

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

STARBUCKS CORPORATION d/b/a)	
STARBUCKS COFFEE COMPANY)	
)	
Respondent,)	
and)	Case Nos. 2-CA-37548
)	2-CA-37599
)	2-CA-37606
)	2-CA-37688
LOCAL 660, INDUSTRIAL WORKERS OF THE WORLD)	2-CA-37689
)	2-CA-37689
Charging Party.)	2-CA-37798
)	2-CA-37821
)	2-CA-38187

**EXCEPTIONS OF EMPLOYER STARBUCKS COFFEE COMPANY TO
ADMINISTRATIVE LAW JUDGE MINDY E. LANDOW’S DECISION**

Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Starbucks Coffee Company (“Starbucks,” “Employer,” or “Respondent”) respectfully submits the following exceptions to the December 19, 2008 decision (“Decision”) of Administrative Law Judge (“ALJ”) Mindy E. Landow in the above-captioned matter.

1. The ALJ erred by concluding on page 16, lines 12 through 15, that Respondent violated Section 8(a)(1) of the Act limiting the number of pins that employees may wear in support of a labor organization while working. *See* Exceptions Brief at Section II.

2. The ALJ erred by finding at page 15, lines 5 through 6, that the March 2006 settlement agreement did not contemplate a limitation on the number of pins worn by employees. *See* Exceptions Brief at Section II.A.

3. The ALJ erred by concluding at page 15, lines 13 through 15, that Starbucks pin policy was not promulgated as part of Starbucks dress code. *See* Exceptions Brief at Section II.B.

4. The ALJ erred by finding at page 15, lines 13 through 15, that none of the Respondent's witnesses pointed to the dress code as the rationale for the restrictions in Starbucks pin policy. *See* Exceptions Brief at Section II.B.

5. The ALJ erred by finding at page 15, lines 19 through 28, that there was no distinction between Starbucks-sponsored pins and non-work-related pins. *See* Exceptions Brief at Section II.B.

6. The ALJ erred by finding at page 15, lines 33 through 35, that Starbucks pin policy "apparently applies regardless of whether the employee is in a selling area or elsewhere in the facility or whether the employee is working or on break." *See* Exceptions Brief at Section II.B.

7. The ALJ erred by finding at page 15, lines 33 through 36, that Starbucks pin policy is unlawfully overbroad. *See* Exceptions Brief at Section II.B.

8. The ALJ erred in her analysis at page 15, lines 38 through 50, by relying upon *Serv-Air, Inc.*, 161 N.L.R.B. 382 (1966), a factually dissimilar and distinguishable case, to find that Starbucks pin policy did not qualify for the special circumstances exception despite the fact that it does not include a wholesale ban on pins. *See* Exceptions Brief at Section II.B.

9. The ALJ erred by finding at page 16, lines 12 through 15, that Starbucks failed to demonstrate the existence of special circumstances for the promulgation and enforcement of its pin policy. *See* Exceptions Brief at Section II.B.

10. The ALJ erred by concluding on page 50, lines 38 through 40, that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Joseph Agins (“Agins”). *See* Exceptions Brief Section III.

11. The ALJ erred by concluding at page 44, lines 18 through 24, that Agins’ dispute with Ifram Yablon (“Yablon”) was not “unprotected in its entirety” because “the comments allegedly made by Yablon toward Agins’ father arose from protected conduct” and that the confrontation between Agins and Yablon therefore “took place within an overall context of protected activity.” *See* Exceptions Brief at Section III.A.

12. The ALJ erred by crediting, at page 44, line 28 through page 45, line 4, the General Counsel’s witnesses’ accounts of Agins’ outburst given her finding that they “were shading their testimony in an apparent attempt to protect Agins.” The ALJ erred by finding the witnesses’ “inconsistencies would be characteristic of witnesses testifying truthfully, from their best recollection” *See* Exceptions Brief at Section III.C.3.

13. The ALJ erred by concluding at page 45, line 11, that Yablon used profanity during his interaction with Agins. *See* Exceptions Brief at Section III.C.1.

14. ALJ erred on page 36, lines 41 through 45, and page 45, lines 6 through 19, by failing to discredit Agins’ testimony based on material omissions in his affidavit and journal entries regarding the May 15 and November 21 incidents. *See* Exceptions Brief at Section III.C.1.

15. The ALJ erred by discrediting at page 45, lines 13 through 26, Tanya James’ (“James”) version of the November 21 outburst. The Judge erred by finding that “James subsequently came over to admonish Agins, but he remained seated with the group, and did not use profanity or make threatening gestures toward James.” The ALJ erred by discrediting James’

testimony that “Agin resisted the efforts of his companions to intercede in the argument . . . [and] that as Agin proceeded forward, James interceded to calm him down but that he continued to press toward the door and shout profane comments.” The Judge also erred on page 46, line 45 through page 47, line 2 by concluding it was “doubtful that the diminutive James would have positioned herself in front of the substantially larger and heavier Agin to intercede, as she testified.” *See* Exceptions Brief at Section III.C.2.

16. The ALJ erred by concluding on page 40, lines 45 through 48, that the November 28 e-mail sent by James “was authored by someone else.” The Judge also erred on page 45, lines 26 through 30, by giving “no weight” to the November 28 e-mail written by James describing Agin’s outburst. *See* Exceptions Brief at Section III.C.2.

17. The ALJ erred on page 45, lines 26 through 30, by finding James’ December 5 statement “contradicts her sworn testimony” and “was not an accurate reflection of her initial statement about the events of the evening” The Judge also erred by concluding on page 46, lines 36 through 41, that the December 5 statement “contains narrative which did not emanate from James.” *See* Exceptions Brief at Section III.C.2.

18. The ALJ erred on page 47, lines 12 through 14, by drawing an adverse inference from Starbucks “failure to produce James’ initial report or to explain its absence through probative evidence.” *See* Exceptions Brief at Section III.C.2.

19. The ALJ erred by concluding on page 47, lines 22 through 26 that it was “inherently improbable that, had Agin continued to be disruptive, insubordinate and profane, as has been described, his fellow IWW supporters would have remained in the facility” for ten minutes after his confrontation with Yablon. *See* Exceptions Brief at Section III.C.2.

20. The ALJ erred by concluding on page 47, lines 28 through 34, that James' failure to contact the police the night of November 21 indicated Agins was not as disruptive as alleged and that James was not "as threatened as has been asserted." See Exceptions Brief at Section III.C.2.

21. The ALJ erred on page 48, line 1 through page 50, line 40, by applying the legal standard set forth in *Atlantic Steel*, 245 N.L.R.B. 814 (1979), and further erred in concluding on page 43, line 42 through page 44, line 24, that Agins' exchange with Yablon was part of the res gestae of concerted protected activity. See Exceptions Brief at Section III.A.

22. The ALJ erred on page 48, lines 17 through 25, by failing to accord proper weight to the place of Agins' outburst in her *Atlantic Steel* analysis and by concluding that heated discussions and the "importune use of profanity" were not uncommon at Respondent's stores. See Exceptions Brief at Section III.B.2.a.

23. The ALJ erred by concluding on page 48, lines 27 through 38, that the subject matter of the discussion between Agins and Yablon weighed in favor of protection. The Judge erred by concluding it "involved a personal matter" but nevertheless related to "organizational activity which implicated core Section 7 rights" and that it "took place in the overall context of a demonstration in support of employees' Section 7 rights." See Exceptions Brief at Section III.B.2.

24. The ALJ erred by concluding on page 48, line 35 that Yablon's alleged "earlier insult" directed to Agins' father "stemmed from protected conduct." The Judge further erred on page 37, lines 30 through 36, by relying on Agins' hearsay account of the alleged insult, despite her conclusion that "Agins acknowledged that he did not personally hear Yablon" make any comment about his father. See Exceptions Brief at Section III.A.

25. The ALJ erred by concluding on page 48, line 40 through page 49 line 14, that the nature of Agins' outburst "militates toward retaining the protections of the Act." *See* Exceptions Brief at Section III.B.1.

26. The ALJ erred by concluding on page 48, lines 42 through 43, that Agins' outburst was not "as extreme or prolonged" as characterized by Starbucks. The ALJ further erred by concluding on page 52 that "Respondent has exaggerated and mischaracterized the scope and nature of Agins' misconduct on November 21." *See* Exceptions Brief at Section III.B.1.

27. The ALJ erred by concluding on page 48, lines 43 through 48, that the evidence "generally" necessary for an employee to lose the protection of the Act must demonstrate "a repeated, sustained course of action, including vulgar language, typically accompanied by threats, physically intimidating conduct or otherwise inappropriate references, usually directed toward a superior." *See* Exceptions Brief at Section III.B.1.

28. The ALJ erred by concluding on page 49, lines 10 through 12, that Starbucks treated other partners "less harshly" than Agins and that this weighed in favor of Agins retaining the protections of the Act. The ALJ also erred by concluding on page 52, lines 7 through 10 and 15 through 21, that "on various occasions Respondent has dealt with conduct more egregious than Agins' with lesser discipline" and that this supported the conclusion that an unlawful reason was the motivating factor in Starbucks decision to discharge Agins. *See* Exceptions Brief at Section III.B.1.

29. The ALJ erred by concluding on page 49, lines 18 through 28, that, even though Yablon did not provoke Agins by unlawful conduct, "the overall context of the discussion creates mitigating factors which would lead me to conclude that this factor weighs only slightly against continued protection under the Act." *See* Exceptions Brief at Section III.B.2.b.

30. The ALJ erred by concluding on page 50, lines 22 through 23, that “it is undisputed that Yablon’s initial comments addressed themselves to” the issue of unfair labor practice charges that had been filed regarding the right to wear union buttons. *See* Exceptions Brief at Section III.B.2.b.

31. The ALJ erred by concluding on page 50, lines 34 through 36, that the fourth *Atlantic Steel* factor “supports continued protection under the Act” and that “even if I were to find that the fourth factor weighed slightly against protection, this would not alter my ultimate conclusion.” *See* Exceptions Brief at Section III.B.2.b.

32. The ALJ erred by concluding at page 52, lines 15 through 19, that Starbucks did not satisfy its burden under *Wright Line* to establish it would have discharged Agins regardless of union activity. *See* Exceptions Brief at Section III.D.

33. The ALJ erred by concluding on page 51 line 41, through page 52 line 2, and page 41 fn. 44, that Agins never received a final written warning for the May 15 incident and by crediting Agins’ testimony over Smith’s that the final warning prepared for this incident was “torn up.” *See* Exceptions Brief at Section III.D.1.

34. The ALJ erred by concluding on page 52, lines 12 through 15, that Agins was discharged solely for his outburst on November 21, and that because this outburst was protected by the Act, “it is a foregone conclusion that Respondent cannot carry its burden of proving that the discharge was for neutral non-discriminatory reasons.” *See* Exceptions Brief at Section III.D.2.

35. The ALJ erred by concluding on page 52, line 25 through page 57, line 15, that Isis Saenz’s (“Saenz”) termination violated Sections 8(a)(1) and (3) of the Act. *See* Exceptions Brief at Section IV.

36. The ALJ erred by concluding on page 56, lines 9 through 18, that the location of Saenz's misconduct weighed in favor of protection under the Act under the first *Atlantic Steel* factor. *See* Exceptions Brief at Section IV.A.

37. The ALJ erred at page 56, lines 12 through 18, by relying in part upon the fact that Saenz was off-duty at the time of her misconduct to conclude that the location of the misconduct weighed in favor of protection under the Act under the first *Atlantic Steel* factor. *See* Exceptions Brief at Section IV.A.

38. The ALJ erred by concluding on page 56, lines 13 through 14, that there was "no evidence that any on-duty employees had any knowledge of or were in a position to overhear any comments [Saenz] may have made to [Jim] McDermet." *See* Exceptions Brief at Section IV.A.

39. The ALJ erred by concluding on page 56, lines 13 through 18, that the location of Saenz's misconduct weighed in favor of protection because no on-duty employees witnessed or overheard her misconduct. *See* Exceptions Brief at Section IV.A.

40. The ALJ failed to properly consider on page 56, lines 9 through 18, that other demonstrators were current Starbucks employees, all of whom were in a position to overhear and observe Saenz's disrespectful conduct toward Jim McDermet ("McDermet"). *See* Exceptions Brief at Section IV.A.

41. The ALJ erred by concluding on page 56, lines 46 through 47, that the nature of Saenz's misconduct was not "so egregious as to remove [Saenz] from the protections of the Act." *See* Exceptions Brief at Section IV.B.

42. The ALJ failed on page 56, line 27, to credit undisputed evidence that Saenz shouted "Piss on him!" toward McDermet. *See* Exceptions Brief at Section IV.B.

43. The ALJ erred by concluding on page 56, lines 28 through 31, that the nature of Saenz's comments did not lose the protection of the Act because "the comments were made prior to McDermet exiting the store" and "there is no evidence any Starbucks manager, or on-duty employee, had any awareness that such comments were made at the time." *See* Exceptions Brief at Section IV.B.

44. The ALJ erred by concluding on page 56, lines 43 through 49, that the nature of Saenz's conduct weighed in favor of protection under the Act despite finding that Saenz was part of a group that followed McDermet down the street shouting out profane and threatening comments. *See* Exceptions Brief at Section IV.B.

45. The ALJ's analysis of the third *Atlantic Steel* factor on page 56, line 26 through page 57, line 8, failed to accord proper weight to Saenz's admission that McDermet likely found the conduct of her and her fellow union supporters to be threatening and intimidating. *See* Exceptions Brief at Section IV.B.

46. The ALJ erred by relying in part upon her speculation at page 56, lines 44 through 52, that "[h]ad the demonstrators' behavior been as threatening as Respondent now asserts, it would have been unlikely" that McDermet's companions would have left him, in order to conclude that the nature of Saenz's misconduct was not "so egregious as to remove [Saenz] from the protections of the Act." *See* Exceptions Brief at Section IV.B.

47. The ALJ erred by concluding on page 57, lines 1 through 8, that Saenz's misconduct amounted to mere "impertinence" despite evidence that Saenz participated in threatening and intimidating conduct directed toward McDermet. *See* Exceptions Brief at Section IV.B.

48. The ALJ erred in relying on *Aroostook County Regional Ophthalmology Center*, 317 N.L.R.B. 218, 220 (1995), *enforcement denied in part*, 81 F.3d 209 (D.C. Cir. 1996) on page 57, lines 1 through 8, as the principles of that case on which the ALJ relies were expressly rejected by the United States Court of Appeals for the District of Columbia Circuit. *See* Exceptions Brief at Section IV.B.

49. The ALJ erred by concluding on page 84, lines 43 through 44, that Daniel Gross' ("Gross") termination violated Section 8(a)(1) and (3) of the Act. *See* Exceptions Brief at Section V.

50. The ALJ erred by concluding at page 82, lines 20 through 24, that "the timing of the downgrading of Gross' performance corresponds to the escalation" of union events. *See* Exceptions Brief at Section V.A.

51. The ALJ erred by concluding at page 84, lines 39 through 44, that Starbucks did not satisfy its burden to show it would have discharged Gross in the absence of union activity. *See* Exceptions Brief at Section V.B.

52. The ALJ erred by concluding at page 83, lines 2 through 8, that Starbucks had the burden to show that it discharged Gross based on an incident where he was "insubordinate, refused to follow work instructions or engaged in misconduct while on the job." *See* Exceptions Brief at Section V.B.

53. The ALJ erred on page 83, lines 25 through 26, by concluding that "there is no evidence that Gross was ever informed that he had to increase his availability to receive a favorable performance review." The Judge also erred on page 83, lines 19 through 20, by crediting Gross' testimony that Anders told him he would not need to increase his availability, and on page 70, lines 5 through 8, by concluding that Starbucks "was apparently

‘recommend[ing]’ that Gross increase his availability” but “failed to so advise him.” *See* Exceptions Brief at Section V.B.2.

54. The ALJ erred by concluding at page 83, lines 18 through 33, that “Respondent’s reliance upon the fact that Gross worked very few hours is pretextual because there is no probative evidence that his restricted work schedule concretely impacted his ability to perform the basic functions of a barista, or otherwise disrupted the operations of the store.” *See* Exceptions Brief at Section V.B.2.

55. The ALJ also erred by failing to take into account comparative evidence introduced by Respondent demonstrating that other partners with limited availability were treated similarly to Gross. *See* Exceptions Brief at Section VI.A.1.c.

56. The ALJ erred by concluding at page 83, lines 21 through 27, that Gross had not been counseled to improve his availability because he “received a ‘meets expectations’ review notwithstanding the fact that his availability had not changed” and because Starbucks “approved all of his requests for time off.” *See* Exceptions Brief at Section V.B.2.

57. The ALJ erred by concluding at page 83, line 35 through page 84, line 6, that Gross’ conversations with his co-workers in which he told them they did not need to complete certain tasks constitutes protected concerted activity, and by concluding that Respondent’s reliance on these conversations “as proof that [Gross] failed to create a positive work environment or to impugn his ‘attitude’” evidences an unlawful motive. *See* Exceptions Brief at Section V.B.1.

58. The ALJ erred by concluding at page 84, lines 8 through 29, that “in several areas where Gross’ performance was found to be unsatisfactory” in his August 2006 performance review, “his protected conduct was cited as a basis for such conclusion” and that therefore “the

evaluation is, in and of itself, direct evidence of Respondent's unlawful motive." *See* Exceptions Brief at Section VI.A.

59. The ALJ erred by concluding at page 84, lines 40 through 41, that "substantial evidence demonstrates that Respondent's downgrading of Gross' performance in several critical areas was pretextual." *See* Exceptions Brief at Sections V and VI.

60. The ALJ erred by concluding at page 84, lines 31 through 44, that "Respondent has not established that the perceived deficiencies in Gross' job performance would have been a sufficient basis for discharge, absent protected conduct" and that therefore Respondent violated Sections 8(a)(1) and (3) of the Act. *See* Exceptions Brief at Section V.B.

61. The ALJ erred by concluding on page 85, lines 38 through 39 that Gross' January 29, 2006 performance review violated Section 8(a)(1) and (3) of the Act. *See* Exceptions Brief at Section VI.A.

62. The ALJ erred by finding at page 64, lines 33 through 34, that "Gross offered testimony rebutting the downgrading of his performance in areas such as composure, his ability to anticipate store needs and his punctuality." *See* Exceptions Brief at Section VI.A.1.b.

63. The ALJ erred by finding at page 64, lines 37 through 39, that "Respondent presented no evidence, other than what is contained the evaluation itself and PAN notice, to establish why Gross' job performance had suffered such a decline." *See* Exceptions Brief at Section VI.A.

64. The ALJ erred by concluding at page 65, lines 35 through 36, that "the General Counsel has adduced sufficient evidence of animus to meet its initial burden" to establish that Starbucks January 2006 performance review of Daniel Gross was discriminatory. *See* Exceptions Brief at Section VI.A.1.

65. The ALJ erred by finding at page 65, lines 37 through 39, that “Respondent’s comments about Gross’ attitude, absent any specific explanation by Respondent, constitute some evidence of an unlawful motive.” *See* Exceptions Brief at Section VI.A.1.

66. The ALJ improperly shifted the burden of proof at the prima face stage in her analysis at page 66, lines 10 through 18, by requiring Starbucks to “adduce[] evidence, either through testimony or . . . through specific examples as set forth in Gross’ performance evaluation, of ways in which his poor attitude had some impact upon the way he performed his job.” *See* Exceptions Brief at Section VI.A.1.

67. The ALJ erred by finding at page 66, lines 10 through 18, that Starbucks adduced no proof of ways in which Gross’ poor attitude impacted his job performance. *See* Exceptions Brief at Section VI.A.1.c.

68. The ALJ erred by finding at page 66, lines 18 through 22, that the references to Gross’ failure to evince a positive attitude and failure to adhere to Starbucks values, beliefs and principles in his January 2006 performance review were “veiled reference[s] to his Union activities, and evidence of animus.” *See* Exceptions Brief at Section VI.A.1.

69. The ALJ erred by concluding at page 66, lines 32 through 35, that “Respondent has failed to meet its burden of coming forward with specific, probative evidence to establish that it would have evaluated Gross in a substantially similar fashion notwithstanding his Union activities.” *See* Exceptions Brief at Section VI.A.2.

70. The ALJ erred by failing to take into account comparative evidence introduced by Respondent demonstrating that other partners received “needs improvement” ratings for similar reasons as Gross. *See* Exceptions Brief at Section VI.A.2.

71. The ALJ erred by finding at page 66, line 43 through page 67, line 2, that even if the General Counsel failed to adduce sufficient evidence to show that the January 2006 performance review was discriminatory, based upon subsequent events, “the General Counsel has adduced substantial evidence of unlawful motivation with regard to Gross, relating to later performance evaluations and his eventual discharge.” *See* Exceptions Brief at Section VI.A.

72. The ALJ erred by discrediting at page 67 lines 15 through 26, Jose Lopez’s (“Lopez”) testimony regarding Gross’ acts of misconduct. *See* Exceptions Brief at Section VI.A.

73. The ALJ erred by finding at page 69 line 18 through page 70, line 17, that the performance update given to Gross at his meeting with Lopez and James Cannon on April 14, 2006 constituted an adverse employment action. *See* Exceptions Brief at Section VI.B.1.

74. The ALJ erred by finding at page 69, lines 38 through 41, that, based upon comments about Gross’ attitude and lack of adherence to Starbucks values, culture and ethics, “there is some evidence” that the April 14 performance follow-up meeting with Gross “was discriminatorily motivated.” *See* Exceptions Brief at Section VI.B.2.

75. The ALJ erred by finding at page 70, lines 14 through 16, that Starbucks “failed to show, by a preponderance of the credible evidence, that it would have administered the same evaluation to Gross in the absence of his protected conduct.” *See* Exceptions Brief at Section VI.B.2.

76. The ALJ erred by finding at page 70, lines 13 through 16, that the performance evaluation follow-up meeting between Gross and Lopez on April 14, 2006 was “pretextual” and “discriminatory.” *See* Exceptions Brief at Section VI.B.2.

77. The ALJ erred by finding at page 85, lines 38 through 39 that the performance evaluation follow-up meeting between Gross and Lopez on April 14, 2006 was a “negative

employment evaluation” that violated Section 8(a)(1) and (3) of the Act. *See* Exceptions Brief at Section VI.B.

78. The ALJ erred by finding at page 72, lines 37 through 40, that “Lopez failed to . . . explain the disparity between the observations recorded in his log, and the assessment of Gross’ work performance as reflected in the [April 29, 2006] Update.” *See* Exceptions Brief at Section V.B.

79. The ALJ erred by finding at page 72, lines 42 through 44, that the performance update given to Gross by Lopez on April 29, 2006 was “pretextual and, accordingly, constitutes persuasive evidence of Respondent’s unlawful motive with regard to its future actions toward Gross.” *See* Exceptions Brief at Section VI.B.2.

80. The ALJ erred by finding at page 72, lines 50 through 51, that the memorandum Lopez gave to Gross at the April 29, 2006 performance update meeting was “tantamount to a negative performance evaluation.” *See* Exceptions Brief at Section VI.B.1.

81. The ALJ erred by failing to draw an adverse inference based on the failure of Charles Polanco to testify. *See* Exceptions Brief at Section VI.A.1.b.

82. The ALJ erred by finding at page 72, lines 50 through 51, that Starbucks violated Section 8(a)(1) and (3) of the Act when Lopez gave Gross a performance update document at the April 29, 2006 meeting. *See* Exceptions Brief at Section VI.B.

Because of the important issues presented by the Decision, Respondent requests oral argument.

Respectfully submitted,

AKIN, GUMP STRAUSS, HAUER
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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of March, 2009, I caused a copy of the foregoing Exceptions of Employer Starbucks Coffee Company to Administrative Law Judge Mindy E. Landow's Decision to be served, via electronic mail and overnight mail, on the following:

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