district court been searching for one, it would have faced a difficult inquiry: did Starbucks's purported unfair labor practices so thoroughly douse the nascent unionization movement's fire that the Board would have been powerless to reignite it going forward? *See Hooks ex rel. NLRB v. Nexstar Broad., Inc.*, 54 F.4th 1101, 1118–20 (9th Cir. 2022) (holding that the district court abused its discretion in granting a § 10(j) injunction where it presumed, rather than analyzed, irreparable harm to the Board's remedial power); *Bluefield Hosp. Co.*, 902 F.3d at 442–43 (affirming, under the *Winter* test, the denial of a preliminary injunction where the Board "fail[ed] to demonstrate that the Board's ability to redress the alleged unfair labor practices will be impaired or frustrated"); *S. Bakeries*, 786 F.3d at 1125–26 (vacating a § 10(j) injunction where the Board did not make out irreparable injury to its remedial powers).

Consider whether that movement was actually chilled following the Memphis Seven's termination. The district court seems to have presumed that termination of union

supporters necessarily produces an insurmountable chill on organizing. No such supposition would be allowed, however, under the irreparable injury inquiry. *See Bluefield Hosp. Co.*, 902 F.3d at 440 (highlighting "a fundamental tension between the Board's theories of inherent harm and the Supreme Court's recognition that 'a preliminary injunction is an extraordinary remedy never awarded as of right'" (quoting *Winter*, 555 U.S. at 24) (emphasis omitted)). Nor was there any description of why the Board could not ultimately remedy the follow-on effects of the terminations, if those terminations did indeed produce a chill. *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 391 (6th Cir. 2020) ("To merit a preliminary injunction, an injury 'must be both certain and immediate,' not 'speculative or theoretical.'" (quoting *D.T.*, 942 F.3d at 327)). Much the same is true for the court's finding that the absence of six of the bargaining committee's members would impair the remaining employees' ability to unionize. Perhaps that translates into irreparable injury, perhaps not. Before granting extraordinary relief, though, we should at least be asking the question.

3. Were it wrapping up an analysis under the *Winter* test, the district court would have also considered the balance of the equities and the public interest. *D.T.*, 942 F.3d at 326. It might have entertained, for example, Starbucks's unclean hands defense. *See Performance Unlimited, Inc. v. Questar Publishers, Inc.*, 52 F.3d 1373, 1383 (6th Cir. 1995). Or the broad public policy implications of the growing unionization movement at Starbucks, a topic that has received national attention, including in in the halls of Congress. Heather Haddon, *Starbucks's Howard Schultz Faces Tough Questions from*

*Bernie Sanders About Union Talks*, Wall St. J. (updated March 29, 2023, 3:52 PM), https://perma.cc/MGD8-P9AR.

Refusing to entertain arguments about those important considerations "slight[s]" them. *Spartan Mining Co.*, 570 F.3d at 543. Yet under our interpretation of "just and proper," it is not apparent which factors (other than future injury) fit within that phrase's scope. We once suggested that a district court might consider aspects other than just potential future injury, like the Board's delay in seeking a § 10(j) injunction. *Frankel*, 818 F.2d at 495. But how broad is the doorway *Frankel* opens? Seemingly not so broad as to allow consideration of all four equitable factors, a point emphasized here, where Starbucks's unclean hands defense fell by the wayside. Maj. Op. at 11–12; *see also Ozburn-Hessey Logistics*, 875 F.3d at 343. Ultimately, *Frankel*'s hint remains only that: a hint. Litigants and lower courts are left to guess at what items fall under the just and proper prong. *Cf. Edwards v. Vannoy*, 141 S. Ct. 1547, 1566 (2021) (Gorsuch, J., concurring) ("Sometimes this Court leaves a door ajar and holds out the possibility that someone, someday might walk through it–though no one ever has or, in truth, ever will."). Utilizing the *Winter* standard would clear up this fuzzy picture.

4. All things considered, our § 10(j) jurisprudence has dramatically lowered the bar for the Board in securing an injunction, "an extraordinary remedy never awarded as of right." *Benisek*, 138 S. Ct. at 1943 (quoting *Winter*, 555 U.S. at 24). That body of law has produced predictable consequences. As a bottom-line matter, our feeble test stacks the deck in the Board's favor, a point the Board well understands: it claims to have achieved "either a satisfactory settlement or substantial victory in litigation"

in a whopping 93 percent of the § 10(j) cases it brought in fiscal year 2022. Performance and Accountability Report FY 2022, at 86. And the slow pace of Board proceedings means that this "temporary" relief binds private parties for months, if not years.

That is no small matter for those restrained by the injunction. That equitable remedy amounts to a "drastic" judicial intervention, *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 165 (2010), an exercise of the "strong arm of equity," with significant coercive effects. *Detroit Newspaper Publishers Ass'n v. Detroit Typographical Union No. 18*, 471 F.2d 872, 876 (6th Cir. 1972) (quotation omitted). Considerable forces push against allowing these invasions. One is our responsibility to guard individual liberty zealously from government incursion. *See Roman Cath. Diocese of Brooklyn v. Cuomo*, 141 S. Ct. 63, 69–72 (2020) (Gorsuch, J., concurring). Another is our obligation to rigorously police the limits of our own power. *See TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) ("Requiring a plaintiff to demonstrate a concrete and particularized injury caused by the defendant and redressable by the court ensures that federal courts decide only 'the rights of individuals,' and that federal courts exercise 'their proper function in a limited and separated government.'" (internal citations omitted)). If injunctive relief truly is "extraordinary," *Winter*, 555 U.S. at 24, then we should be doubly cautious before infringing upon a private party's ability to operate at the government's request.

* * * * *

Our 40-year experiment with borrowed jurisprudence has not served us well. In the right case, our en banc Court should reconsider our approach to § 10(j). We

would not be the first. Among other circuits, the Seventh Circuit previously departed from its prior practice to conform to text and Supreme Court precedent, bringing its approach to § 10(j) in line with *Winter*. Judge Easterbrook recognized there the hard truth that while "[c]ourts are reluctant to overrule their decisions," we "[n]onetheless . . . have an obligation to give statutes their proper meaning rather than to perpetuate the effects of our own mistakes." *Pioneer Press*, 881 F.2d at 491. We would be wise to do the same.

**APPENDIX B**

No. 22-5730

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

M. KATHLEEN MCKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,
Petitioner-Appellee,

v.

STARBUCKS CORPORATION,
Respondent-Appellant.

**FILED**
Sep 06, 2022
DEBORAH S. HUNT,
Clerk

O R D E R

Before: GRIFFIN, NALBANDIAN, and READLER, Circuit Judges.

PER CURIAM. While waiting for the National Labor Relations Board to decide whether Starbucks Corporation engaged in unfair labor practices, the Board's Regional Director petitioned the district court for a temporary injunction. The court partially granted the relief requested, requiring Starbucks to, among other things, offer reinstatement to seven employees it allegedly terminated for participating in union activities for Workers United. Starbucks moves to stay the injunction pending appeal and strike Workers United's amicus response and attached declarations. We vacate our prior administrative stay, deny Starbucks's motions to strike, and deny Starbucks's motion to stay.

**I.**

Starbucks, the world's largest coffeehouse chain, operates almost 9,000 stores across the country. After its employees began unionizing efforts at a Memphis store, Starbucks allegedly engaged in unfair labor practices. It terminated seven employees who engaged in pro-union activities, known recently as the "Memphis Seven."[1]

In response, Workers United ("the Union") filed three unfair labor practice charges against Starbucks. The National Labor Relations Board ("the Board") investigated and issued a consolidated complaint. The Board asserted that Starbucks violated §§ 8(a)(1) and (3) of the National Labor Relations Act ("the Act") by taking corrective action against an employee after overhearing her talk about unionizing; obstructing a sit-in by closing the store lobby; removing pro-union materials from a bulletin board; increasing manager monitoring after learning that store employees had publicly announced their union efforts; and terminating the Memphis Seven after they engaged in pro-union-organizing activity.

Although the Union and the Board have filed actions, no administrative hearing has taken place. In the meantime, the Board seeks to reinstate the Memphis Seven under § 10(j) of the Act. That section allows the Board to petition a district court for temporary, interim-injunctive relief while awaiting administrative hearings on unfair labor practices. 29 U.S.C. § 160(j).

The district court's § 10(j) proceedings are "ancillary"

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[1] *See* @memphisseven901, Twitter, https://twitter.com/memphisseven901 (last visited Sept. 6, 2022). Before the termination, the Memphis Seven accounted for eighty percent of the organizing committee for Workers United. (R. 86, Order, PageID 1805.)

to the Board's own proceedings. *Fleischut v. Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 28 (6th Cir. 1988). The district court does *not* adjudicate the merits of unfair labor practices; that question remains in the Board's exclusive jurisdiction, subject to appellate court review. *Id.* Instead, the court can only grant the Board temporary relief "as it deems just and proper." § 160(j). This process "reflects Congress' view" that interim relief can "restore and preserve the status quo, pending final Board adjudication." *Fleischut*, 859 F.2d at 28–29. Or that such relief can "avoid frustration of the basic remedial purposes of the Act and possible harm to the public interest." *Id.*

With that in mind, the Board petitioned the district court for a temporary § 10(j) injunction. And the Union received leave to participate as an amicus curiae. The district court held a two-day hearing and considered post-hearing briefs before issuing relief. After finding "reasonable cause" that unfair labor practices occurred, the court ordered injunctive relief as "just and proper." *McKinney v. Ozburn-Hessey Logistics, LLC*, 875 F.3d 333, 339 (6th Cir. 2017) (citations omitted).

Under the injunction, Starbucks had to: by August 23, offer to reinstate the Memphis Seven and rescind prior discipline against one of the employees; by August 25, post certain notices, grant all store employees access to said notices, and grant Board agents access to the store to monitor compliance; and by September 7, comply with court-ordered directives related to the injunction. Starbucks asked the district court to stay the injunction. The district court denied Starbucks's motion for a stay, leaving in place the injunction's prior deadlines. This appeal followed. Starbucks requests a stay pending an

appeal and moves to strike the Union's amicus response and attached declarations. We granted an administrative stay to consider Starbucks's request and ordered expedited briefing.

**II.**

First, we address the motions to strike. Starbucks moves to strike the Union's 3,388-word response for exceeding the permitted length. The Union has since filed a corrected response with fewer words. In exercising our discretion, we will consider the corrected response.

Next, Starbucks argues that the Union cannot submit the new employee declarations because nothing permits an amicus curiae to attach declarations to a response. Although it is within "the sound discretion of the courts" to determine an amicus curiae's extent of participation, *United States v. Michigan*, 940 F.2d 143, 165 (6th Cir. 1991) (citation omitted), an amicus generally "has no rights other than the conditional right to file 'a brief' in accordance with Rule 29" of the Federal Rules of Appellate Procedure. 16AA Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure* § 3975.1 (5th ed. 2022). Courts limit amici "to issues raised or the implications of issues raised by the parties. It is improper for the court to ask amicus to go further." David G. Knibb, *Federal Court of Appeals Manual* § 32:14 (7th ed. 2022).

Nevertheless, this matter is before us on a request for a stay of an injunction and not on the "merits." In these situations, we may look to additional evidence, in our discretion, in making our determination. Although we are hesitant to permit that evidence from an outside party, here the declarations are being submitted by the employees themselves who are at the center of this

dispute. Therefore, we decline Starbucks's request to strike them.

## III.

Second, we address the motion to stay. Four factors determine whether we can stay an injunction pending an appeal: (1) the movant's likelihood of success on appeal; (2) the potential for irreparable injury to the movant absent a stay; (3) the harm to others from a stay; and (4) the public's interest in a stay. *Dodds v. U.S. Dep't of Educ.*, 845 F.3d 217, 220−21 (6th Cir. 2016) (per curiam) (order). "The first two factors . . . are the most critical," and a stay requires more than a "possibility" of both. *Nken v. Holder*, 556 U.S. 418, 434−35 (2009) (internal quotations omitted).

Starbucks fails to meet the first. It fails to show more than a possibility of success on appeal against the district court's grant of a § 10(j) injunction. And this comes as no surprise. The Board's § 10(j) relief came with a "relatively insubstantial" burden. *Schaub v. W. Mich. Plumbing & Heating, Inc.*, 250 F.3d 962, 969 (6th Cir. 2001) (citation omitted). The Board does not have to prove a violation of the Act or even a valid liability theory; instead, it need only show a "substantial and not frivolous" legal theory. *McKinney*, 875 F.3d at 339 (internal quotations omitted). From there, a district court can find "reasonable cause" to believe that unfair labor practices occurred and issue § 10(j) relief as "just and proper." *Id.* (citations omitted).

Knowing this hurdle, we accord great deference to a district court's grant of a § 10(j) injunction. *Sheeran v. Am. Com. Lines, Inc.*, 683 F.2d 970, 976 (6th Cir. 1982); *see Schaub*, 250 F.3d at 970–71. We review de novo the district court's finding that the Board had a substantial

theory, and we review "that there are facts consistent with the Board's legal theory for clear error." *McKinney*, 875 F.3d at 339. And if facts support the Board's theory of liability, we cannot find a court's findings "clearly erroneous." *Id.* (internal quotations omitted). Lastly, we review the finding that an injunction is "just and proper" for abuse of discretion. *Id.*

**A. The district court did not err in finding "reasonable cause" of unfair labor practices.**

The court did not err in finding reasonable cause. The Board asserts a substantial legal theory that Starbucks violated the Act by, among other things, terminating the Memphis Seven for participating in pro-union activities. Consistent with that theory, facts support the court's "reasonable cause" finding that Starbucks engaged in unfair labor practices.

The court relied on sufficient evidence before finding reasonable cause for § 10(j) relief. It first found that the Memphis Seven engaged in a protected activity. Despite conflicting testimony in the record, the court next reasoned that the Board met its burden in proving that Starbucks knew of the Memphis Seven's organizing efforts. The court pointed to the employees' conversations with management and the public announcements of union activities. Finally, circumstantial evidence informed the court that Starbucks's stated reasons for imposing discipline were pretext for anti-union animus. From the record, the court found reasonable cause that Starbucks retaliated against an employee after making public announcements, did not penalize other employees for similar infractions in the past, closed its lobby to interfere with planned union sit-ins, and removed union literature from the community

bulletin board.

Starbucks asserts that the Board did not establish reasonable cause. Starbucks offers its own conflicting evidence, challenges the weight afforded to evidence, and questions the use of circumstantial evidence. On each ground, Starbucks does not have a likelihood of success on appeal. A district court "need not resolve conflicting evidence between the parties or make credibility determinations." *Ahearn v. Jackson Hosp. Corp.*, 351 F.3d 226, 237 (6th Cir. 2003) (internal quotations omitted). Again, so long as facts support the Board's theory of liability, we will not find the court's findings clearly erroneous. *Id.* And courts can rely on circumstantial evidence. *Airgas USA, LLC v. NLRB*, 916 F.3d 555, 561 (6th Cir. 2019). Because facts support the Board's theory of liability, we cannot hold the district court's findings clearly erroneous. *McKinney*, 875 F.3d at 339.

**B. The district court did not err by finding an injunction "just and proper."**

After finding reasonable cause, the district court found partial relief "just and proper" to protect the Board's remedial powers and end the frustration against collective bargaining. The Board argued that § 10(j) relief (like reinstating the Memphis Seven) would stop the chilling of union efforts. Although the Union's certification vote had overwhelmingly passed, Starbucks had discharged eighty percent of the organizing committee. As a result, the court determined that other employees felt chilled by Starbucks's alleged retaliation. This, the court found, warranted the interim relief. Again, at this stage of the proceeding, we do not find error in the court's decision.

Starbucks challenges the "just and proper" conclusion. It argues that the court improperly elevated subjective evidence of a chilling effect over contrary objective evidence, ignored intervening events, and did not explain the need for the extraordinary relief. We disagree.

The district court properly considered an employee's fear of retaliation from participating in pro-union activities. *See NLRB v. Main St. Terrace Care Ctr.*, 218 F.3d 531, 539 (6th Cir. 2000) (upholding a finding of a violation if an employer's statement tends to coerce). And the court did not just rely on the employee's testimony. It also explained the exacerbated-chilling effect that arises when a newly certified union has not yet entered an initial-collective-bargaining agreement and an employer fires the organizing-committee members. *See Ahearn*, 351 F.3d at 239 (holding that a court did not abuse its discretion in reinstating employees because the terminations would otherwise "have an inherently chilling effect on other employees"); *Bloedorn v. Francisco Foods, Inc.*, 276 F.3d 270, 298–99 (7th Cir. 2001); *Pascarell v. Vibra Screw Inc.*, 904 F.2d 874, 880 (3d Cir. 1990).

Nor did the court err when ordering reinstatement while recognizing the Union's certification vote. The district court wanted to return events to the "status quo." *Schaub*, 250 F.3d at 971. That is, "the state of affairs existing before the alleged unfair labor practices took place." *Id.* (quoting *Frye v. Specialty Envelope, Inc.*, 10 F.3d 1221, 1226 (6th Cir. 1993) (per curiam)). The court believed the Union's certification vote did not impact the status quo. *See McLeod v. Gen. Elec. Co.*, 385 U.S. 533, 535 (1967) (per curiam) (requiring a district court, before

exercising its discretion, to "determine in the first instance the effect of this supervening event upon the appropriateness of injunctive relief"). And the court defined the status quo as the state before Starbucks terminated the Memphis Seven and no chilling effect on pro-union efforts had occurred.

To obtain this status quo, the court found § 10(j) extraordinary relief reasonably necessary. Courts have the discretion to order interim reinstatement and the "unseating of current employees" if they find the relief "reasonably necessary to preserve the Board's ability to remedy the unfair labor practices . . . ." *Muffley v. Voith Indus. Servs., Inc.*, 551 F. App'x 825, 835 (6th Cir. 2014); *see Schaub v. Detroit Newspaper Agency*, 154 F.3d 276, 279 (6th Cir. 1998). Contrary to Starbucks's claims, the district court explained the evidence supporting the reinstatement. The district court detailed why it found injunctive relief just and proper. And Starbucks did not show a likelihood of success in challenging the relief. Because Starbucks cannot prove one of a stay's "most critical" factors, *Nken*, 556 U.S. at 434−35, we need not analyze the other factors. The district court did not abuse its discretion in issuing a § 10(j) injunction.

**IV.**

Thus, we **VACATE** the administrative stay, **DENY** Starbucks's motions to strike, and **DENY** Starbucks's motion to stay pending an appeal.

ENTERED BY ORDER OF THE COURT

*Deborah S. Hunt*

Deborah S. Hunt, Clerk

## APPENDIX C

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

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| M. KATHLEEN McKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,<br>Petitioner,<br>v.<br>STARBUCKS CORPORATION,<br>Respondent | No. 2:22-cv-2292-SHL-cgc |

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## ORDER DENYING RESPONDENT'S EMERGENCY MOTION TO STAY PENDING APPEAL

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Before the Court is Respondent's Emergency Motion to Stay Pending Appeal or In the Alternative Extend the Deadline for Compliance, filed August 21, 2022. (ECF No. 88.) Respondent seeks a stay of the Court's Order Granting in Part Petition for Temporary Injunction, issued August 18, 2022, (ECF No. 86), pending their

appeal to the Sixth Circuit Court of Appeals. Based on the analysis below, the Court **DENIES** the Motion to Stay, and thus the Order remains in effect, subject to any contrary orders by the Sixth Circuit.[1]

## I. Procedural Background

On May 10, 2022, M. Kathleen McKinney, Regional Director of Region 15 of the National Labor Relations Board, filed a petition on behalf of the Board requesting injunctive relief under § 10(j) of the National Labor Relations Act ("NLRA"). (ECF No. 1.) The Petition sought injunctive relief pending the administrative disposition by the Board of various unlawful labor practice charges filed by the Board against Respondent. (Id.) Petitioner was permitted to supplement the record with additional affidavits, (ECF Nos. 51-2, 51-3, 51-4), and the Court permitted Workers United ("the Union") to participate as amicus curiae, (ECF No. 45). Respondent filed a Pre-Hearing Memorandum on June 3, 2022. (ECF No. 61.)

The Court held a hearing on the Petition on June 9 and 10, 2022, and denied Respondent's Oral Motion for Judgment on Partial Findings. (ECF Nos. 70 & 71.) The Parties filed post-hearing briefs, (ECF Nos. 81 & 82), and

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[1] On August 23, 2022, the deadline for Starbucks to convey its written offer of reinstatement to the seven terminated employees, this Court held a virtual hearing to discuss the status of this Motion to Stay and the logistics at issue with the offer and onboarding for the seven individuals. Because the Court intended to fully address this Motion on an expedited basis, and given the amount of lead time between the written offer and when the employees would actually be back at work, the Court did not stay the reinstatement offer process pending consideration of this Motion to Stay. However, later that same day, the Court of Appeals did grant a stay pending a ruling on this Motion by this Court.

responses to opposing briefs, (ECF Nos. 84 & 85).

On August 18, 2022, the Court issued its Order Granting in Part Petitioner's Request for a Temporary Injunction. (ECF No. 86.) Respondent filed its Emergency Motion to Stay the Injunction Pending Appeal on August 21, 2022, (ECF No. 88), and both Petitioner and the Union filed Responses in Opposition on August 23, 2022, (ECF Nos. 89 & 91).

## II. Analysis

Federal Rule of Appellate Procedure 8(a) and Federal Rule of Civil Procedure 62(d) allow a district court to stay an injunction while an opposing party appeals its issuance. When considering whether to grant a party's request for a stay, courts in this circuit consider the same four factors as those considered for issuing preliminary injunctions: (1) the likelihood that the movant will prevail on the merits of the appeal; (2) the likelihood that the movant will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the stay is granted; and (4) the public interest in granting the requested stay. Mich. Coal. of Radioactive Material Users, Inc. v. Griepentrog, 945 F.2d 150, 153 (6th Cir. 1991). The movant must show a likelihood of reversal on appeal. Id. The level of likelihood the movant must show is negatively related to the amount of irreparable harm that the movant shows they may incur absent a stay; as the amount of irreparable harm increases, the required showing of likelihood of success falls, and vice versa. Id. The Court will evaluate each factor in turn.

### A. Likelihood of Success on the Merits

To satisfy their burden on this factor, Respondent must show, "at a minimum, serious questions going to the

merits." Dodds v. U.S. Dep't of Educ., 845 F.3d 217, 221 (6th Cir. 2016) (quoting Mich. Coal., 945 F.2d at 153). In making this assessment, the Court bears in mind that which Respondent seems to have forgotten – § 10(j) petitions are unique, requiring courts to assess the evidence to determine, in general, whether it meets a particular standard but not to make credibility decisions between competing evidence. See Muffley ex rel. NLRB v. Voith Indus. Servs., Inc., 551 F. App'x 825, 830 (6th Cir. 2014) ("[T]he district court is not to resolve conflicting evidence or weigh credibility in a § 10(j) proceeding"). With this fundamental principle in mind, the specifics of Respondent's five discrete arguments are analyzed below. (See ECF No. 88-1 at PageID 1821-25.)

1. Taylor's Disciplinary Actions

Respondent's first argument centers on the two disciplinary actions involving Taylor. Respondent claims that this Court failed to hold Petitioner to its required evidentiary bar by permitting Petitioner to assert, without evidence, that Starbucks issued Taylor two disciplinary actions. (ECF No. 88-1 at PageID 1821-22.) Respondent argues that this Court erred by relying solely on Taylor's testimony without giving any weight to Morton's contradictory testimony that no disciplinary actions were ever given. (Id.) Finally, Respondent argues that this Court further erred by relying on purely circumstantial evidence that Morton had knowledge of organizing activity at the Memphis Store by January 14, 2022, the day the alleged discipline was issued. (Id.)

The evidence offered at the hearing and the Court's Order contradict Respondent's arguments. First, Respondent's assertion that Petitioner failed to show that Taylor was issued a disciplinary action is contradicted by

the evidence. Beyond simply Taylor's testimony concerning the disciplinary actions and the physical forms entered into evidence, both which contain Morton's signature, (see Exhibits 1 & 2), Morton himself testified that "I am the one that ultimately delivered [the disciplinary action] to [Taylor]." (ECF No. 75 at PageID 1161.) Moreover, Respondent conceded in previous briefing that Morton indeed issued at least one disciplinary action to Taylor. (ECF No. 81 at PageID 1691-92.)

Second, Respondent fails to consider the standard under which the Court must evaluate Petitioner's evidence. When reviewing a § 10(j) petition, the Court is not permitted to resolve conflicting evidence as Respondent argues the Court should. Muffley, 551 F. App'x at 830. Respondent offers no argument as to why this Court should disregard this binding precedent.

Third, the Court considered Respondent's argument concerning the circumstantial support for Morton's knowledge of union organizing efforts at the time of Taylor's disciplinary actions. (See ECF No. 86 at PageID 1790-91.) However, given the evidentiary burden here and the fact that the Court cannot weigh conflicting testimony, the Court concluded that the Board presented sufficient evidence to meet its burden on this issue.

2. Comparator Evidence and Pretext

Respondent's second argument involves evidence of comparators. Respondent argues that this Court erred when it disregarded evidence that Respondent relied on comparator evidence prior to the terminations. (ECF No. 88-1 at PageID 1823.) Respondent points to Steve Fox's testimony that he looked at similar circumstances of

partner misconduct. (Id.) Respondent further argues that this Court misapplied the Wright Line test by evaluating comparator evidence in the context of particular partners rather than in the context of pretext. (Id. at 1822-23.)

Respondent relies on Fox's testimony in support of its argument that Respondent did in fact consider comparator evidence prior to terminating the Memphis Seven. It was Morton, however, who ultimately made the decision to terminate the seven partners. (ECF No. 75 at PageID 1139) (Q: "Who made the decision to discharge these individuals? A: "Ultimately I did;" Testimony of Cedric Morton.) And nothing in Morton's testimony indicated that he in any way considered comparators prior to terminating the partners. Morton does mention that "several partner relations support partners," including Fox, participated in arriving at the decision. (Id. at 1140.) But the only mention of Fox's role in Morton's decision involved reviewing video footage of the incidents to identify participants in the alleged violations of company policy. (Id. at 1170.) Morton never stated that he relied on comparators.

However, even if Morton had said that he relied on Fox's comparator evidence, Respondent's contention that the Court misapplied the use of comparator evidence in the Wright Line test would still be incorrect. As the Court noted in its Order, the Board proffered evidence consistent with its legal theory that Respondent's policy justifications (including comparator evidence) were pretextual in part specifically because Respondent had tolerated similar conduct at the Memphis Store prior to the terminations for the same conduct. (ECF No. 86 at PageID 1801-02.) Thus, the Board's evidence directly

contradicts Respondent's assertion that "Starbucks acted in accordance with its own past practice." (ECF No. 88-1 at PageID 1823.) Again, this Court is not permitted to resolve conflicting evidence and simply considers whether the Board's evidence is consistent with its substantial legal theory. Muffley, 551 F. App'x at 830. Here, it was.

In Respondent's final argument regarding the Court's finding of pretext, it takes issue with the Court's assertion in its Order that "there is no evidence in the record to support the existence of any safety concerns that night," (ECF No. 86 at PageID 1801-02), arguing that this statement is unsupported by the record and that other objective evidence supports a finding that there were indeed safety concerns at the Memphis Store. (ECF No. 88-1 at PageID 1823.) What Respondent misses, however, is that this evidence was considered in the context of pretext, not as an objective factual finding on safety. The Board proffered evidence that partners were previously permitted to unlock the store after hours to allow individuals into the store and were neither reprimanded nor terminated for doing so. (ECF No. 73 at PageID 1424.) Respondent then proceeded to terminate several partners for violating this same, previously inconsistently enforced, policy. This evidence is indeed consistent with the Board's substantial legal theory, the standard to be used in § 10(j) proceedings.

3. Insufficient Evidence of a Chilling Effect at the Memphis Store

Respondent next argues that the Court's finding that an injunction would be "just and proper" is insufficiently supported by evidence. Specifically, Respondent argues that this Court placed undeserved weight on Ax Heiberg's testimony regarding his experience at the Memphis Store

following the terminations. (ECF No. 88-1 at 1823-24.) It contends that Heiberg's testimony counts as nothing more than subjective, hearsay evidence that is countered by objective evidence of continued union support in the Memphis Store, evidenced primarily by the successful union vote. (Id.)

A district court's determination of whether issuance of a temporary injunction under § 10(j) would be "just and proper" is reviewed by an appellate court under an "abuse of discretion" standard. Schaub v. W. Mich. Plumbing & Heating, Inc., 250 F.3d 962, 970 (6th Cir. 2001). A district court abuses its discretion only when it "relies upon clearly erroneous findings of fact or when it improperly applies the law or uses an erroneous legal standard." Kobell v. United Paperworkers Int'l Union, 965 F.2d 1401, 1410 (6th Cir. 1992) (quoting Fleischut v. Nixon Detroit Diesel, 859 F.2d 26, 30 (6th Cir. 1988)).

The Court first notes that Respondent challenges neither the Court's application nor standard of the law regarding "just and proper" determinations. Thus, it appears that Respondent contends that this Court relied upon clearly erroneous findings of fact in determining that Respondent's actions resulted in a chilling effect at the Memphis Store.

In reaching its decision on "chilling effect," the Court did rely, in part, on Heiberg's testimony. He testified at length about his own experiences in the Memphis Store and his opinions about the effect of the terminations, stating that he stopped wearing his union pin for fear of retaliation, that he stopped discussing unionization with others unless he knew he could trust them, and that every partner other than Hall had stopped wearing union pins to work. (See ECF No. 73 at Page ID 1568-69, 1588.)

Contrary to Respondent's contention, Heiberg's testimony encompassing his perception of the Memphis Store and its workplace environment, what occurred following the terminations, and his own actions is not hearsay testimony. While such testimony is subjective, that label does not negate its relevance on the issue of "chilling effect." Indeed, "chilling effect" must, at some level, be a subjective determination.

Additionally, however, the Court also relied on "objective" evidence in determining that an injunction would be just and proper, describing how the union's organizing committee was reduced by 80 percent with the terminations. (ECF No. 86 at PageID 1805.) The Court noted specifically how this objective factor, when an organizing committee is decimated in this manner, renders the remaining employees currently in the process of bargaining a contract with Respondent highly susceptible to management misconduct. (Id. at 1807.) Moreover, the "important role [a terminated employee] played in developing union support" is a factor that the Court may consider in its just and proper analysis for reinstatement. Gottfried v. Frankel, 818 F.2d 485, 496 (6th Cir. 1987). The Court did so when it considered evidence of Taylor's outsized role in organizing the union at the Memphis Store and the extent to which her termination would chill unionization efforts. (ECF No. 86 at PageID 1805.) The Court therefore did not solely rely on subjective, hearsay evidence in its just and proper analysis as Respondent suggests.[2]

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[2] In any event, Respondent cites no authority that would suggest that the Court must draw a distinction between subjective or objective evidence in a just and proper determination and then weigh the two, and the Court thus declines to do so.

The thrust of Respondent's argument on this point seems to be that the Court improperly weighed the evidence in its just and proper analysis by relying too heavily on Heiberg's testimony while not relying enough on "objective" evidence countering it. But that is not the legal standard for success on appeal on this element which requires a clearly erroneous finding of fact. Because Respondent has failed to allege any clearly erroneous finding of fact, alleging instead an improper balancing of facts, this argument is unlikely to carry the day on appeal.

4. Infeasible Return to the Status Quo

Respondent next argues that this Court made no explicit determination that a return to the status quo prior to the allegedly unlawful labor practices is possible and that intervening circumstances, particularly the successful union certification vote, have rendered a return to the status quo through reinstatement impossible anyways. (ECF No. 88-1 at PageID 1824.)

A temporary injunction under § 10(j) of the NLRA is just and proper when it is "necessary to return the parties to the status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA, and whether achieving status quo is possible." McKinney v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333, 339 (6th Cir. 2017). The status quo is "that which existed before the alleged unfair labor practices took place." Muffley, 551 F. App'x at 834.

Respondent characterizes the status quo as "when there was open Union support in the store, but there had not been an election." (ECF No. 88-1 at PageID 1824.) Thus, as Respondent's logic goes, now that there has been a successful union vote, there is no way to restore the

status quo, short of somehow decertifying the vote. (Id.)

The Court disagrees with Respondent's characterization. The substantial legal theory, as put forward by the Board in its Petition, is that the allegedly unlawful terminations of the Memphis Seven caused a chilling effect on open union support in the Memphis Store. The status quo is therefore when the Memphis Seven were employed at the Memphis Store and the chilling effect had yet to occur.

The Court credited Heiberg's testimony in support of the Board's theory of a chilling effect on organization efforts at the Memphis Store. (See ECF No. 86 at PageID 1805-07.) Following the terminations, but prior to the vote, Heiberg testified that he and all but one other partner at the Memphis Store ceased wearing union pins to work (on the day immediately following the terminations) and that he would no longer discuss unionization while on the job. (Id. at 1805-06.) Heiberg also testified that he only felt comfortable voting to support the Union because a secret ballot was used. (Id. at 1806.) This is evidence, consistent with the Board's legal theory, that a chilling effect occurred following the terminations but prior to the vote.

Heiberg's testimony continued however. Heiberg further testified that, following the successful vote, he would not want to be part of the bargaining committee because such open support of the Union would make him a target for Respondent, as the Memphis Seven had been. (Id. at 1806-07.) This indicates, as the Board argues, that a persistent chilling effect remains at the Memphis Store following the successful unionization vote. Moreover, the Court recognized that the discharge of the Memphis Seven, while some remain a part of the bargaining

process, "limited [] their capacity to communicate with, to influence, and to knowledgeably advocate for fellow union members." (Id. at 1807.) This is further evidence of an enduring chill on union efforts, even following the successful vote.

Given the above evidence, the Court found, contrary to Respondent's assertion that it made no determination, that the status quo prior to the chilling effect could be achieved through reinstatement of the Memphis Seven. The Court held that a sufficient foundation had been offered to show an overall chill on union support in the Memphis Store and that reinstatement of the Memphis Seven "will nearly as is now possible restore the conditions prevailing before the discharges and so prevent a frustration of the ultimate administrative action." (Id. at PageID 1809 (quoting Angle v. Sacks, 382 F.2d 655, 660-61 (10th Cir. 1967).)

Respondent briefly asserts that relying on the chilling effect on the bargaining process at the Memphis Store is inappropriate given the Board's initial reliance on a chilling effect on overall union support in its Petition. (ECF No. 88-1 at PageID 1824 n.3.) However, the Board's substantial legal theory has been consistent: the terminations of the Memphis Seven led to a chilling effect on unionization efforts at the Memphis Store. The evidence above, showing a chilling effect both prior and subsequent to the successful union vote, is consistent with this legal theory which is all that the Board is required to show for a temporary injunction under § 10(j). Muffley, 551 F. App'x at 827.

5. Extraordinary Nature of the Relief

Respondent's final argument states that this Court

failed to explicitly consider the "extraordinary nature of Section 10(j) relief" and did "not explain why this relief is necessary in this instance to protect the Board's remedial powers under the NLRA." (ECF No. 88-1 at PageID 1825.)

The Court, however, did precisely that. In its Order, the Court held that the Board had proffered evidence sufficient to constitute an adequate foundation that there was a chilling effect caused by the allegedly unlawful terminations. (ECF No. 86 at PageID 1809.) The Court then held that reinstatement of the Memphis Seven would allow the Board to administratively adjudicate the allegedly unfair labor practices without frustration of the policy of the United States to encourage collective bargaining. (Id. (citations omitted).) As the Court explained, without reinstatement, the chilling effect on the Union's bargaining process would continue until the Board's ultimate disposition of the case. (Id.) By the time of this disposition, the Court held that reinstatement could be rendered an empty formality as the Memphis Seven may have long since found other work. (Id.) Together, these holdings address the very thing Respondent argues the Court did not consider: whether without injunctive relief the Board would be unable to adequately remedy the harm resulting from the alleged unfair labor practices.

**B. Likelihood of Irreparable Harm**

Respondent argues that it will suffer significant, irreparable harm should this Court fail to stay its Order. (ECF No. 88-1 at 1826-29.) Respondent points to incalculable monetary damages it will incur by employing allegedly hostile former employees along with additional monetary damages from onboarding the reinstated employees and the disruption in staffing they would cause.

(Id. at 1826-28.) Respondent further points to nonmonetary damages it would incur through a loss of customer goodwill as current partners at the Memphis Store will be displaced, disrupting relationships the current partners have cultivated with the Store's customers. (Id. at 1829.)

"Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough" to constitute irreparable harm. Baker v. Adams County/Ohio Valley Sch. Bd., 310 F.3d 927, 930 (6th Cir. 2002). Monetary loss may sometimes, however, constitute irreparable harm if "the nature of the loss would make the damages difficult to calculate." Certified Restoration Dry Cleaning v. Tenke, 511 F.3d 535, 550 (6th Cir. 2007) (quoting Basicomputer Corp. v. Scott, 973 F.2d 507, 511 (6th Cir. 1992)).

The Court agrees with Petitioner and amicus – Respondent's harm is monetary in nature and readily measurable, and thus not irreparable. Contrary to Respondent's assertion, Respondent should be able to quantify the cost of onboarding seven, veteran employees as well as the costs of accommodating them at the Memphis Store. While the Memphis Store may indeed experience a disruption, quantifiable potentially by a reduction in revenue at the Store, the cost to displace seven current partners, either through relocation or termination, is a similarly ascertainable amount, particularly given Respondent's size and ample resources.

Respondent's sole allegation of nonmonetary damages is that the loss of current partners at the Memphis Store will disrupt customer relations those partners have built and that a disruption in staff will harm

customer goodwill. (ECF No. 88-1 at PageID 1829.) The Court disagrees. In Certified Restoration Dry Cleaning, 511 F.3d at 538, the case on which Respondent relies, the customer relationships that formed the basis for the customer goodwill involved franchise dry cleaners contracting with insurance companies and restoration contractors, both of whom relied on past experiences with the cleaners to justify future, repeated business once the cleaners had proven themselves. Here, however, the contact between partners at the Memphis Store and customers is far less extensive and far less pivotal for a customer's repeated patronage at the Memphis Store. The Court thinks it profoundly unlikely that the absence of a customer's preferred barista at their local Starbucks location will in any way affect their choice to continue patronizing said Starbucks.

**C. Potential Harm to Others**

Respondent states that neither the Memphis Seven nor the Union will be harmed by a stay of the Order. (ECF No. 88-1 at PageID 1829-30.) Indeed, Respondent argues that there is a significant risk that the Memphis Seven will be harmed absent a stay as success on appeal for the Respondent would lead to their termination by Respondent again, resulting in another Starbucks job loss. (Id.) Respondent also argues that any risk to the Union is low given the lengthy process of first-contract bargaining and the brief nature of the stay pending appeal. (Id. at 1830.) Finally, Respondent notes that, absent a stay, current partners may be displaced as a result of the Memphis Seven's reinstatement. (Id.)

First, the Court agrees with Petitioner and amicus insofar as it will be up to the Memphis Seven to accept Respondent's offers of reinstatement, in full knowledge of

the risk that a pending appeal presents. The Order does not require that they accept the offers, merely that the offers be made. Therefore, there is no substantial risk of harm in requiring that the Order remain in effect and the offers be made.

Second, the continuing harm to the Union is not low as Respondent argues. The Court found the evidence of the chilling effect on the Union's bargaining process sufficient to support reinstatement of the Memphis Seven. (ECF No. 86 at PageID 1809.) This chill continues so long as the Memphis Seven are not reinstated as the bargaining process continues irrespective of the proceedings in court.

Finally, Respondent notes that it may be forced to relocate, terminate, or reduce the hours of current partners to accommodate the reinstated partners. (ECF No. 88-1 at Page ID 1830.) However, the Court has already found that the harm that may be suffered by these current partners is outweighed by the harm resulting from failure to reinstate the Memphis Seven. (ECF No. 86 at PageID 1810) (quoting Blyer ex rel. NLRB v. P & W Elec., Inc., 141 F. Supp. 2d 326, 331 (E.D.N.Y. 2001).)

**D. Public Interest in Granting a Stay**

Respondent argues that the Board's delay in filing its Petition for Injunctive Relief undermines the need for the immediate implementation of the Order and that a brief stay would not be against the public interest. (ECF No. 88-1 at PageID 1830-31.)

When the Government is the opposing party to a Motion to Stay, the "harm to the opposing party and the public interest factors" merge. Wilson v. Williams, 961 F.3d 829, 845 (6th Cir. 2020) (citing Nken v. Holder, 556

U.S. 418, 435 (2009)).

The Court held that the Board has an interest in enforcing the policy of the United States to encourage collective bargaining and that reinstatement of the Memphis Seven is necessary to protect the Board's remedial powers regarding such interest. (See ECF No. 86 at PageID 1809.) Each additional day the Order fails to be enforced necessarily impairs the Board's remedial powers constituting cognizable harm to the Board. Given that the Board's harm is also the public's harm, a stay would be against the public interest; the Board's litigation timeline under these circumstances is irrelevant.

## CONCLUSION

Much of Respondent's Motion asks the Court to do that which it cannot do at this stage: weigh evidence, make credibility determinations, and resolve conflicts in the record. Precedent in this circuit precludes the Court from undergoing its analysis of the evidence in the ways Respondent requests.

Respondent similarly neglects to consider that Petitioner's evidentiary burden is relatively insubstantial to establish reasonable cause for a § 10(j) temporary injunction and that the Court must consider only whether the facts of the case are consistent with Petitioner's legal theory (Respondent does not challenge whether the theory is substantial). As the Court discussed at length in its Order, the facts are so consistent.

Finally, Respondent did not address in its Motion that the Court's determination of whether the issuance of a temporary injunction would be "just and proper" is reviewed under an abuse of discretion standard. Respondent did not challenge the legal standard the Court

applied nor the application of said standard. Respondent argued that the Court improperly weighed the evidence rather than that the Court made a clearly erroneous finding of fact, which is insufficient for success on appeal under an abuse of discretion standard.

For the reasons described above, Respondent's Emergency Motion to Stay Pending Appeal is **DENIED**. Additionally, Respondent cites no authority that would require this Court to extend the Order's deadlines by 14 days and the Court declines to do so. All deadlines in the Order therefore remain the same, subject to contrary orders by the Sixth Circuit Court of Appeals.

**IT IS SO ORDERED**, this 26th day of August, 2022.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE

## APPENDIX D

## IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TENNESSEE WESTERN DIVISION

| | |
|---|---|
| M. KATHLEEN McKINNEY, Regional Director of Region 15 of the National Labor Relations Board, for and on behalf of the NATIONAL LABOR RELATIONS BOARD,<br>Petitioner,<br>v.<br>STARBUCKS CORPORATION,<br>Respondent. | No. 2:22-cv-2292-SHL-cgc |

## ORDER GRANTING IN PART PETITION FOR TEMPORARY INJUNCTION

This matter arises (primarily) from the termination of seven partners[1] employed at Respondent Starbucks Corporation's ("Starbucks") store located at 3388 Poplar Avenue in Memphis, Tennessee ("Memphis Store"). M. Kathleen McKinney, on behalf of the National Labor Relations Board ("Petitioner" or "Board"), asserts that

[1] Starbucks identifies its employees as "partners." (ECF Nos. 73 & 75.)

Starbucks fired these partners, coined by some as the "Memphis Seven," for participating in activity protected under § 7 of the National Labor Relations Act ("NLRA" or "Act"), and took other actions to interfere with pro-union activity at the Memphis Store, all in violation of §§ 8(a)(1) and (3) of the Act. In response, Starbucks contends that all of the actions that it took in relation to these partners – including their terminations – were consistent with the enforcement of its internal policies and its previous corporate practices.

Thus, before the Court is the Board's Petition for Temporary Injunction Pursuant to § 10(j) of the National Labor Relations Act, (ECF No. 1 ("Petition")), and its attachments. (ECF Nos. 1-2 (Index of Exhibits) & 1-3 (Memorandum in Support of Petition).) As part of the Court's hearing on the Petition on June 9-10, 2022, other documents filed by the Parties include Starbucks' Pre-Hearing Memorandum of Points and Authorities in Opposition to Petitioner's Petition for Temporary Injunction, (ECF No. 61), Starbucks' Post-Hearing Memorandum, (ECF No. 81), Petitioner's Post-Hearing Brief, (ECF No. 82), Petitioner's Reply Brief to Starbucks' Post-Hearing Brief, (ECF No. 84), and Starbucks' Reply in Opposition to § 10(j) Relief (ECF No. 85.) As explained below, the Court **GRANTS IN PART** Petitioner's request for temporary injunctive relief.

## PROCEDURAL BACKGROUND

This matter commenced before the Board when, on February 8, February 9, and April 12, 2022,[2] Workers United ("the Union") filed multiple charges of unfair labor

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[2] The April 12, 2022 charge was amended and filed with the Board on May 9, 2022. (ECF No. 1.)

practices against Starbucks. The charges were referred to Petitioner as Regional Director of Region 15 of the Board. (ECF No. 1 at PageID 2.) Following an investigation, the Board's General Counsel issued a Consolidated Complaint and Notice of Hearing on April 22, 2022. (Id. at PageID 3.) Ultimately, the Board issued an Order Further Consolidating Cases, Second Consolidated Complaint and Notice of Hearing ("Consolidated Complaint") on May 9, 2022, alleging that Starbucks engaged in unfair labor practices in violation of §§ 8(a)(1) and (3) of the NLRA. (Id.)

Based on these allegations, the Board filed this Petition on May 10, 2022, seeking a cease and desist order, as well as various forms of affirmative relief including, but not limited to, interim reinstatement of the Memphis Seven to their former positions of employment. (ECF No. 1.) Three days later, the Court held a Status Conference with the Parties and set a hearing on the Petition for June 9-10, 2022, providing the Parties time to conduct expedited discovery and file supplemental briefs. (ECF No. 28.) The Court permitted Petitioner to supplement the record with the affidavits of Richard Bensinger, Cara Nicole Taylor, and an unnamed Starbucks employee. (ECF No. 51-2, 51-3, 51-4.) The Court also permitted the Union to participate as amicus curiae.[3] (ECF No. 45.) On June 3, 2022, Starbucks filed a Pre-Hearing Memorandum. (ECF No. 61.)

The hearing began on June 9, 2022. (ECF No. 70.) That day, the Court heard the testimony of Petitioner's

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[3] The Union filed two documents in its capacity as amicus: a Brief in Support of the Regional Director's Petition, (ECF No. 80), filed June 24, 2022, and a Brief in Response to Starbucks' Post Hearing Brief, (ECF No. 83), filed July 1, 2022.

witnesses Cara Nicole "Nikki" Taylor (and the introduction of Exhibits 1-12); former Store Manager Amy Holden; Reaghan Hall (Exhibits 13-14); Luis "Beto" Sanchez; Anna "Ax" Heiberg (Exhibit 16); and Margaret "Maggie" Carter. (Id.) The following day, the Court started with the testimony of the Board's witness Richard Bensinger via Teams (Exhibit 22). After denying Respondent's Oral Motion for Judgment on Partial Findings, the Court heard the testimony of Regional Director Amandalynn Line (Exhibits 24-37); District Manager Cedric Morton (Exhibits 38-48); Partner Resources Consultant Kimberly Harris (Exhibits 49-53); and Senior Manager of Partner Relations Steve Fox (Exhibits 54-55).[4] (See Exhibit and Witness List, ECF No. 72.) The Court granted Starbucks' post-hearing Motion to supplement the record with one exhibit, (ECF No. 76-2), and the Parties filed post-hearing briefs, (ECF Nos. 81 & 82), and responses to opposing briefs. (ECF Nos. 84 & 85.)

## FACTUAL BACKGROUND

The following facts come from the Petition and Petitioner's submitted affidavits, (ECF Nos. 1-2 & 1-3), as well as hearing testimony and exhibits.[5] (ECF Nos. 73, 75,

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[4] Also admitted into evidence were Plaintiff's Exhibits 15 and 23, and Respondent's exhibits 10, and 17-21. (See ECF Nos. 70 & 71.)

[5] Starbucks objects to all of the hearsay statements introduced by the Board in support of the Petition. However, courts reviewing petitions for injunctive relief disfavor strict adherence to the rules of evidence. See, e.g., Fidelity Brokerage Servs. LLC v. Clemens, No. 2:13-CV-239, 2013 WL 5936671, at *5 (E.D. Tenn. Nov. 4, 2013); see also Damon's Rests., Inc. v. Eileen K Inc., 461 F. Supp. 2d 607, 620 (S.D. Ohio 2006) (recognizing that "district Courts within [the Sixth Circuit] have considered such [hearsay] evidence, as have numerous other circuit courts," in determining preliminary injunctive relief) (citations

79.) Because the Court is not permitted to resolve conflicting evidence when reviewing a § 10(j) petition for injunctive relief, it simply notes the conflicts within the evidence presented. See Muffley ex rel. NLRB v. Voith Indus. Servs., Inc., 551 F. App'x 825, 827 (6th Cir. 2014).

## I. The Memphis Store

Starbucks is the largest coffeehouse chain in the world, with approximately 9,000 stores across the nation. One of them – the "Memphis Store" – is located at Poplar Avenue and Prescott Street, near the intersection of Poplar and Highland Avenue in Memphis, Tennessee.

For purposes of this Order, the Memphis Store's story begins in November 2021, when Amy Holden was serving as its store manager. (ECF No. 73 at PageID 1433.) One Starbucks partner, Nikki Taylor, had transferred to the role of shift supervisor at the Memphis Store during Holden's tenure, having previously worked for her at a different location. (ECF No. 73 at PageID 1359-60.)

According to Holden, the training provided to the partners she supervised at the Memphis Store included receipt of the Partner Guide. (Exhibits 10, 12.) She testified that the Partner Guide was handed out on the first day of a partner's shift, but "[t]here was no way in those two hours [of on-boarding] that they would be able to read that guide, but they were told to sign the guide as an acknowledgment of receiving [it]." (ECF No. 73 at PageID 1440.) She also explained the "knowledge gap"

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omitted)). The Court therefore considers the evidence presented, "admissible or not, but assign[s] it only the weight it deserves." J.P. Morgan Sec. LLC v. Logsdon, No. 3:22-CV-14-BJB, 2022 WL 179606, at *2 (W.D. Ky. Jan. 18, 2022) (internal citations omitted).

versus "skill gap" consideration made before issuing discipline – testifying that Starbucks wanted to ensure that a partner was "aware of what the policy is before we would proceed with any corrective action." (Id. at PageID 1442-43.)

Holden also testified that, upon her arrival at the Memphis Store, she was asked to tackle the partners' noncompliance with the dress code. (Id. at PageID 1434.) She stated that Taylor "assist[ed]" her with the task, and, as a result of their efforts, Holden did not have to send anyone home or deliver any corrective actions for dress code violations while she was Store Manager – although, if she had issues, she would send the partner home to change before delivering corrective action. (Id. at PageID 1435.)

On November 20, 2021, Holden promoted partners Kylie Throckmorton and Lakota McGlawn to shift supervisors. (Id. at PageID 1442.) The next day, she took a leave of absence from Starbucks. (Id. at PageID 1433.) Holden testified that she told District Manager Morton that neither Throckmorton nor McGlawn had received computer training as part of their promotion. (Id. at PageID 1442.)

When Holden took her leave of absence, Elizabeth Page became the "proxy manager" for the Memphis Store – holding the role of Store Manager until a new manager was transferred or hired. (Id. at PageID 1360-61.) Mia Poindexter was the assistant manager under Page. (Id. at PageID 1361.)

## II. Early Organizing Efforts

Nikki Taylor was the first partner to spark the organizing effort at the Memphis Store. When she

learned about union organizing taking place at a Starbucks location in Buffalo, New York, in December 2021, she and others "realized [they] had some of the same issues that [the Buffalo partners] were having." (Id. at PageID 1362, 1458.) Around January 1, 2022, Taylor called and later emailed the Buffalo partners, who told her to connect with the Union. (Id. at PageID 1363, 1365.)

Taylor testified that she told fellow partners Beto Sanchez and Throckmorton about her engagement with the Buffalo store. She also stated that, in the first two weeks of January 2022, she spoke to Sanchez, Nabretta Hardin, Throckmorton, Reaghan Hall, Makayla Abrams, and "Savannah" about her contact with the Union. (Id. at PageID 1367.) Sometimes they would talk behind the bar area, sometimes in the café, sometimes in the "back of house." (Id. at PageID 1367.) Taylor testified that partners worked in close proximity, (id. at PageID 1366), and that she spoke about organizing with partners in the Memphis Store several times when managers – including Page, Poindexter and Morton – were present. (Id. at PageID 1363-64, 1367.)

There were two conversations during which Taylor remembered specific managerial interaction. In one, Taylor was telling Hardin and Throckmorton about meeting with the Union and the next organizing steps while Assistant Manager Poindexter was close enough to hear the conversation; according to Taylor, Poindexter stopped the conversation "to ask about details about what the meeting was about and things of that nature." (ECF No. 73 at PageID 1368.) Taylor testified that she had stated aloud to the others that it was a union meeting, but did not say so directly to Poindexter. (Id. at PageID 1417-18.) However, Taylor "guess[es] that [Poindexter] heard,"

given how close she was to the partners at the time. (Id. at PageID 1418.)

Taylor also testified that, another time, she, Hardin and Hall were discussing work conditions when Store Manager Page was "in the area to hear the conversation." (Id. at PageID 1364.) After Page asked what they were discussing, Taylor responded with "nothing in particular." (Id. at PageID 1365.) Page told them to stop and "get back to work." (Id.)

### III. Issuance of Discipline to Nikki Taylor

Starbucks' first allegedly unlawful behavior was directed toward Taylor. According to her, within days[6] of her conversations with other partners regarding organizing efforts, Cedric Morton issued two corrective action forms to Taylor without previous discussion or first issuing a warning about the alleged conduct. (ECF No. 73 at PageID 1369-71, 1381; see Exhibits 1 & 2, Jan. 14th Corrective Action Forms.) Morton stated that the first corrective action was for exhibiting "aggressive and insubordinate behavior" toward Store Manager Page and for "complaining about Starbucks" to another partner. (ECF No. 75 at PageID 1161.) Taylor disagreed with the allegations in their entirety. (ECF No. 73 at PageID 1373.) In her affidavit, she contends that Morton told her that she was "too comfortable" at the Memphis Store and recommended that she transfer to another store. (ECF No. 1-2 at PageID 167.)

As for the second corrective action, Taylor stated that Morton told her that she was wearing leggings to work,

[6] The Exhibits related to the corrective actions are dated January 14, 2022, which Taylor confirmed in her testimony at the hearing. (See Exhibits 1 & 2; see ECF No. 73 at PageID 1418.)

but she denied doing so. (ECF No. 73 at PageID 1372.) She also testified that Morton told her that he spoke to Store Manager Page before issuing disciplinary action to her. (Id. at PageID 1418.) However, according to Taylor, Store Manager Page explained a different process to Taylor when faced with a later dress code violation by another partner – "that in practice, we would have a conversation with a partner before we had any disciplinary on them." (Id. at PageID 1380-81.) Neither Morton nor Page had a conversation with Taylor before issuing her discipline and she testified that she witnessed multiple instances of dress code violations that were tolerated. (ECF No. 1-2 at PageID 168.)

Taylor signed one of the corrective actions and handed both back to District Manager Morton. (ECF No. 73 at PageID 1373.) According to Morton, he did not deliver the second corrective action (clothing violation) to her, which is why it was unsigned. (ECF No. 75 at PageID 1164.) According to him, the unsigned corrective action did not go on her record. (Id.)

**IV. Events leading up to January 18**

Taylor continued her efforts involving the Union as the disciplinary actions were occurring. She arranged for the union organizing committee (consisting of her, Throckmorton, Hardin, Hall, McGlawn and Sanchez, see Exhibit 3) to participate in a Zoom meeting with the Union on January 17, 2022. (ECF No. 73 at PageID 1373-74; ECF No. 1-3 at PageID 250.) Margaret Carter, a Union representative and Starbucks partner at a different location, and Richard Bensinger, the Union's senior advisor to the Starbucks campaign, participated in the call. (ECF No. 73 at PageID 1398; ECF No. 75 at PageID 940, 943.)

During the call, the partners drafted a letter to Starbucks' then-CEO, Kevin Johnson, and later that night publicly posted the following letter:

> Statement of Starbucks Workers United Organizing Committee at Poplar and Highland Store
>
> On this day in Memphis, Dr. Martin Luther King, Jr. Day, in the city where he was killed while fighting for the right of sanitation workers to organize, we as Starbucks partners are launching our union campaign to build a better store and community.
>
> We are here to fight for our safety and our rights as workers that have been denied and shoved away from us. This day we issue a call to action to our community to assist us in this movement and help us grab what is ours so we can achieve the dignity that we as workers deserve.
>
> With this unionization process we will be able to bring you, the community, a better experience from the company who promises it to you, both for you and for the baristas behind the bars. We say to Starbucks, use this day as a moment of reflection against your apathy towards your workers across the United States.
>
> We as partners are fully aware of the tactics you have been taking to prevent unionization, and we ask you to take Dr King's vision and help us fulfill it. You should live up to your own mission and values and allow us to take these steps without opposition. Please, in the memory of Dr. Martin Luther King, Jr.[,] do not bring your so-called

"pro-partner" anti-union campaign to Memphis.

Kylie Throckmorton
Nabretta Hardin
Reaghan Hall
LaKota McGlawn
Nikki Taylor
Beto Sanchez

(Exhibit 3, "Dear Kevin Letter"; ECF No. 75 at PageID 943.)

### V. Media Event on January 18, 2022

The day after the letter was posted, January 18, 2022, Hardin printed the union authorization cards she received from the Union and openly passed them out to partners at work. (ECF No. 1-2 at PageID 96-97.) According to Regional Director Line, District Manager Morton and Store Manager Page decided to close the store at 6 p.m. that night due to "short staffing." (ECF No. 75 at PageID 1080.) However, the staffing schedule showed a full staff – Florentino Escobar, Aiden Harris, Kimora Harris and Lakota McGlawn, as shift supervisor, were scheduled to work that night – and all of those partners were present when the media event occurred. (Id.; see Exhibit 29.) Off-duty partners involved that evening were Taylor, Sanchez, Hardin, Throckmorton, and Emma Worrell. Reaghan Hall was the only member of the organizing committee not present on January 18, 2022.

Taylor testified that, at approximately 6 p.m., she – while off-duty – allowed customers to leave the store, and opened the door for a TV reporter to enter thereafter, without permission to do so. (ECF No. 73 at PageID 1413.) She stated that she was expecting the news crew to arrive, and they had identification and badges. (Id. at

PageID 1423-24.) According to her, at no point did any partner express safety concerns from the media crew's presence in the store. (Id. at PageID 1424.) Regional Director Line stated that Taylor unlocked the door when allowing the reporter in, although Taylor could not recall that detail. (ECF No. 75 at PageID 1046.)

After the reporter and cameraman entered, off-duty barista Worrell arrived to pick up barista Aiden Harris, who had ended his shift. (ECF No. 1-2 at PageID 131.) After being let in by Hardin, (ECF No. 75 at PageID 1050), Worrell signed an authorization card, handed it to Hardin, shared a drink with Harris that they made together, and left without being interviewed by the media crew. (ECF No. 1-2 at PageID 205-06.) While this took place, Regional Director Line testified that barista Kimora Harris appropriately performed her closing duties. (ECF No. 75 at PageID 1044.)

After Worrell and Harris left, the media interviewed partners Escobar, Hardin, McGlawn, Sanchez, Taylor and Throckmorton; each discussed the organizing objectives, the reasons for unionizing and their chances of success. (ECF No. 1-2 at PageID 145.) The news crew left by 6:45 p.m. Several participating partners (Hardin, Sanchez, Taylor and Throckmorton) went behind the counter before departing. In particular, Sanchez testified that, despite not being the designated cash controller ("the only person to access that safe" during a shift), he entered behind the back of the counter and activated the safe's time delay because McGlawn, shift supervisor that night, did not have a code to the safe. (ECF No. 73 at PageID 1523-24.) Regional Director Line testified that Sanchez assisted McGlawn "so that she could participate in the interviews." (ECF No. 75 at PageID 1044.)

According to the partners, the actions they took that night were routine: they testified that they regularly went behind the counter to gather belongings or make a free drink (an employee perk), came to the store while off-duty to check their work schedule or to retrieve personal items, and accessed or set the safe to assist other partners while off-duty because not all partners had been given a code to access the safe. (ECF No. 1-2 at PageID 113, 114, 146-47, 206.)

### VI. Starbucks' Alleged Actions to Restrict Organizing Activity

Store management found out about the media event the next day, after seeing a tweet posted by a news reporter. (Id. at PageID 216, Twitter Post ("You're looking at the first @Starbucks employees in #Memphis trying to unionize. Hear their grievances, see the steps needed to form a union and find out who's helping these workers tonight on @WMCActionNews5 at 10.").) When District Manager Morton saw the Twitter post, he notified Regional Director Line. (ECF No. 75 at PageID 1138.) Morton testified that Starbucks promptly began an investigation. (Id. at PageID 1139.) According to some partners, Starbucks also engaged in activity that restricted the partners' ability to openly organize, starting with interference with a planned sit-in.

#### A. Interference with Sit-In Campaign: January 21-23, 2022

The day after the media event, on January 19, 2022, the Union and the employee organizing committee scheduled a sit-in campaign for January 21-23, 2022. (ECF No. 73 at PageID 1382-83, 1459.) Taylor helped to post flyers advertising the sit-in on Twitter, and Hall

advertised it on Instagram. (ECF No. 73 at PageID 1383, 1419, 1460; see Exhibit 5.) That same day, District Manager Morton made the decision to restrict the Memphis Store to drive-thru only and limited the hours of operation during the planned sit-in campaign (January 20-23, 2022), due to alleged "spotty sort of coverage or attendance." (ECF No. 75 at PageID 1158.) Morton testified that he learned about the sit-in on January 20 or 21, 2022, after deciding to close the lobby café. (Id. at PageID 1160.)

On the first day of the sit-in, January 21, the lobby café was closed. As for Saturday, January 22, Hall testified that Store Manager Page called her on the 21st to notify her that the next day, the Memphis Store would be "with drive-thru only as a precaution to us being short-staffed." (ECF No. 73 at PageID 1462 (emphasis added).) However, when the Memphis Store had normal staffing levels on January 22, 2022, Hall and Sanchez decided around mid-day to open the lobby. (Id. at PageID 1463.) Morton came to the store shortly after and asked why the lobby café was open because (according to Hall) he "was under the assumption that it was supposed to stay closed no matter what." (Id. at PageID 1465.) Hall testified that Morton told her that she and the other Memphis partners probably believed that the café was closed due to "certain dates," but he also stated that "he supported [their] decision to fight for [their] rights." (Id. at PageID 1466.) Hall also worked on January 23, 2022, opening the store with the same number of people they had the day before. (ECF No. 73 at PageID 1467.) Despite being fully staffed, the lobby remained closed during her whole shift. (Id.)

According to Hall, the rationale for closing the lobby because of lack of staff only applied to the days of the

scheduled sit-in, even though the store was fully staffed during at least part of that time. The policy did not apply after the sit-in ended, when the store was actually understaffed. For instance, on January 24, 2022, when Hall reported for her opening shift, the store was understaffed at its peak time. She asked Store Manager Page if the store was supposed to be drive-thru only due to understaffing, but Page told her that normal operations were back. (ECF No. 73 at PageID 1469.)

**B. Removal of Flyers from Community Bulletin Board**

The next anti-organizing action that Starbucks management allegedly took was removal of the partners' pro-union flyers from the community bulletin board, despite routine noncompliance with a policy of "refreshing" the board.

As background, Taylor testified that partners and members of the public were allowed to post items or information on this bulletin board and that she was not aware of any enforced Starbucks policy requiring the removal of items from the board. (ECF No. 73 at PageID 1388.) In line with Hall's characterization of the practice to "periodically clean up the bulletin board," (Id. at PageID 1500), Taylor stated that she would remove outdated items, but "if it wasn't outdated, [items were] still on the board." (Id. at PageID 1420.) In contrast, Regional Director Line testified that the company policy, and her expectation, was that content would be "refreshed at least on a weekly basis." (ECF No. 75 at PageID 1070; see Exhibit 25.)

Having received pro-union materials from customers during the sit-in campaign, Hall testified that she

subsequently posted these materials on the community bulletin board. (ECF No. 73 at PageID 1470-71; see Exhibit 7, Board with Support Letters.) Those materials were still on the board the day that Taylor returned to work after the sit-in, but were removed shortly thereafter. (Id. at PageID 1388-89; see Exhibits 7 & 8.) However, Hall testified that they only stayed up "about a week and a half"[7] before Page removed them. (Id. at PageID 1472; see also ECF No. 1-2 at PageID 72 ("Page proceeded to begin only taking the pro-union campaign messages off the bulletin board.").) And Sanchez testified that District Manager Morton told him that putting these pro-union notes on the bulletin board violated company policy. (ECF No. 1-2 at PageID 148.) According to partners, Starbucks removed all of the other remaining material from the board and repositioned the condiment bar to make the board less noticeable, stating that the move was "part of remodeling the store." (ECF No. 1-2 at PageID 70.)

### C. Termination of the "Memphis Seven"

On February 8, 2022, Starbucks terminated five of the six organizing committee members – partners Hardin, McGlawn, Sanchez, Taylor and Throckmorton – and other partners engaging in union activity, Escobar and Worrell, allegedly for committing terminable policy violations during the January 18 media event. District Manager Morton, who made the decision to terminate the Memphis Seven, stated that he did so for the following reasons:

1. Worrell, while off-duty, entered the store and the back of house area after closing.

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[7] In contrast, Taylor testified that, by "Thursday or Friday that week, [the bulletin board] was completely empty." (ECF No. 73 at PageID 1390.)

2. Hardin, while off-duty, was in the store after closing, and unlocked a locked door to allow an unauthorized person to enter.
3. Escobar stayed in the store after closing and went behind the counter and in the back of house area after his shift ended.
4. Throckmorton, while off-duty, was in the store after closing and went into unauthorized areas.
5. Taylor, while off-duty, was in the store after closing, went into the back of house area, and unlocked a locked door after closing to allow unauthorized individuals to enter the store.
6. Sanchez, while off-duty, was in the store after closing, went into the back of house area, and activated the safe and handled cash.
7. McGlawn, as shift supervisor, "allowed all of these things to happen," including allowing off-duty partners to remain in the store after closing and allowing safety-related policy violations, putting partners at risk.

(ECF No. 75 at PageID 1142-52; see Exhibits 9, 39-44.) Overall, these offenses can be categorized as doing the following after the store was closed: (1) being in the store while off-duty; (2) entering the back of house or behind the counter while off-duty; (3) unlocking a locked door to allow an unauthorized person to enter while off-duty; (4) activating the safe and handling cash while off-duty; and (5) supervising the previous actions.

As for the other partners present that night, District Manager Morton testified that barista Aiden Harris was not fired because his policy violation – having a beverage

that was not rung up – was not terminable, (ECF No. 75 at PageID 1141; see Exhibit 38), and Regional Director Line confirmed that barista Kimora Harris was not fired because she performed her closing duties appropriately. (ECF No. 75 at PageID 1044.)

## VII. Policies versus Practice

Notwithstanding Starbucks' justifications for these terminations, the Board offered testimony that the relevant policies supporting the terminations were not practically or consistently enforced. Indeed, Taylor testified that she understood the policies prohibiting (1) off-duty partners from being behind counter or in the back room, (2) nonpartners from being "behind the counter or in the back room/office at any time unless authorized by the store manager. . . and accompanied . . . by a designated store partner on-duty," and (3) customers from accessing the store when closed to be policies "in writing but not in practice." (ECF No. 73 at PageID 1410-11.) These practices are discussed in more detail below.

### A. Off-Duty Partner Being in Store After Closing

Taylor stated that she had been in the store after the close of business hours while off-duty before the start of the organizing campaign, but was not disciplined for doing so. (ECF No. 73 at PageID 1394-95.) She stated that partners would regularly remain in the store after the close of business. (Id. at PageID 1421.) For instance, if there was a newer partner who was unaware of the closing duties, "we would come back off-duty to help them close." (Id. at PageID 1421-22.) She also stated that the Memphis store operated as a "rendezvous spot," meaning that partners would come back, off-duty, to the store and sit in the café before going out to dinner later in the evening.

(Id. at PageID 1422.) Other times, for those partners without cars, partners with cars would wait for them in the lobby after the close of business. (Id.)

### B. Off-Duty Partner Entering Back of House/Behind Counter

Hall also confirmed the policy of prohibiting off-duty partners access to the store when the store was closed, but stated that she was unaware of any other partner who was discharged for going to the back of the house or behind the counter while being off-duty, or for being in the store after closing. (ECF No. 73 at PageID 1503, 1516.) Confirming that lack of policy enforcement, Taylor testified that, before starting the organizing campaign, she had gone behind the counter or to the back room or office area while off-duty, but was not disciplined for doing so. (ECF No. 73 at PageID 1395.)

### C. Off-Duty Partner Unlocking Door to Allow Unauthorized Person to Enter

Hall testified that the Starbucks policy prohibits partners from letting anyone into the store after the door is locked at closing time. (ECF No. 73 at PageID 1508.) Despite that policy, Taylor stated that she was not disciplined for opening a locked door after the close of business, allowing an unauthorized individual in the store, or for allowing customers to access the store while it was closed for business. (Id. at PageID 1395.) In fact, Taylor testified that she was previously told by Manager Page to unlock a locked door when the store was closed for business to let a customer in to "see what she wanted," which ultimately involved a mobile order. (Id. at PageID 1424.)

**D. Off-Duty Partner Accessing Safe**

Testimony indicated that the safe access policies were also not rigidly enforced. For instance, former Store Manager Holden testified that, while improper for someone to access the safe while unauthorized persons were behind the line, she was unaware of any partner receiving discipline for briefly leaving the safe open and unattended. (ECF No. 73 at PageID 1451, 1442.) Moreover, while Sanchez stated that Starbucks' policy prohibited shift supervisors from using other shift supervisors' codes to the safe (their "PIN"), he testified that Store Manager Page and District Manager Morton were aware that three shift supervisors – McGlawn, Throckmorton and Taylor – were not given their own designated PINs; in his words, the shift supervisors "had requested frequently to both Elizabeth [Page] and Cedric [Morton] and never ended up receiving one because they would still have to communicate with me for [using] my PIN." (Id. at PageID 1525.) When Sanchez raised the partners' lack of PIN access with Page, she said that she would "take care of it," but never did. (Id. at PageID 1523.) He testified that Page actually asked him to share his PIN with Throckmorton and McGlawn. (Id. at PageID 1539.)

Sanchez testified to previous non-enforcement of the policy. He stated that he had accessed the safe and assisted with cash handling for Brinks Security personnel while off-duty on two previous occasions, when partners Throckmorton or McGlawn were on-duty shift supervisors, because he was the only partner with a PIN able to complete the transfer. (ECF No. 73 at PageID 1528.) As for Taylor, Sanchez testified that she had to use a "different shift [supervisor]'s PIN," one registered to a

former shift supervisor who no longer worked at the store. (ECF No. 73 at PageID 1524.)

**VIII. Increased Management Oversight**

The Board alleges that Starbucks heightened the presence of management in the store after the Union campaign was publicly announced, beginning before the terminations and continuing afterward.

Holden testified that, between September and November 2021 when she was at the Memphis Store, District Manager Morton rarely visited the store. (ECF No. 73 at PageID 1439.) Hall testified that she had only seen Store Manager Page once or twice on a weekend since November 2021 until the terminations took place in February 2022. (Id. at PageID 1484.) However, after the union petition was filed and the campaign announced, Taylor – who worked in the store five to six days per week – stated that she saw District Manager Morton almost daily in the Memphis Store. (Id. at PageID 1392, 1394.) Hall testified that she saw Store Manager Page in the Memphis Store on the weekends after the terminations.

On February 9, 2022, the Memphis Store opened as drive-thru only. (Id. at PageID 1473-74.) Hall stated that the café closure was due to "a third of [her] staff" being fired" the day before, and the Store remained drive-thru only for a "few weeks." (Id. at PageID 1474, 1480.) Yet, despite the lobby café being closed, multiple managers came to the store every day for a few weeks to work there – including Morton, Page and other store managers from other Memphis locations that Hall or other partners recognized. (Id. at PageID 1480-81.) At times, three managers were there together; they also came on weekends, departing from past behavior. (ECF No. 73 at

PageID 1482-84.) Hall testified that these visiting managers did not provide them with any direction, and she was not told why they were at the store. (ECF No. 73 at PageID 1483.) They continued this behavior beyond the period of time when the store was drive-thru only. (Id. at PageID 1483.) Regional Director Line, in contrast, stated that it is "common" for store managers to work together, including to do computer work. (See ECF No. 75 at PageID 1075-76.)

## LEGAL STANDARD

The Board brought this action under § 10(j) of the NLRA, which authorizes the Board, upon issuance of an administrative complaint alleging an unfair labor practice, to petition a district court for "such temporary relief or restraining order as it deems just and proper" pending the outcome of the administrative proceedings. 29 U.S.C. § 160(j). To grant such relief, a district court must make two findings. First, it must find "reasonable cause" to believe that an unfair labor practice has occurred. Muffley, 551 F. App'x at 827 (citing Ahearn v. Jackson Hosp. Corp., 351 F.3d 226, 234 (6th Cir. 2003)). Second, if the district court finds reasonable cause, it must then determine whether injunctive relief is "just and proper." Id.[8] Because the Board adjudicates the unfair labor practices charges, thereafter subject to judicial review, a court evaluating a § 10(j) petition may not adjudicate the merits of such charges. Id.

[8] Starbucks urges the Court to consider traditional equitable criteria in its analysis, but the Sixth Circuit has rejected this approach. See Glasser ex rel. NLRB v. ADT Sec. Servs., Inc., 379 F. App'x 483, 485, n.2 (6th Cir. 2010) (distinguishing its approach from circuits incorporating traditional equitable criteria for injunctions into the "just and proper" element).

## ANALYSIS

Whether there is "reasonable cause" supporting each of the five unfair labor practices alleged by the Board is first considered below, and the Court concludes that the Board has met its relatively insubstantial burden to establish reasonable cause as to each. Next, the Court finds that most of the requested injunctive relief is "just and proper." The Court therefore **GRANTS** the Petition **IN PART**, ordering Starbucks to abide by the directives outlined below.

### I. Reasonable Cause

The Board's burden to establish reasonable cause is "relatively insubstantial." Muffley, 551 F. App'x at 830. It must support its petition with "some evidence," but "need not convince the court of the validity of the Board's theory of liability, as long as the theory is substantial and not frivolous." Fleischut v. Nixon Detroit Diesel, Inc., 859 F.2d 26, 29 (6th Cir. 1998). The facts of the case must, however, "be consistent with the Board's legal theory." Muffley, 551 F. App'x at 827 (citing Ahearn, 351 F.3d at 237). Thus, there are two questions to consider: first, is the legal theory substantial? And, second, are the facts supportive of the Board's legal theory? As it is only required to evaluate whether facts exist to support the Board's theory of liability, the Court may not "resolve conflicting evidence or weigh credibility in a § 10(j) proceeding." Id. Because the Board offered proof of facts that support the Board's substantial legal theory, reasonable cause exists.

#### A. Is the legal theory substantial?

Section 8(a) of the NRLA provides, in pertinent part:

It shall be an unfair labor practice for an employer –

> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;
>
> . . . [and]
>
> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization; . . .

See 29 U.S.C. §§ 158(a)(1) and (3).

The Board contends that Starbucks violated §§ 8(a)(1) and (3) of the NLRA by: (a) issuing discipline to lead organizer Nikki Taylor after hearing her discussing organizing union meetings, (b) closing the lobby of the Memphis Store to obstruct customers from participating in a union sit-in campaign, (c) removing pro-union literature from the community bulletin board, (d) increasing managerial monitoring after employees publicly announced their intent to organize, and (e) terminating the Memphis Seven after they engaged in pro-union activity. (ECF No. 84 at PageID 1748.) In support, it applies the Wright Line test for discriminatory action, under which the Board bears the burden of establishing a prima facie case by showing that "(1) the employee was engaged in protected activity; (2) that the employer knew of the employee's protected activity; and (3) that the employer acted as it did on the basis of anti-union animus." Airgas USA, LLC v. NLRB, 916 F.3d 555, 561 (6th Cir. 2019) (applying the burden-shifting framework articulated in Wright Line, 251 N.L.R.B. 1083 (1980), adopted by the Supreme Court in NLRB v. Transp. Mgmt. Corp., 462 U.S. 393 (1983)). If a prima

facie case is established, the employer must prove "by a preponderance of the evidence that the employee would have been [disciplined] for permissible reasons even if he had not been involved in activity protected by the [Act]." Id. (quoting NLRB v. Overseas Motor, Inc., 721 F.2d 570, 571 (6th Cir. 1983)).

Starbucks does not oppose the NLRB's reliance on the Wright Line test. (ECF No. 85 at PageID 1764 (challenging only Petitioner's evidence to support establishing reasonable cause).) Thus, the legal theory is "substantial." The next inquiry focuses on whether there exist facts supporting each allegation, without weighing credibility or resolving conflicts in the evidence.

**B. Do the Facts Support Petitioner's Legal Theories?**

To establish a violation of §§ 8(a)(1) and (3) of the NLRA, the Board must first make out a prima facie case of discrimination, demonstrating that (1) the employee engaged in protected activity (2) of which the employer was aware and (3) the employer acted as it did based on anti-union animus. Airgas, 916 F.3d at 561. The last element of establishing a prima facie case of discrimination, anti-union animus, "may be 'inferred from circumstantial as well as direct evidence.'" Id. Certain circumstantial factors supporting a finding of animus include: "the company's expressed hostility towards unionization combined with knowledge of the employees' union activities; inconsistencies between the proffered reason for [discipline] and other actions of the employer; disparate treatment of certain employees compared to other employees with similar work records or offenses; a company's deviation from past practices in implementing the [discipline]; and proximity in time between the

employees' union activities and their [discipline]." Id. (citing W.F. Bolin Co. v. NLRB, 70 F.3d 863, 871 (6th Cir. 1995)).

If a prima facie case is established, then the burden shifts to the employer to establish, by a preponderance of the evidence, that there was a permissible justification for the discipline unrelated to the protected activity. Id.; see also Ozburn-Hessey Logistics, LLC v. NLRB, 803 F. App'x 876, 884 (6th Cir. 2020). "If 'the employer's proffered justification for the decision is determined to be pretextual, the Board is not obligated to consider whether the employer would have [made] the same decision regardless of the employee's union activity.'" Id. (quoting Ctr. Constr. Co. v. NLRB, 482 F.3d 425, 435–36 (6th Cir. 2007)).

"Motive is a factual matter" in NLRB proceedings, and the Court, in this circumstance, is especially aware of heeding the requirement not to make factual findings or resolve factual inconsistencies. See NLRB v. Mini-Togs, Inc., 980 F.2d 1027, 1032 (5th Cir. 1993). "The Board's inference of improper motivation must be upheld if it is reasonable in light of the proven facts." Birch Run Welding & Fabricating, Inc. v. NLRB, 761 F.2d 1175, 1179 (6th Cir. 1985).

The evidence offered in support of the Board's legal theory for each allegation is outlined below.

**1. Issuing Discipline to Taylor**

The Board argues that there is reasonable cause to believe that Starbucks retaliated against Taylor for organizing the Memphis Store by issuing two disciplinary write-ups. (ECF No. 1-3 at PageID 263.) Specifically, it argues that it establishes a prima facie case of

discrimination because (1) Taylor engaged in protected activity "by talking with her coworkers about unions, working conditions, and their interest in starting a campaign at the store;" (2) Starbucks was aware of that activity; and (3) Starbucks' issuance of two disciplinary write-ups was motivated by animosity it harbored against Taylor's activity. (Id. at PageID 263-64.) Further, the Board contends that Starbucks' affirmative defense that it disciplined Taylor for policy violations is pretextual. (ECF No. 82 at PageID 1701.)

In response, Starbucks argues that District Manager Morton only issued one corrective action regarding Taylor's pattern of communication, and he was unaware of her organizing activity when doing so. Without knowledge, Starbucks argues there is no reasonable cause. (ECF No. 81 at PageID 1693.) Additionally, even if Morton did have knowledge, Starbucks contends that there is no evidence that the disciplinary action was retaliatory "except for the timing," which is in itself insufficient. (Id.)

Because Starbucks does not challenge Taylor's engagement in protected activity, the question becomes whether Starbucks was aware of it. The Board argues that, "[g]iven the presence of surveillance cameras in the store, the pointed questioning by Managers Page and Poindexter, the small size of the store, and the fact that at least six of about twenty employees discussed organizing during a concentrated period of time, Starbucks' knowledge of Taylor's protected activities may reasonably be inferred." (ECF No. 1-3 at PageID 265.) It offers Taylor's testimony for proof of Starbucks' knowledge, including her open conversations in the Memphis Store with other partners about union activity occurring in the

presence of managers. (ECF No. 82 at PageID 1700; see ECF No. 73 at PageID 1363-64) ("Q: Were any managers present in the Memphis Store when you discussed organizing with partners? Several times . . . Elizabeth Page, Mia Poindexter and also Cedric Morton.").) Relying on the small-plant doctrine,[9] the Board argues that these conversations, held in the intimate working environment of the Memphis Store, bolster the inference that Starbucks' managerial staff knew about Taylor's activity. (ECF No. 82 at PageID 1700, n.3 (citing NLRB v. Roemer Indus., Inc., 824 F. App'x 396, 404 (6th Cir. 2020)).)

In rebuttal, Starbucks relies on District Manager Morton's testimony that he was unaware of any organizing activity in the Memphis Store until the morning after the January 18 media event and had not heard anything from Store Manager Page or Assistant Manager Poindexter regarding organizing activity. (ECF No. 81 at PageID 1668 (citing ECF No. 75 at PageID 1162).) Starbucks argues that, "[a]s the final decision-maker, it is Morton's knowledge of organizing activity that is outcome determinative," and the Board furnished no evidence that Morton was aware of the union activity or that information about organizing activity was conveyed to him. (ECF No. 82 at PageID 1692-93.)

The Board presented sufficient evidence supporting its position that Starbucks knew about Taylor's pro-union activity when Morton disciplined her. Taylor's testimony

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[9] "The essence of the small plant doctrine 'rests on the view that an employer at a small facility is likely to notice union activities at the plant because of the closer working environment between management and labor.'" NLRB v. Health Care Logistics, Inc., 784 F.2d 232, 236 (6th Cir. 1986) (quoting Alumbaugh Coal Corp. v. NLRB, 635 F.2d 1380, 1384 (8th Cir. 1980)).

that Morton was present at the Memphis Store when she discussed union organizing; that Morton's direct report, Manager Page, and her direct report, Assistant Manager Poindexter, interacted with Taylor when she was discussing union activity; and the working environment in which all Memphis Store partners worked in "close proximity," (ECF No. 73 at PageID 1366), supports the Board's assertion that Morton knew about Taylor's union activity. See Roemer, 824 F. App'x at 404 ("The inference [of knowledge] was proper here in light of other circumstantial evidence . . . that Roemer had 'reason to notice the union activities.'") (citing Health Care Logistics, 784 F.2d at 236). While Morton denies knowledge of Taylor's activities at the time of the discipline, it is not the role of the Court to resolve the conflicting testimony. Thus, the evidence is sufficient to find that the Board satisfied its "relatively insubstantial" burden to provide facts supportive of the theory that Morton knew about Taylor's union activity.

Turning to the remaining prong, anti-union animus, the Board argues that Taylor did not engage in behavior subject to discipline and that the relevant policies were selectively enforced against her, offering evidence that Starbucks did not take otherwise routine steps to address the alleged violations and tolerated similar conduct by others. (ECF No. 82 at PageID 1701-02; see ECF No. 1-2 at PageID 168; ECF No. 73 at PageID 1435.) In response, Starbucks argues that the Board presents no evidence, other than timing, to establish that the disciplinary action was retaliatory, which is insufficient given Taylor's pattern of misbehavior and Starbucks' right to address that behavior. (ECF No. 81 at PageID 1693.)

The facts presented in affidavits and testimony at the hearing are consistent with the Board's theory of anti-union animus. Further, even though Starbucks had a dress code policy and a policy of addressing negative behavior, there is evidence that supports the Board's theory that the discipline was pretextual.

First, according to the evidence, Taylor was issued discipline the second week of January, after engaging in open union activity earlier in the month. (See Exhibits 1 & 2); FiveCAP, Inc. v. NLRB, 294 F.3d 768, 777 (6th Cir. 2002) (finding that proximity in time contributed to finding anti-union animus). Second, although Store Manager Page told Taylor that, "in practice, we would have a conversation with a partner before we had any disciplinary on them[,]" and although former Store Manager Holden testified that a partner in non-compliant clothing would be sent home to change before being issued corrective action, Taylor testified that she was not given a prior warning or talked to before her write-up. (ECF No. 73 at PageID 1380-81, 1435); see Bolin, 70 F.3d at 871 (employer deviation from past practice may be a basis to infer animus). There is also no evidence that she was sent home to change before the discipline. Finally, Taylor states that, to her knowledge, another partner with non-compliant clothes was not issued a write-up for the same infraction only a few days later. (Id. at PageID 1381-82; see Bolin, 70 F.3d at 871 (disparate treatment of employees can contribute to finding animus).)

As for the "communication" discipline, Taylor denies engaging in any passive aggressive behavior toward Store Manager Page or using inappropriate language in the Store. (ECF No. 1-2 at PageID 169-173.) She maintains that she had not heard of any discipline issued against

partners who engaged in allegedly similar conduct of having an inappropriate conversation or failing to uphold Starbucks' respectfulness standards. (Id. at PageID 173.)

Even if Starbucks only issued one disciplinary write-up, as Starbucks contends, factual inconsistencies are for the Board to review in its administrative proceeding, not for the Court to resolve here. Given the timing of the discipline, Taylor's denial of the violations and testimony supporting inconsistent policy applications, the Board met its burden to offer evidence that supports reasonable cause that Starbucks violated § 8(a)(3) of the NLRA in issuing discipline against Taylor.

**2. Obstructing the Sit-In Campaign**

Second, the Board argues that there is reasonable cause to believe that Starbucks closed the lobby service at the Memphis Store for three days – from January 21 to 23, 2022 – to interfere with a union sit-in campaign scheduled for those days. (ECF No. 1-3 at PageID 266.) It argues that Starbucks made this decision while aware of the partners' previous union activity and their advertisement of the campaign. Further, the Board asserts that Starbucks' proffered reason of "short staffing" for closing the lobby was simply pretext, as Starbucks inconsistently closed the lobby due to staffing shortages and there were sufficient partners working that weekend to keep the lobby open.

In response, Starbucks argues its lack of knowledge and lack of discriminatory motive. It relies on the "very severe staffing crisis" that the Store underwent in January 2022, forcing it, as a policy response, to turn off channels of business to maintain operations. (ECF No. 81 at PageID 1693 (citing ECF No. 75 at PageID 1072).)

Starbucks cites to testimony by its managers that they were unaware of planned sit-ins when making that decision. (ECF No. 81 at PageID 1694 (citing ECF No. 75 at PageID 1074, 1160).)

As to knowledge, the Board provides "some evidence" to support that Starbucks was aware of the sit-in campaign before it took place. The record supports that, on January 19, 2022, the Union and members of the employee organizing committee organized a sit-in for the January 21-23 weekend and advertised it on social media channels including Twitter and Instagram before the weekend. (ECF No. 73 at PageID 1382-83, 1419, 1460; see Exhibit 5, Flyer.) Regional Director Line testified that she "[m]aybe" follows "[a] few" partners in her stores on Instagram, in which case she could have seen Hall's advertisement. (ECF No. 75 at PageID 1074.) Additionally, while Morton testified that he decided to shut down the café area before knowing about the sit-in, (id. at PageID 1160), he also stated that he became aware of the sit-in campaign before the weekend began, and still enforced the closure. Finally, all of the Memphis Store managers were aware of general union activity as the partners had taken their campaign public that week. (Id. at PageID 1037.) The Board's proffered evidence is supportive of its theory that Starbucks was aware of protected activity when making this decision.

In addition, the record supports the existence of anti-union animus. First, the decision to close the café was made only days after the public announcement of the union campaign and after the advertisement was publicized – timing that lends support for a discriminatory motive. See FiveCAP, Inc., 294 F.3d at 777-78. So, too, does the specific tailoring of the closure; Starbucks chose

to close the lobby café instead of closing online orders, and chose to close the lobby café precisely on the days that the sit-in was to occur.

Further, while Starbucks offers the justification that "short staffing" caused the closure, there is support in the record that the real reason was interference with union activity, not an understaffed store. Indeed, the Board offered testimony that Starbucks did not need to close the lobby that weekend because the store was appropriately staffed those days; and that, faced with a staffing shortage on January 24, 2022, just one day after the sit-in campaign, Starbucks chose not to follow the same policy and instead kept the store's lobby open. (ECF No. 73 at PageID 1465, 1469.) Even though Starbucks emphasizes that Morton did not re-close the café when Hall and Sanchez opened it midday on the Saturday of the sit-in weekend, when the store was sufficiently staffed, testimony indicated that he also reminded the partners that the café "was supposed to stay closed no matter what"– indicating support for the theory that whether there were appropriate staffing levels did not impact the decision to close the store. (Id. at PageID 1465.)

Moreover, the evidence that protest signs were allowed to be made in the lobby of the Memphis Store on January 22nd when Sanchez and Hall opened the lobby does not change the Board's evidence supporting its theory that "short staffing" was a pretextual justification for closing the lobby. The Court therefore concludes that there is reasonable cause to believe that Starbucks violated § 8(a)(1) by interfering with the union's sit-in campaign.

### 3. Removing Union Literature from Community Bulletin Board

The Board further argues that there is reasonable cause to believe that Starbucks' next retaliatory acts were (1) to disparately apply a previously unenforced policy to remove Union-oriented material from the bulletin board days before removing other material and (2) to tell employees that they violated company policy by posting pro-union notes on the board, in violation of § 8(a)(1) of the NLRA. (ECF No. 1-3 at PageID 269.)

Not contesting the first two prongs of the Wright Line test, Starbucks only challenges the Board's argument that it acted with anti-union animus. It argues that the removal of pro-Union posters was "in accordance with its policy that political materials be removed and . . . its policy that the board should be regularly refreshed," particularly because pro-Union posters "limit[ed] the ability of other customers to use the board for approved purposes." (ECF No. 81 at PageID 1695 (citing, inter alia, Mek Arden, LLC d/b/a Arden Post Acute Rehab, 365 N.L.R.B. No. 110, slip op. 1, n.3 (June 25, 2017) (quoting Register Guard, 351 N.L.R.B. 1110 (2007), enforced in part, 571 F.3d 53 (D.C. Cir. 2009) (holding that "discrimination" against union materials means "the unequal treatment of equals.")); see Exhibit 25, Starbucks Store Operations Manual).

In support of a finding of anti-union animus, the Board emphasizes that partners testified about previously being allowed to post items on the bulletin board and about Starbucks' noncompliance with its stated policy regarding the bulletin board. It argues that there was not a previous practice of removing individual items from the board (other than outdated material), nor all of the items

at once, yet when partners posted customers' notes of pro-union support, that policy of removal was abruptly applied. (ECF No. 82 at PageID 1703; see ECF No. 73 at PageID 1388-1390.)

The record includes evidence consistent with the Board's theory of anti-union animus, and, in the alternative, pretextual application of an otherwise unenforced policy. Therefore, the Court finds reasonable cause to believe that Starbucks violated § 8(a)(1) of the NLRA by removing the pro-union literature.

#### 4. Increasing Managerial Oversight

The Board argues that there is reasonable cause to believe that Starbucks monitored the partners engaged in union activity more closely when it significantly increased the frequency and length of time their managers spent at the Memphis Store following the public announcement of the organizing campaign. (ECF No. 1-3 at PageID 267-68); see Gold Kist, Inc., 341 N.L.R.B. 1040, 1040 (2004) (finding it unlawful under the Act for an employer to monitor employees more closely following engagement in union activity). It also argues that Starbucks' justification of needing more managers to conduct interviews related to the January 18 investigation is belied by the length of time that the managers spent in the Memphis Store and the presence of rotating managers who did not participate in the interviews. (Id. at PageID 268.)

In response, Starbucks does not argue that the time spent and number of managers at the Memphis Store did not increase following the union announcement; instead, it contends that this conduct is not "so out of the ordinary that it creates the impression of surveillance or constitutes improperly increased supervision" under prevailing law.

(ECF No. 81 at PageID 1696 (citing Bellagio, LLC v. NLRB, 854 F.3d 703, 711 (D.C. Cir. 2017); Charter Commc'ns, Inc. v. NLRB, 939 F. 3d 798, 811 (6th Cir. 2019)).)

The Court agrees with the Board. Prohibitions under § 8(a)(1) regarding increased supervision do not "prevent employers from observing public union activity, particularly where such activity occurs on company premises so long as the employer does not engage in conduct that is so out of the ordinary that it creates the impression of surveillance." Bellagio, 854 F.3d at 711. Indeed, an employer may "mere[ly] observ[e]" union activity without that observation constituting unlawful surveillance. Charter Commc'ns, Inc., 939 F.3d at 811. To determine when an employer's supervision becomes unlawful, the Board considers "the duration of the observation, the employer's distance from its employees, and whether the employer engaged in other coercive behavior during its observation." Aladdin Gaming, LLC, 345 N.L.R.B. 585, 586 (2005), aff'd sub nom, Local Joint Exec. Bd. of Las Vegas v. NLRB, 515 F.3d 842 (9th Cir. 2008). When unlawful supervision occurs, the "union activity need not be 'personally seen' during the close supervision; the question is whether the supervision is motivated by earlier union activity." Charter Comm'cns, Inc., 939 F.3d at 813. Here, there is evidence supporting a conclusion that the question be answered affirmatively.

The Board presented evidence that there was a different level of supervision before the announcement of the union campaign and the media event on January 18 than there was after these events. For instance, Holden testified that, between September and November 2021, when she was at the Memphis Store, District Manager

Morton only visited the store rarely, (ECF No. 73 at PageID 1439), but, after the union campaign became public, Taylor testified that she saw District Manager Morton almost daily in the Memphis Store. (ECF No. 73 at PageID 1392, 1394.) Further, whereas Hall also testified that Store Manager Page rarely made weekend appearances at the Store, after the public union activity she saw her frequently in the Memphis Store on weekends. (ECF No. 73 at PageID 1484.)

While the increased attentiveness of the Memphis Store managers is some evidence of increased supervision, the increased number of rotating managers from other stores supports reasonable cause that the increased supervision was motivated by pro-union activity. The Board presented testimony that other store managers did indeed visit and spend long periods of time at the Memphis Store with no explanation for their presence. (ECF No. 73 at PageID 1480-83.) The Court finds this evidence consistent with "creat[ing] the impression of surveillance," see Bellagio, 854 F.3d at 711, and therefore finds reasonable cause that Starbucks increased its supervision in violation of § 8(a)(1) of the NLRA.

**5. Terminating the Memphis Seven**

Lastly, the Board argues that there is reasonable cause to believe that the Memphis Seven "would not have been discharged but for the fact that they engaged in protected activity," including but not limited to the January 18 media event. (ECF No. 82 at PageID 1703); see Kentucky Gen., Inc. v. NLRB, 177 F.3d 430, 435 (6th Cir. 1999) (finding that an employer violates § 8(a)(3) of the Act when it discharges employees due to their union support). It contends that the discriminatory and pretextual nature of the discharges is rooted in Starbucks'

inconsistent, selective enforcement of its policies in relation to all of the partners' union activity, and an inference of animus is supported by the timing of the terminations in close proximity to the union activity. (ECF No. 82 at PageID 1704.)

In response, Starbucks contends that the company never previously tolerated similar conduct to that involved in the January 18 event; instead, the nature of the partners' violations was "extraordinarily different" from the Board's comparators and the subsequent discharges were appropriately consistent with past practice involving similar levels of violations. (ECF No. 85 at PageID 1763 (citing ECF No. 75 at PageID 1068-69).) Moreover, it urges the Court not to rely on unproven allegations of other unfair labor practices to demonstrate anti-union animus in this instance. (ECF No. 85 at PageID 1764 (citing Dresser-Rand Company v. NLRB, 838 F.3d 512 (5th Cir. 2016)).) Again, the first two prongs of the Wright Line test are unchallenged, leaving the question of anti-union animus as the focus here.

Both to demonstrate animus and to establish pretext for Starbucks' policy reasons for the terminations, the Board emphasizes the (1) proximity of the timing of the discharges to the partners' engagement in union activity, including but not limited to the January 18 media event, (2) previous tolerance of policy violations that Starbucks now deems terminable, and (3) disparate treatment of the discharged partners compared to those who previously violated the relevant policies. (ECF No. 82 at PageID 1703-04.)

First, the Board presented evidence that the terminations occurred three weeks after the January 18 media event, and even closer to when partners engaged in

the sit-in campaign and posted pro-Union materials on the community bulletin board. While timing alone is insufficient to infer animus, it is one supportive circumstantial factor. See Airgas, 916 F.3d at 561.

As for policy enforcement, the Board offered testimony that Starbucks tolerated off-duty employees remaining in the store – or going behind the counter or in the back office area – to make drinks, collect belongings, and assist each other with safe access after closing. Specifically, Taylor testified that she engaged in these actions without discipline and had not otherwise received training for how to handle filming requests, (ECF No. 73 at PageID 1394-95, 1396-97); Holden testified that these policy violations, including accessing the safe while off-duty or when non-employees are present, were routinely tolerated, (id. at PageID 1425-26); Hall testified that she was unaware of a written policy prohibiting partners from going behind the counter or to the back of house after hours, until after the discharges, (id. at PageID 1485); and Sanchez testified that he accessed the safe and assisted with cash handling while off-duty on two previous occasions as the only partner with a PIN able to complete the transfer. (Id. at PageID 1526-28). (ECF No. 82 at PageID 1704-05.) Such tolerance before union activity, but terminations resulting thereafter, supports an inference of discriminatory motive. See Airgas, 916 F.3d at 561.

Further, the Board urges the Court to reject Starbucks' rebuttal evidence that these terminations were in line with other terminable violations because that testimony raises conflicts in the evidence and issues of witness credibility that the Court cannot resolve; instead, it "should accept the record evidence presented by

Petitioner as long as facts exist which could support the Petitioner's legal theory." (ECF No. 84 at PageID 1748-49 (citing, e.g., Ahearn, 351 F.3d).)

In response, Starbucks argues that it had legitimate, non-discriminatory policy reasons for terminating each partner after conducting a thorough investigation into their actions. According to District Manager Morton, who made the decision to terminate the seven partners, (ECF No. 75 at PageID 1140), they were all terminated for varying involvement in (1) being in the store while off-duty; (2) entering the back of house or behind the counter while off-duty; (3) for Taylor, unlocking a locked door to allow an unauthorized person to enter while off-duty; (4) for Sanchez, activating the safe and handling cash while off-duty; and (5) for McGlawn, allowing the previous actions to occur. (Id. at PageID 1142-1152; see Exhibits 9, 39-44.) In support, Starbucks provides evidence that it "verified that the partners had been trained or given a Partner Guide addressing the policy violations for which they were discharged," and that the partners largely do not dispute that they committed these acts. (ECF No. 81 at PageID 1688 (citing ECF No. 75 at PageID 1128; Exhibit 53).)

Starbucks also contends that its actions were in line with its past actions regarding employees who committed such policy violations. In contrast to partners who committed the same policy violations in name, but to a lesser, "extraordinarily different" degree, Starbucks argues that it had previously terminated partners who engaged in similar conduct when Starbucks knew of the violations and when the violations occurred after hours. (Id. at PageID 1690.) To rebut the Board's argument that there was inconsistent enforcement of safe and cash-

handling policies, Starbucks argued that any inconsistency was immaterial because partners were not discharged for the violation of code-sharing, and blamed the inconsistencies on previous Store Manager Holden. (Id. at PageID 1691.)

Finally, Starbucks argues that the timing of the violations does not create an inference of anti-union animus because the "[d]ischarged [p]artners' policy violations, and Starbucks' investigation of them, are critical intervening events that render any inference of animus based on timing alone null." (Id. at PageID 1691 (citing Dallas & Mavis Specialized Carrier Co., 346 N.L.R.B. 253 (2006) (timing is not evidence of anti-union animus when there is evidence the decision was motivated by an intervening event that would justify disciplinary action)).)

The Board's evidence provides reasonable cause to support the conclusion that Starbucks violated § 8(a)(3) of the Act by terminating the Memphis Seven because it provides evidence consistent with the theory that Starbucks discriminatorily applied its policies to the Memphis Seven when terminating them. Specifically, the evidence offered supports inconsistent enforcement of the policies at issue and, as to the duties related to the safe and handling of cash, knowing approval of policy violations by management.

Moreover, assuming arguendo that Starbucks' policy justifications – including safety concerns – are legitimate, the Board provides evidence consistent with the theory that Starbucks' policy justifications were pretextual. For instance, terminating partners for being in the store after closing, or even unlocking a door to allow media personnel (with identification) into the store, on the basis of safety

concerns appears to be a pretextual justification when there is no evidence in the record to support the existence of any safety concerns that night. (ECF No. 73 at PageID 1424.) Starbucks' tolerance of similar conduct in instances other than the night of January 18 also lends support for the Board's pretext argument.

Finally, the Court disregards Starbucks' offering of evidence that other employees were similarly terminated for such offenses, for two reasons. (See ECF No. 75 at PageID 1289-93; Exhibit 54.) First, the evidence offered is inconsistent with the Board's proffered testimony that similar conduct at the Memphis Store was previously tolerated. Second, Starbucks did not offer testimony that these comparable offenses actually played any role in the investigation into the January 18 incident or that Morton used these comparable circumstances to come to his decision to terminate the employees.

## II. Just and Proper

Having found reasonable cause supporting the conclusion that Starbucks committed the alleged violations, the question becomes whether injunctive relief is "just and proper" to protect the NLRB's remedial power. The Board seeks a cease and desist order, instructing Starbucks to end its unlawful acts, and other related relief, including temporarily reinstating the terminated employees, rescinding the discipline issued to Taylor, and reading aloud, posting, and distributing the Court's Order both in the Memphis Store and nationally.

A temporary injunction is just and proper when it is "necessary to return the parties to status quo pending the Board's proceedings in order to protect the Board's remedial powers under the NLRA, and whether achieving

status quo is possible." McKinney v. Ozburn-Hessey Logistics, LLC, 875 F.3d 333, 339 (6th Cir. 2017). Returning to the status quo requires returning the parties to their relevant positions before the alleged violations occurred, not to their positions when the petition was filed. Fleischut, 859 F.2d at 30 n.3. Further, "the relief to be granted is only that reasonably necessary to preserve the ultimate remedial power of the Board, and is not to be a substitute for the exercise of that power." Gottfried v. Frankel, 818 F.2d 485, 494 (6th Cir. 1987) (quoting Kobell v. Suburban Lines, Inc., 731 F.2d 1076, 1084 (3rd Cir. 1984)). Therefore, "[i]nterim judicial relief is warranted whenever 'the circumstances of a case create a reasonable apprehension that the efficacy of the Board's final order may be nullified, or the administrative procedures will be rendered meaningless.'" Sheeran v. Am. Com. Lines, Inc. 683 F.2d 970, 979 (6th Cir. 1982) (quoting Angle v. Sacks ex rel. NLRB, 382 F.2d 655, 660 (10th Cir. 1967)).

Because the "just and proper" determination is "fact-intensive and complex," it "could certainly cause reasonable minds to differ." Lindsay v. Mike-Sell's Potato Chip Co., No. 3:17-CV-126, 2017 WL 5257126, at *4 (S.D. Ohio Nov. 13, 2017). Having the judicial discretion to determine whether this standard has been met, courts must explain the reasons for their determinations. See Calatrello v. Automatic Sprinkler Corp. of Am., 55 F.3d 208, 214 (6th Cir. 1995); Fleischut, 859 F.2d at 30. As explained below, a temporary injunction as to some, but not all, relief sought is necessary here to return the parties to the status quo, pending the Board's proceedings.

**A. Reinstatement**

The Board argues that reinstatement of the Memphis Seven is just and proper because it will return the Parties

to the environment of open union support that existed before Starbucks engaged in its pattern of unlawful conduct. (ECF No. 84 at PageID 1742.) Absent reinstatement, the Board argues that (1) the "residual chilling impact" of the mass discharge harms the partners' ability to openly support the union as members of the bargaining committee, and (2) the lack of daily contact between current partners and the Memphis Seven harms the interim bargaining process with the newly-certified Union. (ECF No. 84 at PageID 1742 (citing Frankl v. HTH Corp., 650 F.3d 1334, 1364 (9th Cir. 2011)).)

In response, Starbucks contends that reinstatement is not just and proper because "the purposes of the Act have not been frustrated, . . . there is no credible evidence of an erosion of support for the Union . . . [as] the Union has been elected the bargaining representative for the Memphis Store, the Union's nationwide campaign continues unabated, and the Discharged Partners are . . . participating in collective bargaining." (ECF No. 81 at PageID 1674.)

The Court agrees with the Board that reinstatement of the Memphis Seven is just and proper. Interim reinstatement of employees is a permissible exercise of judicial discretion under § 10(j) when it is reasonably needed to preserve the Board's remedial power to be exercised at the conclusion of the administrative proceedings. Muffley, 551 F. App'x. at 835. The Board's remedial power is impacted if "the termination of respondent's employees resulted in a 'chilling effect' on co-employees." Lightner v. Dauman Pallet, Inc., 823 F. Supp. 249, 253 (D.N.J. 1992), aff'd mem., 993 F.2d 877 (3d Cir. 1993). The "chilling effect" – or, in other words, the "erosion of support for a nascent union movement," see

Pye ex rel. NLRB v. Excel Case Ready, 238 F.3d 69, 74–75 (1st Cir. 2001) – is even more salient when an employer discharges "active and open union supporters" or the members of a bargaining committee. See Kaynard for & on Behalf of NLRB v. Palby Lingerie, Inc., 625 F.2d 1047, 1053 (2d Cir. 1980); Pascarell v. Vibra Screw, 904 F.2d 874, 880 (3d Cir. 1990) (noting that the employer's discharge of the entire bargaining committee rendered the chilling effect on other non-activist employees obvious). Faced with the risk of chill when these employees are terminated, "the need for interim relief is heightened" when a union is newly certified, yet the employer and union "have yet to achieve an initial collective bargaining agreement covering the . . . employees." Lund v. Case Farms Processing, Inc., 794 F. Supp. 2d 809, 822 (N.D. Ohio 2011). In that circumstance, employees are "highly susceptible" to unfair labor practices. Id. (citing Calatrello v. General Die Casters, No. 1:10-CV-2421, 2011 WL 446685, at *8 (N.D. Ohio Jan. 11, 2011) (internal citations omitted)); see also Eisenberg v. Wellington Hall Nursing Home, 651 F.2d 902, 907 (3d Cir. 1981) (failure to reinstate terminated employees who were supporters of union undermines union's ability to represent all members during bargaining sessions).

Here, there is evidence in the record that the terminations included the active and open leadership of the organizing effort, with the terminated partners consisting of over 80% of the union's organizing committee. In December 2021 and January 2022, the organizing effort was growing, with a six-person leadership team collecting union authorization cards from the majority of partners at the Memphis Store. That leadership team involved Taylor, the self-proclaimed

"mama in the store" and "most organized" partner, who testified that she was a "big influence in the [Memphis] store at the time." (ECF No. 73 at PageID 1401.) Facilitated by her leadership, the union organizers and other Memphis Store partners wore their union pins at work, discussed union activity at the Memphis Store and involved sympathetic community members. (See, e.g., id. at PageID 1363-64, 1385-86, 1470-71.)

There is also evidence in the record that, after the terminations, the Memphis Store's organizing efforts were chilled. The six-person organizing committee was reduced to one. A current barista, Ax Heiberg, testified that the terminations caused him not to wear his union pins anymore because he felt like he would be targeted if he did – he decided "[t]o just keep [his] head down, focus on work." (ECF No. 73 at PageID 1568.) He stated that he "was not positive for the union" and stopped discussing it with others. (Id.) Indeed, after the terminations, Heiberg would only discuss organizing efforts with other partners if he "knew for a fact that they were pro-union and that no managers could overhear [him.]" (Id. at PageID 1569.) He also stated that he noticed that, on the morning shifts after the terminations, every partner other than Hall stopped wearing their union pins at work. (ECF No. 73 at PageID 1569, 1588.)

At the hearing, Heiberg also spoke of managerial activity that he perceived as targeting union activity. On the morning of February 9, 2022, Heiberg and Store Manager Page saw members of the Memphis Seven picketing outside the Memphis store. (Id. at PageID 1570.) Heiberg was told to lock the lobby door, so he went to the door, cracked it to say that he could not talk to the picketers, shut the door and locked it. (ECF No. 73 at

PageID 1571.) According to Heiberg, Store Manager Page then told him he was not allowed to talk to the picketers, and he responded that he was telling that to the picketers. They "went back and forth a few times before [Heiberg] just gave up and walked away." (Id. at PageID 1572.) When asked if that conversation affected his willingness to participate in the picketing in support of the Union organizing campaign, Heiberg answered "yes." (Id.)

Heiberg also testified at the hearing that Hall and other partners hired after the terminations participated in protest activities outside the store. (Id.) However, he believed that he would be unfairly targeted if he were seen protesting, and he communicated those sentiments to Sanchez, McGlawn, Hardin and Throckmorton between April 24 and 28, 2022. (Id.)

The record also includes evidence of more enduring chilling effects at the Memphis Store. Despite the successful union election at the Memphis Store, there was testimony about continuing fear of supporting the ongoing bargaining process. For instance, while Heiberg stated that the anonymity of voting for the Union using a secret ballot allowed him to participate in Union elections, he confirmed that he would not want to be part of a bargaining committee because that type of open union support would position him as a target for Starbucks. (ECF No. 73 at PageID 1583.)

The evidence indicates that some partners believe that, even with the successful election, an ongoing negotiating process amidst the lingering impacts of the terminations renders participants in the bargaining process still "highly susceptible" to management misconduct. Lund, 794 F. Supp. 2d at 823. Moreover,

while true that discharged partners are involved in the bargaining process already underway, (see Exhibit 56), without employment at the Memphis Store, they are limited in their capacity to communicate with, to influence, and to knowledgeably advocate for fellow union members. And the organizing activity of Hall, the only remaining member of the organizing committee still employed at Starbucks, narrowed in scope as her recruitment efforts were stymied. According to Hall, although she spoke with and convinced nine of the ten new hires to support the organizing campaign, she did not speak about the campaign with any of the five employees who transferred to the Memphis Store from Store Manager Page's previous store because she did not feel comfortable trusting them. (ECF No. 73 at PageID 1490-91.)

Starbucks still argues that, contrary to the Board's position which relies on hearsay evidence, there was no chill from the terminations, and the publicity about the terminations actually galvanized union activity both at the Memphis Store and nationally. (ECF No. 81 at PageID 1675-76.) It emphasizes that Hall continued organizing at the Memphis Store, convincing new hires to wear pro-union pins at work, and that she testified about other partners' interest in joining the organizing committee. (Id. at PageID 1676 (citing ECF No. 73 at PageID 1490-91).) Starbucks also notes that Sanchez testified that his termination strengthened the organizing effort and that the discharged partners have engaged in ongoing union activity. (Id. at PageID 1676-78 (citing, inter alia, ECF No. 1-2 at PageID 153).) Indeed, according to Starbucks, the terminations actually "emboldened union activities" both in Memphis and nationally. (ECF No. 81 at PageID 1681 (citing ECF No. 75 at PageID 1253 (over 300

petitions were filed for the Union to represent Starbucks workers from mid-December 2021 to the week before the hearing)).)

Complicating Starbucks' narrative is contrary testimony about the chilling impact of the terminations. (See, e.g., ECF No. 73 at PageID 1600 (Margaret Carter testifying that Jackson store partners told her they were "very fearful about actions that were similar [to the Memphis terminations] taking place in their store if they were to organize."); ECF No. 75 at PageID 960-61 (Richard Bensinger testifying that a partner in Southern Florida told him that he was "incredibly nervous for himself that he would be fired like the Memphis people were;" that it was difficult to recruit a committee of union organizers in the store; and that his manager stated to him, "Let's just not have here what happened in Memphis.").) Moreover, the Board notes that affirmative evidence of organizing does not negate other situations where "even the possibility of organizing has been extinguished or where any perceived momentum for the Union in once-active campaigns has died." (ECF No. 84 at PageID 1747.)

The Court emphasizes that evidence of the movement being chilled or energized on a national scale does not change the Board's proffered evidence of "some erosion of Union support" in the Memphis Store. See Catatrello v. Carriage Inn of Cadiz, No. 2:06-cv-697, 2006 WL 3230778, at *7, *23 (S.D. Ohio Nov. 6, 2006) (finding that one employee's testimony about concerns about union support constituted "some evidence [of] erosion of Union support" and was sufficient for the court to find injunctive relief just and proper). Indeed, the effect of the actions on the ability of the remaining employees at the Memphis Store to

effectively bargain is critical when considering this requested relief. See Lightner, 823 F. Supp. at 253 (the Board's remedial power is impacted if the termination chilled "co-employees") (emphasis added); Lund, 794 F. Supp. 2d at 822 (discussing a "heightened" need for interim relief when a newly-certified union has "yet to achieve an initial collective bargaining agreement").

Here, even if the evidence is not wholly conclusive as to the overall chill, "an adequate foundation has been offered" to warrant this temporary injunctive relief. See Boren v. Cont'l Linen Servs., Inc., No. 1:10–cv–562, 2010 WL 2901872, at *5 (W.D. Mich. July 23, 2010) (conclusive proof not required under just-and-proper standard for the issuance of an injunction). Instead of waiting until the Board's final order, which could come at a time when the discharged employees have found other work and the reinstatement order would be an "empty formality," the reinstatement of the Memphis Seven "will nearly as is now possible restore the conditions prevailing before the discharges and so prevent a frustration of the ultimate administrative action." See Angle v. Sacks, 382 F.2d 655, 660-61 (10th Cir. 1967). Under § 7 of the Act, employees have the decision "to bargain collectively through representatives of their own choosing" – and may make that choice "without restraint or coercion by their employer." 29 U.S.C. § 157; NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33 (1937). Granting temporary injunctive relief will enable the Board to determine the merits of these alleged acts without frustration of the "policy of the United States" to "encourag[e] . . . collective bargaining." 29 U.S.C. § 151. It will not "advance the Union's cause" as Starbucks puts it, (ECF No. 85 at PageID 1760), but rather restore the employees' ability to

effectively bargain in the ongoing process.[10]

Finally, that the reinstatement of the Memphis Seven may require dismissal of a replacement does not support denying injunctive relief. "[A]ny hardship that may be caused by the displacement of new employees is outweighed by the harm that will result if the union's organizational efforts are terminated prematurely." Blyer ex rel. NLRB v. P & W Elec., Inc., 141 F. Supp. 2d 326, 331 (E.D.N.Y. 2001).

**B. Other Injunctive Relief**

The Board also requests other relief, including (1) a broad cease-and-desist order; (2) interim rescission of the discipline issued to Taylor; (3) a reading of the Court's Order in front of employees and a representative of the Board; (4) posting of the Order at the Memphis Store; (5) distribution of electronic copies of the Order to all Starbucks employees via the Partner Hub; and (6) distribution, via Partner Hub, of electronic copies of a Starbucks official or Board agent reading the Order in the presence of the other person.

A cease and desist order has been found as "just and proper" relief under § 10(j) of the Act where "there is reasonable cause to believe that the effects of unfair practices linger." Gottfried for & on Behalf of NLRB v. Purity Sys., Inc., 707 F. Supp. 296, 302 (W.D. Mich. 1988 (citing Eisenberg v. Wellington Hall Nursing Home, 651

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[10] Starbucks supplemented the record from the hearing with an email sent from Kylie Throckmorton to Starbucks management on June 14, 2022, requesting a meeting to negotiate the first bargaining contract. (Exhibit 56.) However, the record does not contain any further indication that the bargaining process has yet been successful or that a meeting took place, despite Throckmorton's proposal of a meeting on July 11, 2022. (See id.)

F.2d 902, 904 (3d Cir. 1981)). Here, in light of the Board's evidence suggesting the existence of multiple unlawful employment practices, ordering Starbucks to cease and desist those practices "is in the public interest to effectuate the policies of the NLRA and to protect the NLRB's remedial powers." See Hooks ex rel. NLRB v. Ozburn-Hessey Logistics, LLC, 775 F. Supp. 2d 1029, 1051–52 (W.D. Tenn. 2011). Achieving the status quo in the relationship between Starbucks and the partners involved here is possible by directing Starbucks to cease unlawful behaviors. If the activity was instead allowed to continue until the conclusion of the Board's administrative proceedings, there is a "reasonable apprehension that the efficacy of the NLRB's final order may be nullified and the administrative procedures . . . rendered meaningless." See id. at 1051.

Additionally, the rescission of any discipline issued to Taylor is "just and proper" to protect the remedial power of the Board. If the discipline, which the Board has established reasonable cause to believe was unlawfully issued, were to remain in Taylor's file, it may allow Starbucks' unlawful activity to continue with impunity. However, the Court orders the rescission solely of the discipline which was actually issued to Taylor. To the extent that Taylor was not issued discipline for a dress code violation, as Starbucks' evidence suggests, the lack of issued discipline does not need a remedy.

As for the reading, distribution, and posting of the Court's Order, the Court finds it "just and proper" to affirmatively require Starbucks to post copies of the Order in the Memphis Store "because it officially notifies Respondent's employees of the Court's order." Muffley v. APL Logistics Mgmt. Warehouse Servs., Inc., No. 3:08-

CV-26-R, 2008 WL 4561573, at *2 (W.D. Ky. Oct. 10, 2008) (citing Gottfried v. Mayco Plastics, Inc., 472 F. Supp. 1161, 1166 (E.D. Mich. 1979), aff'd 615 F.2d 1360 (6th Cir. 1980)). However, the Court does not find it "just and proper" to require Starbucks to read the Order aloud, or to post electronic copies of the Order on the Partner Hub or via any other intranet site. Restoring the Memphis Store to the status quo, which is the focus of this Order, does not require broader dissemination.

## CONCLUSION

As explained above, the Petition for Temporary Injunctive Relief is **GRANTED IN PART**. **IT IS THEREFORE ORDERED THAT:**

A. Respondent, its officers, representatives, supervisors, agents, employees, attorneys, and all persons acting on its behalf or in participation with it, are hereby enjoined, pending the final disposition of the matters involved herein by the Board, from:

1. Discharging, disciplining or otherwise discriminating against employees because of their activities on behalf of and support for the Union or any other labor organization;

2. More closely supervising or monitoring the activities of employees because of their activities on behalf of and support for the Union or any other labor organization;

3. Preventing employees from engaging in protected activity by closing the lobby/café portion of its facility and confiscating and removing union and pro-union materials from the community bulletin board; and

4. In any other manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in § 7 of the Act.

B. Respondent, its officers, agents and representatives shall:

1. Within five (5) days of the issuance of this Order, offer, in writing, full interim reinstatement to employees Florentino Escobar, Nabretta Hardin, LaKota McGlawn, Luis "Beto" Sanchez, Cara Nicole Taylor, Kylie Throckmorton and Emma Worrell, or, if those positions no longer exist, to substantially equivalent positions at the Memphis Store without prejudice to their seniority or any other rights and privileges previously enjoyed, and displacing, if necessary, any employee who may have been hired, contracted for, or reassigned to replace them;

2. Within five (5) days of the issuance of this Order, rescind and expunge the unlawful discipline issued to Cara Nicole Taylor and refrain from relying on that discipline in issuing any future discipline;

3. Within seven (7) days of the issuance of this Order, post copies of the Court's Order at Starbucks' Memphis Store in all places where Starbucks typically posts notices to its employees at the Memphis Store, as well as translations in other languages as necessary to ensure effective communication to Starbucks' employees as determined by the Board's Regional Director of Region 15, said translations to be provided by

Starbucks at its expense; maintain these postings during the pendency of the Board's administrative proceedings free from all obstructions and defacements; grant all employees free and unrestricted access to said postings; and grant to agents of the Board reasonable access to its worksite to monitor compliance with this posting requirement;

C. Within twenty (20) days of the issuance of this Order, file with the Court, with a copy submitted to the Regional Director of Region 15 of the Board, a sworn affidavit from a responsible official of Starbucks describing with specificity the manner in which Respondent has complied with the terms of this Court's Order, including how the documents have been posted as required by the Court.

**IT IS SO ORDERED**, this 18th day of August, 2022.

s/ Sheryl H. Lipman
SHERYL H. LIPMAN
UNITED STATES DISTRICT JUDGE