

127 Restaurant Corp. d/b/a Le Madri Restaurant and Luis Jerez and Walter Magnuson. Cases 2–CA–30176 and 2–CA–30729

May 26, 2000

DECISION AND ORDER

BY MEMBERS FOX, LIEBMAN, AND BRAME

On June 23, 1999, Administrative Law Judge Steven Davis issued the attached decision. The Respondent filed exceptions and a supporting brief and the General Counsel filed an answering brief.

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

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, 127 Restaurant Corporation d/b/a Le Madri Restaurant, New York, New York, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Christene Mann, Esq., for the General Counsel.

Michael Etkin, Esq. (Ravin, Sarasohn, Cook, Baumgarten, Fisch & Rosen, P.C.), of New York, New York, for the Respondent.

Beth Margolis, Esq. (Gladstein, Reif & Meginiss, Esqs.), of New York, New York, for the Charging Parties.

DECISION

STATEMENT OF THE CASE

STEVEN DAVIS, Administrative Law Judge. Based on a charge in Case 2–CA–30176 filed by Luis Jerez, an individual, on March 4, 1997, and based on a charge in Case 2–CA–30729 filed by Walter Magnuson, an individual, on August 25, 1997, a complaint was issued on July 31, 1998, against 127 Restaurant Corp. d/b/a Le Madri Restaurant (Respondent).

The complaint alleges essentially that Respondent (a) warned and informed its employees that it would be futile for them to engage in union or protected concerted activity, (b) refused to grant time off to Magnuson because he engaged in protected concerted activity in furtherance of his being a plaintiff in a lawsuit against Respondent, (c) reduced the work shifts of Magnuson because he engaged in protected concerted activity, and (d) discharged Jerez and Magnuson because they engaged in concerted

activities, and because Respondent believed that Jerez had engaged in union activities and to discourage employees from engaging in such activities.

Respondent's answer denied the material allegations of the complaint, and on February 3, March 5, and April 16, 1999, a hearing was held before me in New York City.¹

On the evidence presented in this proceeding, and my observation of the demeanor of the witnesses² and after consideration of the briefs filed by all parties, I make the following

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation having its office and place of business at 168 West 18th Street, New York, New York, is engaged in the operation of restaurants serving food and beverages to the general public. Annually, in the course of its business operations, Respondent derives gross revenues in excess of \$500,000, and purchases and receives at its facility products, goods, and materials valued in excess of \$5000 which are purchased from suppliers located in New York State, but which suppliers are firms engaged in interstate commerce. I accordingly find and conclude that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE ALLEGED UNFAIR LABOR PRACTICES

A. The Facts

1. The lawsuit against Respondent

Luis Jerez and Walter Magnuson were waiters employed by Respondent, a Manhattan restaurant.

In late February 1996, Jerez and Magnuson were among a total of 19 named plaintiffs, members of the wait staff of Respondent, who sued it in Federal court for violations of Federal and state labor law. Specifically, the suit alleged that Respondent failed to pay the plaintiffs' minimum wage, overtime, call in pay, and failed to reimburse them for the cost of purchasing and maintaining their required uniforms. The suit also alleged that Respondent unlawfully made deductions from their wages for tips and cash losses, and misappropriated their tips by requiring them to participate in an involuntary tip sharing method, pursuant to which they were required to share their tips with other "dissimilar" employees and/or with agents of the Respondent.

A couple of days after the suit was filed, employees were required to attend a meeting at which Respondent's president, Pino Luongo, spoke to the entire wait staff which consisted of 15 to 20 employees. Also present was Alysa Adler, the day manager and admitted supervisor. According to Jerez, this was the first meeting conducted by Luongo in Jerez' 4-month tenure there.

Jerez and employee Todd Piorier testified that Luongo threw the lawsuit papers on the table, and asked why "this" happened and why didn't anyone come to him before "it got to this." Piorier characterized his demeanor as being "very angry, intimidating,

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf'd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings. Additionally, in the absence of exceptions, we adopt pro forma the judge's recommended dismissal of the allegation that Respondent's president violated Sec. 8(a) (1) of the Act by remarks concerning his employees' lawsuit.

² In affirming the violations with respect to employee Walter Magnuson, we rely solely on Sec. 8(a)(1), and not Sec. 8(a)(3).

¹ Following the close of the hearing, certain Charging Party exhibits were missing from the exhibit file. Copies of those exhibits were included in the exhibit file with the consent of all parties.

² Charging Party moved that the testimony of Manager Alysa Adler be struck on the ground that she violated the sequestration order by reviewing the transcript of the hearing. My denial of the motion is hereby affirmed. Respondent's attorney represented that Adler did not review the testimony of its other witness, and apparently thus only reviewed the testimony of the General Counsel's witnesses in order to prepare for rebuttal of their testimony. As such, her review of the transcript was permissible. *Greyhound Lines*, 319 NLRB 554 (1995).

solemn and mean.” Several employees voiced their opinions in response to Luongo’s statement. One unnamed employee volunteered that it was not possible to approach Luongo.

Jerez testified that he said that although Luongo had the authority to set restaurant policy, the tips received by the waiters was their business and they should decide how they are distributed. He also told Luongo that the wait staff had voiced their concern to management over being sent home although scheduled for shifts, and over management’s abusive language during meetings with the staff.³

Jerez also told Luongo that if this was a “union house, none of these things would happen.” Luongo told those assembled that the lawsuit was “totally frivolous and without merit,” adding that they would not get any money from him since he was in complete compliance with state and Federal laws. He also stated that their “pro bono” attorney would be “crushed” by his \$450 corporate lawyer. He also said that “over [my] dead body, Le Madri would become a Union restaurant,” and he would “close it down before.”

Piorier testified that Jerez voiced concerns that he had with Respondent’s policies: tips were being illegally allocated to people who were not entitled to receive them, such as parking lot attendants and restaurant management; employees who were scheduled for shifts and reported to work were told to leave when managers decided that they were not needed; and complaints to management were not acknowledged, but instead were ridiculed.⁴

According to Piorier, Jerez also remarked that “in a union house, this would probably not ever have escalated to the point that it’s gotten to.” Luongo, then became “irate” and said, “over my dead body will you ever get this house to be a union house, that before I would ever let that happen, I would close these doors down.” The meeting ended “abruptly” at that point.

Piorier stated that perhaps one or two other employees made comments concerning similar issues.

Piorier testified that 1 or 2 days after the meeting, General Manager Alysa Adler approached him, and told him that Luongo asked her to tell him that there would not be any “ramifications or repercussions” if he decided to withdraw from the lawsuit. She also mentioned that if he remained a plaintiff, there may be “counterclaims” made against him by Luongo, and information may be revealed which would have to be reported to the Internal Revenue Service (IRS) as tip income. Piorier replied that he felt “confident” in his position as a plaintiff, and would continue with the suit. Jerez also testified that Adler told him that the lawsuit had no basis, and that Luongo would not penalize anyone if they withdrew from it, adding that there was still time to withdraw. Jerez replied that he did not think it was appropriate to be discussing the lawsuit, and that they should leave it to the attorneys.

Piorier also testified that in the spring of 1996, Luongo dined in the restaurant and he was assigned as his waiter. During the course of the meal, Luongo, who was “jovial and blasé” about the suit, told him that he would not win that case, and that there would be no problems if he wanted to withdraw his participation in it. Luongo also told him that there would be counterclaims made against him if he proceeded, and also mentioned that his tip income would remain as a plaintiff.

³ A shift is one work session, for example one lunch on Monday, or a dinner on Tuesday.

⁴ Piorier first testified that Jerez also complained about overstaffing because Respondent absorbed employees of a closed restaurant, but later conceded that overstaffing was not a problem at that time since that other restaurant had not yet closed.

Piorier stated that following that conversation, he was told by Philip Smith, the maitre d’, that Luongo did not want Piorier to serve as his waiter when he dined at the facility, and thereafter he was not assigned to work in the VIP section, where Luongo dined. Piorier also stated that other lawsuit plaintiffs were not allowed to wait on Luongo following the filing of the suit.

2. Luis Jerez

a. Complaints to management

Jerez worked for Respondent from June 1995 to November 1996. He has worked in the restaurant industry for more than 20 years, and prior to his service with Respondent, he was a manager at the Rainbow Room in Manhattan.

In September 1996, a restaurant called Mad 61, which was owned by Luongo, closed, and about four to six members of that wait staff became employed at Respondent. Jerez testified that because of the additional employees, Respondent’s wait staff worked fewer days, were assigned to fewer tables, received less tips, and were sent home more frequently, even after being scheduled to work and reporting to work.

Jerez voiced these concerns to General Managers Adler and Lesley Whitten and Night Manager John Hankinson during preservice meetings and in private. He also spoke with his coworkers about these matters. Jerez stated that Hankinson and Whitten told him that this situation was temporary, and would be resolved. However, according to Jerez, it became a permanent problem and when he later became more outspoken about it Whitten told him that if he did not like it he could leave. Piorier corroborated Jerez’ testimony that he complained to Whitten about overstaffing, and that she told him that he could leave if he was dissatisfied.

Jerez testified that in late October and early November 1996, he spoke to his coworkers, and with Managers Price and Whitten, and Maitre d’ Smith, in protest of the tip policy, which allocated tips to Managers Price and Smith, and other nonwait staff.⁵

At about the same time, Jerez spoke with management personnel at preservice meetings about the adverse effects of the addition of the Mad 61 employees, including being sent home early. He was told that if he did not like it he could leave. He also protested Luongo’s alleged verbal abuse of employees, and his failure to tip them when they waited on him. Whitten told Jerez that as an officer of the corporation Luongo did not have to leave a tip.

Jerez also spoke to the kitchen staff about their complaints that the new chef reduced their work hours, and sent them home before they accumulated 40 hours per week in order to avoid paying overtime rates. He advised them that they did not have to accept such treatment, and that they should consider getting together and unionizing, and that there were unions which could help them stop Respondent’s abuse. He had four such conversations with the kitchen staff, which took place in a basement locker room next to a management office. Jerez stated that when he used that office he could overhear conversations in the locker room. Bartender Marcus asked Jerez whether he heard anything about unionizing or mention of a union. Jerez said that he did not, adding that a union was “long overdue.”

⁵ Jerez conceded that Price may not have been employed in the period September through November 1996, but nevertheless stated that Price had been receiving part of the waiters’ tips during Jerez’ employment.

Whitten testified that she did not recall that Jerez complained about overstaffing due to the Mad 61 closing, or about tips being given to managers. She denied telling him that he could leave if he was dissatisfied. Whitten stated that Respondent was not overstaffed, but rather there was a shortage of wait staff, and in fact the restaurant had required four to five additional waiters, who had come from Mad 61.

b. The discharge of Jerez

(1) The General Counsel's evidence

Jerez testified that on November 15, 1996, Whitten told him that a customer made a complaint which had "gone to headquarters, all the way to the top", and because of the "gravity of the complaint" a decision had been made at headquarters to discharge him.

Jerez replied that he doubted that that was the reason for his termination, adding that he never had a complaint about his work. Whitten denied that there was another reason, but added that management had been "working with" him on his service. When asked for an explanation, Whitten answered that John Hankinson has had to assist him in his station and work with him. Jerez denied that he had such help, and asked that Hankinson be called into the meeting, which he was. Hankinson told Jerez and Whitten that he had been working in, and helping with his (Jerez') station. Jerez answered that that was part of his job—management helps with and opens wine and helps with family-style service. According to Jerez, Hankinson looked "evasive," and then left.

Whitten then showed Jerez an employee counseling notice regarding this incident which noted that his performance was "below standards" and recounted the customer's complaint. As testified by Whitten, on that day she received a call from Luongo who said that he had received a complaint from an attorney with a large law firm with which the Respondent does a great deal of business. The attorney told Luongo that a female associate in the firm and her female friend had dined in the restaurant the night before. The counseling notice prepared by Whitten in relevant part, is as follows:

Two lady customers sat . . . in Luis' section. They finished their meal at 9:30 p.m. having eaten 2 appetizers and 2 main courses and drank 2 glasses of wine. . . . They felt that they had been ignored. They were not asked if they wanted another glass of wine with their main course. They said that they had to raise their hand each time to ask for service. They had left the restaurant quietly and decided never to return. They felt as if they had been treated like second class citizens—maybe because they were 2 women, or had not spent enough, or not beautiful enough or something.

Action Taken: For the last 2 days at pre-service meetings we had discussed the importance of making everyone feel welcome and have everyone leave with the wish to come back. I consider this complaint serious enough to warrant immediate termination.

Jerez recalled waiting on those customers, but denied providing less than his usual excellent service. He did not recall any unusual incidents, did not see them raising their hands for service, and did not recall that they left any less than the usual 15 percent tip.

Jerez testified that on that evening, he had been assigned by Manager Hankinson to take special care of a table of customers

who were just being seated in his serving area. They had threatened to leave the restaurant because they received poor treatment at the door and because they had to wait too long for their table. Jerez waited on the table and the customers were "very happy" when they left.

Jerez testified that other waiters had received customer complaints, including Paul Abrusso who forgot the first course for his table. When the main course arrived, the customers complained. According to Jerez, Abrusso replied that he was too busy, "what do you expect me to do?" The customer, who was "furious" complained to Hankinson, who reassigned Abrusso to a different table. Jerez stated that Abrusso was not discharged or disciplined for his conduct, which occurred in the same week that Jerez was discharged.

Jerez was not aware of any waiter being discharged for a customer complaint. He denied having a counseling session with Hankinson or any other manager, and never received a written warning concerning his work.

Jerez denied being told that he was fired for his participation in the lawsuit, or because he complained about Respondent's rules or policies. Nor did he speak with Whitten concerning the lawsuit.

(2) The Respondent's evidence

Whitten testified that when Luongo told her of the customer complaint, he directed her to look up the customer's name, and take care of the matter. She then found the customer's name and determined that Jerez served her. Whitten then asked Hankinson if he had observed any problems at that table or in that area of the dining room, and Hankinson said that he had not. Neither had Whitten noticed any problems with customer service, nor had any been brought to her attention. She checked with Maitre d' Smith who also did not notice any problems. Hankinson told her, however, that he had been working in Jerez' section, trying to give him "pointers" and "coach" him to correct such problems and issues as lateness in serving, and timing of the delivery of food to the tables.

Whitten stated that for the last 4 days before this incident, she spoke to the waiters at the preservice meeting about the importance of making every customer feel special, spoiled, and overwhelmed with extraordinary service, so that they would wish to return to the restaurant. She noted that sales had declined from the prior year, and that a book which critiqued restaurants noted that customers should "watch out for the service—it has a bit of an attitude to it." She told Hankinson that she was disappointed in receiving the customer's complaint, particularly since she had stressed the importance of special service. She decided that they would speak to Jerez that evening. Prior to discharging Jerez, Whitten had not spoken to the customer who complained, or to her law partner who spoke to Luongo.

At their meeting, Whitten told Jerez that she received a "very serious complaint" and was upset since she had been stressing the importance of great service, and that Hankinson had to work with him often in addressing these issues. Whitten stated that at that point, Jerez became "extremely defensive," stating that the incident was "made up," was "ridiculous" and he did not believe that there had been any problem with the customers. He further stated that he did not believe that his patrons waited too long for service, or that they would have wanted to order more wine, especially since they were in a rush to leave. Whitten then told him that "perhaps you just don't understand

what I'm trying to accomplish here. Maybe this just is not the right spot for you."

Whitten testified that prior to the meeting, she had not determined to discharge Jerez, and had not known that he was a plaintiff in the Federal lawsuit. She decided to fire him when he "disbelieved" that there was a problem with his service that evening, which was in "complete disregard" of her attempts to improve service. She stated that perhaps he had a problem taking orders from her because she is a woman. She stated that she decided to discharge Jerez because of his attitude toward the problem, and because she had been speaking to the staff for the past 2 days regarding this specific issue. She decided to fire him because he did not understand that there had been a problem at the table, and he did not understand what she was trying to "convey" to the staff. She further stated that the incident was an extremely big problem because this incident was an example of the issue she was trying to correct. When she spoke to Jerez, she saw that he "just did not understand." She concluded that she was not going to "get through" to him, he was being very defensive, and she did not understand why he insisted that there was another reason for his firing.

Whitten stated that after hearing Jerez' reaction to the criticism of his service, she decided to fire him, and she completed the "action taken" section of the notice in his presence in which she wrote that he was discharged. In support of her testimony that she had not decided to discharge Jerez when she first met with him, Whitten stated that she did not discuss with Luongo her decision to fire Jerez. She denied Jerez' statement that she told him that he was being fired by direction of someone in the corporate hierarchy.

Whitten's testimony is contradicted in two respects. First, Jerez denied that Whitten wrote the "action taken" section while he was present at the meeting, and stated that the form, including the action taken noting that he was discharged, was completely filled in when presented to him.

In addition, Jerez testified that Whitten told him that a decision had been made by headquarters to fire him. In that respect, Jerez is supported by Luongo's deposition testimony in the Federal lawsuit that Jerez is "the one that I requested to be dismissed based on the customer complaint." He based that decision on a rating report which spoke about his "lack of performance, inconsistency of service," and that he always needed a floor captain's help in his station, was "very sloppy in [his] overall performance," and was "struggling with the computers." He stated that Whitten often told him that Jerez was not performing well, and when he heard about the customer complaint, "I made the decision myself without even knowing that it was there at first, just the basis of the customer complaint, and I choose to do this." He also noted that Whitten and Hankinson suggested that Jerez be fired because they did not believe that he was "improving too much."

Further, Whitten's pretrial affidavit stated that, "I announced to Jerez that I was disappointed because I had just discussed service issues, and I said that I had decided to terminate him." At hearing, Whitten characterized that statement as a "summary" of what had happened during the entire conversation, and not, as the General Counsel contended, a statement that she entered the meeting with the intention of firing Jerez.

Whitten conceded that she had never spoken to Jerez concerning performance problems prior to that evening, and she had never told Luongo about any such problems. She stated, however, that she believed, although she never saw, that Hankinson addressed

some issues with Jerez concerning timing of service, but such discussions were not considered disciplinary action against him.

With respect to customer service, Whitten explained that the waiter is responsible for service in that if the kitchen staff does not prepare the food in a timely manner, he is required to demand that the food be presented.

With respect to Hankinson's assistance to Jerez, Whitten conceded that the floor manager's job is to "back up" the waiter, and if the waiter is too busy and cannot service the tables sufficiently, he calls for the help of a floor manager. Further, if the floor manager sees that help is needed he is expected to assist, even if not requested by the waiter.

The Respondent's personnel manual in effect at that time provides that if the employee breaks a policy or fails to follow procedure, he was subject to "poor performance warning" progressive discipline consisting of a counseling session with a manager for a first offense and a note placed in the employee's personnel file, a written warning for a second offense, and termination for a third offense.⁶

The manual also provided that grounds for immediate dismissal included "gross neglect, such as careless handling or abuse of company property," fighting, theft or vandalism, serving free food to customers, using profane language, insubordination including refusal to obey an instruction or using insulting, abusive or threatening language to a supervisor, tampering with a time card or punching another employee's timecard, possession or use of a weapon, gambling or illegal drug use on the premises, sleeping on company time, dishonesty, altering a check including changing a tip, and confronting a customer over a tip or any other difference of opinion.

In answer to a leading question by Respondent's counsel, Whitten testified that she believed that Jerez' treatment of the customer at issue constituted "gross neglect" of the customers and therefore constituted grounds for immediate discharge pursuant to the personnel manual's rules.⁷

Piorier, who was employed from October 1995 to April 1998, knew of no other waiter who was fired for a customer complaint. Indeed, no evidence was presented that any member of the wait staff had been disciplined or discharged due to a customer complaint.

3. Walter Magnuson

a. *The General Counsel's evidence*

Magnuson was employed by the Respondent for over 4 years, from April 1993 to June 1997. He was a plaintiff in the February 1996 lawsuit against the Respondent. Within 1 or 2 days after the lawsuit was filed, he received a phone message from Manager Alysa Adler, asking him to call her. He did not do so, but 1 or 2 weeks later, Adler told him that as part of the lawsuit, the Respondent had to present its books to the IRS, and she hoped that he had reported all his tips. Magnuson replied that he had.

Adler testified, admitting that she contacted or attempted to contact every plaintiff, advising them that they could withdraw the suit if they wished, and that there might be counterclaims filed against them if they did not withdraw it. She also told them that since the suit concerned tips, their tax information would be "exposed" and provided to the Government. She also told them that

⁶ A somewhat different procedure was in effect later, in April 1997, pursuant to a revised personnel manual.

⁷ "Q. Do you consider Mr. Jerez' conduct with regard to the patrons that evening as gross neglect of those customers? A. Absolutely."

they did not report their tips accurately and now, because of the suit, they would have to reveal their tip records. She did not threaten them with discharge, or tell them that their jobs were in jeopardy if they did not withdraw the suit.

At hearing, Adler explained that she contacted the plaintiffs because the Respondent was not aware of the reason for the suit, and wanted to leave the matter “open for discussion.” She told them that if there was “something we could help you with” as an alternative to their pursuit of the legal action perhaps they could “work it out” or “help” them.

b. Discipline and discharge of Magnuson

One month after the filing of the lawsuit, while at work on March 19, 1996, Magnuson went into the kitchen and asked the expeditor, who was Executive Chef Johnny Scapan, about the status of an order for his table. Scapan answered that he could not speak with him about the tables. Magnuson said, “fuck you” and left the kitchen. Magnuson explained that the job of the expeditor is to facilitate the movement of food out of the kitchen.

Magnuson stated that profanity was used in the kitchen, and he had used the same language toward Scapan in the past, and Scapan had also used such language in a joking way which was part of the “give and take” and stress of the serving atmosphere. Nevertheless, this time Magnuson received a two-shift suspension. The notice stated that “Walter made a remark that offended the executive chef in front of all his staff with disrespect.”

That was the first time that Magnuson was disciplined or counseled in the 3 years that the Respondent had employed him.

One year later, on Tuesday, April 22, 1997, a deposition was taken from General Manager Adler in the office of the Charging Parties’ attorney, Beth Margolis. Magnuson and other waiters were present. Occasionally, Magnuson was asked questions by Margolis as he sat in the audience.

Adler testified that the April 1997 deposition she gave as part of the lawsuit was the first deposition she had ever given. She said that she was nervous and described the experience as unpleasant. Although she knew that observers could be present, she was surprised to see Magnuson there as she did not know that he would be in attendance.

Magnuson stated that prior to the deposition, his working relationship with Adler was friendly and warm. However, the next day he found Adler to be “very distant, cold,” with no eye contact between them, and they did not converse that day.

At the end of that week, as he was leaving work, Night Manager Hankinson told him that Adler was very upset about a customer complaint card left at his table on April 23. The card stated that “the food was good but the service wasn’t—our waiter disappeared repeatedly, and a business dinner that should have taken 2 hours took 3 hours. I would think twice about coming back especially for a business dinner.” Magnuson replied that he was surprised at the complaint, but that he would be “extra attentive” in the future.

Adler testified that she tried to call the customer at her residence in California but she had not returned to that state by the time Adler called her. She stated that if a waiter receives a negative customer comment, someone in management speaks to the waiter about it. She did not notice a problem at that table, but was told by Hankinson that he (Hankinson) had to give extra attention to the table. She asked Hankinson to speak with Magnuson about the matter, and to write a warning notice. Hankinson wrote the notice, which will be discussed, below.

During his employment, Magnuson was enrolled in a master of fine arts program in college that involved his acting in certain performances during the school year. At various times, he required as much as 2 weeks off from work in order to rehearse for the performances. Respondent accommodated his school and performance schedules, and his work schedule varied according to these endeavors.

Magnuson testified that in mid-April 1997, he asked Adler for time off from May 7 through May 18 for rehearsals and an upcoming performance. Adler told him “okay” and advised that he put a written request in the schedule box, which he did. Thereafter, he submitted the same request on each Wednesday, through the end of April.

On April 30, Magnuson again made a request for that time off, and was told by Adler to give his request to Sue, the day manager who was then doing the scheduling.

Magnuson gave his written request to Sue, and told him that he had previously requested the time off from Adler, with a modification that he was available on May 10.

On May 3, the schedule was posted, and Magnuson noted that he was scheduled to work on May 10 and 11, which was Mother’s Day. He told Sue that he could not work on May 11.

At the end of his shift on May 10, Hankinson told Magnuson that the following day was Mother’s Day, and everyone was required to work that day. Magnuson replied that he (Hankinson) knew that Magnuson would not be working the following day because of a rehearsal. Hankinson said that he would leave a note for Sue.

In the morning on May 11, Magnuson called Sue and told her that he would not be reporting to work as he had a rehearsal all day. Sue replied that he was scheduled to work, he must come in and if he did not, “appropriate action” would be taken. Magnuson did not report to work.

On May 16, Magnuson called the restaurant and learned that his name was not listed on the daily work schedule for the week ending May 25. On May 19, he went to the restaurant and asked Adler why his name was not on the schedule. Adler replied that she was confused, and did not list his name since she did not know when he was returning from the show. She also said that the Respondent hired many full-time employees, and since he was working only half time, the Respondent’s priority was to “take care” of the full-timers. Adler said, however, that she would ensure that he was on the next week’s schedule. Adler did not mention the fact that Magnuson did not work on Mother’s Day.

Magnuson’s name was listed on the bottom of the next week’s schedule, the week ending June 1. He was assigned to one shift that week. The following week he was scheduled for five shifts, but not his former schedule—which was Wednesday, Saturday, and Sunday nights.

Magnuson and Piorier stated that preference in time off was given by seniority. The schedule was arranged with the most senior employees being listed at the top. Piorier stated that scheduling was done by seniority, with those employed the longest asking for and receiving the shifts they wanted. Piorier further stated that the shifts employees worked were based on what shifts they wanted and when the waiter was available to work. Piorier also stated that manager Price told him that employees were listed on the schedule in order of seniority.

Adler stated that there was no significance to Magnuson’s being at the bottom of the schedule. She copied the names from the prior week, and since he was not listed that week, she wrote his name on the bottom of the schedule. She conceded that if an em-

ployee is not working for 1 week, usually his name would be in the same place on the schedule. It should also be noted that for the week ending June 8, his name was again on the bottom of the schedule, but nevertheless, according to the Respondent's schedule, was scheduled to work five shifts that week, more than his normal workload.

On June 7 the restaurant was used solely for a private party to begin at about noon. Magnuson was scheduled to report at 10 a.m. and work until the end of the party, at 3 or 4 p.m. On that day, Magnuson drove to work and was delayed by traffic. He arrived at about 10:20 a.m. Adler approached him and told him that he was late. Magnuson apologized and said that he was delayed in traffic. He had considered calling to say that he would be late, but did not want to take the extra time to make the call.

At the end of his shift, he was told to speak with Adler. At the meeting, at which Hankinson was also present, Adler told him he was terminated because he was 20 minutes late to work that day. Adler showed him a notice in which she wrote that Magnuson arrived at 10:24 a.m. without calling to say he would be late. "There was a private function at the restaurant and a full staff was required to be in at 10:00 a.m. to set up the rooms." Magnuson wrote on the form "stuck in traffic on Brooklyn Bridge, no history of lateness."

Adler also showed him three other disciplinary notices: cursing Executive Chef Scapan; the customer complaint; and his refusal to work on Mother's Day.

The only written notice he had received prior to that day was the one for cursing Scapan, discussed above. The writeup for the customer complaint simply repeated what the customer wrote on the card, set forth above. On June 7 Magnuson wrote on that counseling notice that he could not account for the customer's perception, in that he never disappeared, and attempted to give excellent service.

The notice for Mother's Day stated that Magnuson was scheduled to work 2 shifts that day, and was told that requests for time off would not be honored because "the business of the restaurant requires a full staff on Mother's Day. Walter did not show up nor did he call that day." Magnuson wrote on the notice that he called and spoke to Sue. Adler conceded at hearing that Magnuson was only scheduled to work one shift on Mother's Day, and that he called in that day.

Magnuson testified that before and after the filing of the lawsuit in February 1996 he was given whatever time off he requested, other than Mother's Day, 1997.

Magnuson testified that after the suit was filed, and beginning about September 1996 he began working about three shifts per week as opposed to a full five plus shifts per week. Nevertheless, his schedule requests were honored at all times. Other waiters worked about three shifts per week.

At the time of his discharge, other plaintiffs, such as Piorier, Seron, and Virhuez were still employed.

c. The Respondent's evidence

Adler stated that with respect to the lawsuit, she was not instructed to treat any of the plaintiffs differently or scrutinize their work any differently than any other employee. She told them that whatever they wanted to do was their own business, but when they were working it was "business as usual."

The event that precipitated Magnuson's discharge, the private party, involved an extensive setup according to Adler. Tables, chairs, and hutches had to be moved and the party involved an

unusual style of service that included a dance floor, buffet area, and a children's area.

When Magnuson arrived, Adler told him to change his clothing as there was work to do. The employees had a 30-minute meal and a staff meeting before the party. Although Adler agreed that Magnuson could have chosen not to eat the meal but instead work during the meal period, she stated that he could not choose the time to report to work. Adler stated that he arrived during the period of time used to prepare the room.

Although the party began on time at noon, Adler stated that the hosts were expected to arrive before that time for a "walk-through" in order to ensure that the room was arranged according to their expectations. Last minute changes are made then. Adler apparently was emphasizing the importance of early room setup so that it would be ready for the hosts' inspection.

Adler conceded that to her knowledge Magnuson had no prior history of lateness, and she had no reason to doubt that he was delayed by traffic that day.

Adler stated that at the end of the day, she decided to issue a written warning to Magnuson for being late and not calling to inform Respondent that he would be late, as is required. In this regard, the Respondent's personnel manual states that employees are required to call if they will be late to work. It further states that "tardiness will result in a warning and excessive tardiness may result in termination of employment." She opened his personnel file, observed three other prior writeups, and decided to discharge him.

It was stipulated that of the counseling notices written for employee misconduct during the period July through December 1997, only one referred to lateness. However other counseling notices written outside that period of time referred to lateness.

Respondent's personnel manual in effect at the time of Magnuson's discharge provides that unacceptable conduct may lead to disciplinary action up to and including termination in certain circumstances:

Failure to perform job or work assignments satisfactorily, safely and efficiently. . . .

Interfering with or hindering work schedules, failing to work on a shift as scheduled . . . failing to call in advance when late or absent, excessive tardiness or absenteeism.

The manual in effect at that time provided for "standard steps of progressive discipline" for violation of company rules, including a documented verbal warning, written warning, final written warning, suspension pending investigation, and termination.

These steps were not followed. Magnuson testified that, aside from the written warning he received concerning the chef, he received no other discipline or warnings prior to his discharge.

Adler testified that she alone made the decision to fire Magnuson, and did not consult with anyone prior to making that decision, or before advising him that he was terminated. She specifically denied speaking to Luongo before discharging Magnuson. However, her pretrial affidavit stated that she called Luongo and told him that Magnuson was late that day. She mentioned that there were some other writeups, and Luongo asked what they were. Adler told him, and Luongo "then agreed with me that Magnuson should be fired."

At hearing, in explanation, Adler stated that on June 7, the day of the private party, she decided to terminate Magnuson on her own, and did so. About 1 hour later she spoke to Luongo about the party, and he asked how it went. She told him that there was a "little bit of a mishap" in the morning in that Magnuson was late.

Adler told him that she was going to write him up, but looked at his file and determined that it was “time to fire him.” Luongo asked what the previous instances of misconduct were and Adler told him. He then said that she “made a good decision.”

With respect to the other three writeups she relied on in basing her decision to discharge Magnuson, she had no firsthand knowledge of the incident concerning the cursing of the executive chef.

Regarding the customer complaint, Adler stated that customer complaints are a daily part of the restaurant business. The Respondent is a “classy” restaurant whose clientele of demanding customers and celebrities have high expectations. She agreed that complaints may be very subjective, and that one customer might find objectionable what another would not, and that management sometimes does not agree that a complaint is valid. Respondent’s personnel manual states that “with the expectation level that our guests have of us, critical comments are a daily part of business. Tastes and expectations are outside of our control to some degree.”

Regarding Magnuson’s refusal to work on Mother’s Day, Adler testified that the Respondent honored Magnuson’s requests for time off if they did not interfere with its business. Mother’s Day was the only day in which his request for time off was not honored. That request was not honored because it is historically a very busy day where all staff members are required to work. She noted that during the several months before Magnuson’s termination in June 1997, she noticed a slight reduction in his performance or attitude. He seemed “very cavalier” about his job. Her pretrial affidavit stated that she could not recall when Magnuson first asked her for time off during the period including Mother’s Day. She conceded that it was possible that he first made a written request in early April for such time off. She further conceded that she may not have answered the request. He conformed to her procedure in that he put the request in the envelope. Adler further stated in her pretrial affidavit that she had no recollection that he asked for the block of time off, from May 5 to 18, but that had he done so because of his unavailability, she would not have scheduled him for Mother’s Day.

Indeed, Respondent’s personnel manual provides that Respondent “will allow team members to take a limited number of weeks off as an unpaid leave of absence. Employees are required to advise their supervisor immediately of such a request which “must be reviewed and approved by Human Resources.”

Eleven of the 13 members of the wait staff worked on Mother’s Day.⁸ Of those 11, 4 worked a double shift—lunch and dinner. Adler stated that the restaurant was busy that day.

Adler testified that she could have requested that employees Jack Buttigieg, Sal Kader, and Olof Sander, who worked only the lunch shift that day, work the dinner shift on Mother’s Day, but did not do so. Such an assignment would cause them to be paid overtime, which Adler was reluctant to do.

With respect to the wait staff working overtime, a review of certain employee weekly work schedules in evidence for the 6-month period from the weeks ending September 22, 1996, through March 30, 1997, reveals that an average of 15 wait staff worked each week. In only 4 of those weeks no employee worked more than 40 hours. In contrast, in 2 weeks 10 of the 15 employees worked more than 40 hours;⁹ in 2 weeks 9 employees worked more than 40 hours;¹⁰ in 1 week 8 employees worked more than

40 hours;¹¹ in 3 weeks 7 employees worked more than 40 hours;¹² in 2 weeks 6 employees worked more than 40 hours;¹³ in 4 weeks 5 employees worked more than 40 hours;¹⁴ in 1 week 4 employees worked more than 40 hours;¹⁵ in 1 week 3 employees worked more than 40 hours;¹⁶ in 3 weeks 2 employees worked more than 40 hours;¹⁷ and in 1 week¹⁸ 1 employee worked more than 40 hours. In 1 week, March 23, the schedule stated that one employee “was cut early to avoid overtime.”

Adler stated that one waiter, Piorier, was out of town on Mother’s Day. In fact, as he testified, on April 29 he requested to have Mother’s Day off because it was his birthday. That weekend, Adler announced to the wait staff that the entire staff would be working on Mother’s Day. Piorier told her that he had requested the day off as it was his birthday. Adler told him not to worry, and that she would “work something out.” Piorier stated that 1 year earlier, on Mother’s Day 1996, the restaurant was not busy although a full staff was present that day. He stated that the restaurant was staffed according to the expected volume of business.

The Respondent had always granted Magnuson’s requests to change his schedule, and had granted him leaves of absence for his school and acting endeavors. In fact, in December 1996, Respondent permitted Magnuson to be absent from work for 3 weeks at Christmas, typically the busiest time of the year.

Adler stated that no employee ever discussed union activity or a desire for union representation with her, and she never heard anyone discussing that topic.

Adler stated that Respondent’s employment policy includes giving a warning to an employee and, depending on the situation and on how many problems he has had, permitting him an opportunity to correct his behavior. She stated that for each problem, the manager is supposed to inform the employee, document it in writing, and give him the opportunity to correct it.

Piorier stated that he knew of only one waiter, other than Jerez and Magnuson who was fired for misconduct—that was Roy, who was fired for drinking on the job. Another employee, Antonio DaSilva, was suspended for the same reason. In addition, Mary Faith Cerasoli was discharged. According to Piorier, she was one of the “initiators” of the lawsuit, and management showed an “open dislike” for her.

Analysis and Discussion

A. The Alleged Violation of Section 8(a)(1) of the Act

The complaint alleges that in February 1996 Luongo warned and informed employees that it would be futile for them to engage in union or protected concerted activity.

As set forth above, 19 employees of the Respondent became plaintiffs in a lawsuit against it in February 1996 which alleged that the Respondent had engaged in certain unlawful activities with respect to their pay and tip policies.

It is well settled that the filing of a civil action by employees is protected activity unless done with malice or in bad faith. *Trinity Trucking & Materials Corp.*, 221 NLRB 364, 365 (1975); *Host International*, 290 NLRB 442, 443 (1988). There is no evidence of malice or bad faith here. Of course, by joining

⁸ CP Exh. 9.

⁹ November 3 and December 15.

¹⁰ November 10 and 17.

¹¹ September 29.

¹² October 13, 27, and December 22.

¹³ October 20 and February 23.

¹⁴ November 11, December 29, February 9 and 16.

¹⁵ February 2.

¹⁶ September 22.

¹⁷ January 12, 19, and 26.

¹⁸ March 30.

together to file the lawsuit they engaged in concerted activity. Respondent's answer admits that the employees concertedly filed the action.

I credit the uncontradicted testimony of Jerez and Piorier that at the meeting called shortly after the suit was filed, Respondent's owner Luongo, in response to Jerez' remark, told the assembled employees that "over my dead body" would the Respondent become a "union house," and before he would let that happen he would close the restaurant. This warning was clearly informing employees that Luongo would not permit union representation at the restaurant, and that he would close the business in order to prevent its unionization. Such a remark violated Section 8(a)(1) of the Act since its impact is advice to employees that it would be futile to seek union representation. *Portsmouth Ambulance Service*, 323 NLRB 311, 319 (1997); *South Nassau Communities Hospital*, 262 NLRB 1166, 1175 (1982).

However, I cannot find that Luongo's further remarks suggested that it would be futile to engage in protected concerted activity, as alleged. Luongo told the assembled employees that their lawsuit was frivolous and without merit, and that he would not have to pay any money since Respondent was in compliance with all laws. He added that their lawyer would be "crushed" by his lawyer. These remarks constitute a lawful prediction of the outcome of the lawsuit based on Luongo's belief that Respondent did not commit violations of the law. There was testimony here that the Federal lawsuit was settled. There was no evidence presented that Respondent was in violation of any of the laws it was charged with, or that Luongo did not have an objective, good-faith belief that the case had no merit. I accordingly find no violation in Luongo's remarks concerning the lawsuit.

B. The Alleged Violations of Section 8(a)(3) of the Act

1. The discharge of Jerez

The complaint alleges that Jerez was discharged because of his concerted activities, and because the Respondent believed that he engaged in union activities.

Jerez was a plaintiff in the lawsuit brought against the Respondent, and was outspoken at the mandatory meeting conducted by Luongo shortly after the suit was filed. As set forth above, Jerez' corroborated and uncontradicted testimony established that at the meeting he expressed his coworkers' concern about working conditions and loss of tips. When he voiced his opinion that if the Respondent was a union house this would not have occurred, he was the subject of an unlawful threat that the Respondent would close before it became a union house. By expressing his opinion, Jerez identified and aligned himself with a union solution to the problems faced by employees.

I am aware that Jerez did not contact a union and no overt attempts at unionization occurred. However, it is clear that Luongo apparently believed that Jerez had union sympathies based on his comment at the meeting.

Jerez' voicing of employee complaints, including the allegedly improper deduction of money from tips constituted protected concerted activity. *Liberty Ashes & Rubbish Co.*, 323 NLRB 9, 11 (1997); *C & D Charter Power Systems*, 318 NLRB 798 (1995); *Neff-Perkins Co.*, 315 NLRB 1229 fn. 1 (1994).

Thereafter, from September through November 1996, Jerez continued to complain to his managers about the loss of work and pay due to the assumption of the Mad 61 employees, and the tip allocation problem. I credit Jerez' corroborated testimony over that of Whitten who said that she could not recall that Jerez raised these problems.

In view of the lawsuit that addressed the tip issue, and Jerez' uncontradicted testimony that he mentioned certain of these matters at Luongo's meeting, I find that Jerez would have spoken to his managers about these issues. Further, his testimony in this regard was corroborated by employee Piorier. These complaints, too, constituted protected concerted activity. "Concerted activity encompasses those circumstances where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Liberty Ashes*, supra at 11. Jerez' comments were certainly an outgrowth of the action taken by employees in bringing suit against the Respondent.

Based on the above evidence, I find that the General Counsel has made a showing that Jerez' union and protected concerted activities motivated the Respondent's decision to discharge him. His publicly expressed belief that unionization of the Respondent would have prevented the alleged misallocation of tips and poor working conditions evoked a strong reaction in the Respondent's president, who said that unionization would occur over "my dead body" and that he would close the Respondent before that took place.

Jerez' concerted complaints about working conditions continued up until the time of his discharge. Whitten's reaction to them were advice that Jerez should quit.

Having found that the General Counsel has established that the union and protected concerted activities of Jerez were motivating factors in his discharge, the burden shifts to the Respondent to establish that it would have discharged Jerez even in the absence of his union and protected activities. *Wright Line*, 251 NLRB 1083, 1089 (1980).

Prior to his discharge for a customer complaint, Jerez had not received any disciplinary action during his 1-1/2 years of employment with the Respondent.

There has been no evidence that any employee has been discharged for a customer complaint. "The failure of an employer to show that it has treated employees in the past in a similar manner for engaging in similar misconduct to that of the alleged discriminatee has been held to be an important defect in the employer meeting its *Wright Line* burden." *Grand Central Partnership*, 327 NLRB 966, 972-973 (1999).

Further, Respondent's treatment of Jerez differed substantially from another customer complaint which occurred in the same week as Jerez' discharge. Thus, as set forth above, waiter Abrusso was rude to customers who complained to the manager. He was reassigned to another table, but did not suffer any discipline and was not discharged for that conduct. Indeed, as recognized by the Respondent's manual and the testimony of Managers Adler and Whitten, customer complaints, which are very subjective and may not always be valid, are a daily part of the restaurant business. As set forth in the manual, the Respondent's emphasis appears to be to try to placate the customer while she is at the table with offers of a replacement dish or free food. The emphasis is not on discipline of the wait staff.

With respect to the specific complaint for which Jerez was discharged, there was no evidence that any of the managers or maitre d' saw anything lacking in Jerez' service that night. Indeed, he had been assigned that evening by Manager Hankinson to take special care of customers who had received poor service at the door. In this respect, Hankinson's helping at Jerez' station cannot be considered an effort to improve his service. Rather, a manager is expected to assist when needed. Even according to Whitten's testimony, Hankinson told her that he noticed no problems at the table

in question or at Jerez' station. Further, Hankinson's assignment of Jerez to unhappy customers undermines Whitten's testimony that Hankinson told her that Hankinson had to assist Jerez.

The disciplinary report was written prior to Jerez being asked about the incident. In this connection, I credit Jerez' testimony that the disciplinary report, including the notation that he was terminated, was completely written when he entered the room. Whitten's testimony that she simply wanted to discuss the incident with Jerez, and then terminated him when he became upset and defensive, is not credited. Jerez' testimony that he was told that the complaint had gone all the way to the top and that a decision to discharge him had been made at headquarters is supported by evidence that Luongo was made aware of the complaint, and according to Luongo's deposition testimony he gave the order to fire Jerez.

The notice of discharge refers to the customer complaint, and the fact that at preservice meetings service to customers was stressed. However, the notice does not refer to Jerez' alleged poor attitude as being the reason for the discharge. Whitten asserted that both the incident and his refusal to believe that he had done anything wrong contributed to the decision to discharge him, however there is nothing in the discharge notice which indicates that Jerez' refusal to believe that he did anything wrong and defensive attitude toward the problem played a part in his discharge. Indeed, the notice states that Whitten "considers this complaint serious enough to warrant termination." Thus, the reason for the discharge as set forth in the notice is the customer complaint only.

The manner in which the termination was made is also indicative of an improper motive. Whitten had not even spoken directly to the customer involved. Her report was third-hand. The customer related the story to her partner who told Luongo, who then advised Whitten. As the only person with direct knowledge of his service, Jerez was not given an opportunity to relate his response to the complaint prior to the decision to discharge him. *Paper Mart*, 319 NLRB 9, 10 (1995). It is significant that the managerial personnel present during the evening's service who were in a position to see any problem with Jerez' performance observed no problems at all.

With respect to the Respondent's argument that Luongo and Whitten did not know the name of the waiter to whom the complaint referred, apparently Luongo became aware that Jerez was the waiter involved. Luongo's deposition testimony sets forth in detail that he was made aware of Jerez' alleged shortcomings prior to his discharge, and that he decided to terminate him when he heard about the customer complaint. Accordingly, I cannot credit Whitten's testimony that she did not speak to Luongo about Jerez' performance prior to his discharge when Luongo stated that she did. Further, if they spoke, it was likely that Whitten discussed Jerez' complaints about working conditions.

Even assuming that Jerez' performance was the subject of prior discussions, no documentation was made of it, and no discipline was given. Indeed, the testimony that Hankinson allegedly needed to assist Jerez on the evening in question is suspect inasmuch as Hankinson apparently thought enough of Jerez' abilities to assign him to a table of disgruntled customers that night.

Jerez' termination appears to have deviated from the Respondent's rules concerning progressive discipline. According to those rules, the employee is to be warned for his first offense. This was the first disciplinary action that Jerez had received during his tenure with the Respondent, and accordingly he should have been warned for this offense. Whitten testified however, in answer to a leading question by counsel, that his discharge constituted "gross

neglect of customers" and his discharge was therefore proper pursuant to the manual's provision that "gross neglect" is a ground for immediate discharge.

However, a plain reading of those provisions does not lead me to believe that this type of conduct, especially unnoticed by any managerial personnel when it occurred, constituted gross neglect of the customer sufficient to warrant immediate discharge. The manual described "gross neglect" as "careless handling or abuse of company property." It does not mention customer relations. Other examples of grounds for immediate discharge set forth in the manual strongly suggest that only the most serious misconduct warranted summary discharge. Such conduct included fighting, theft, cursing, insubordination, sleeping, timecard offenses, weapons, gambling, drug use, sleeping, dishonesty, and confronting a customer.

In this connection, it should be noted that Magnuson was not immediately discharged for cursing the chef, although the rules provided for that disciplinary action. He was given a written warning instead. In addition, Whitten did not seem to base Jerez' discharge on that provision of the manual. Rather, she only sought to give him a warning for that offense but then, according to her testimony, decided to fire him on hearing his defensive reaction.

Respondent argues that the passage of time, 9 months, since the time of the filing of the lawsuit until Jerez' discharge disproves the existence of an antiunion motive, citing *Meco Corp. v. NLRB*, 986 F.2d 1434, 1437 (D.C. Cir. 1993). First, the timing of the discharge in relation to the employee's union or concerted activities is only one factor to be considered in determining the lawfulness of the discharge. The court in *Meco* stated that the *Wright Line* test requires that the timing of the alleged reprisal be proximate to the protected activities.

Here, I find that Jerez' concerted activities were proximate to the discharge in that his complaints about working conditions to Whitten continued up until his discharge. Whitten, who discharged him, was the same person who told him he could leave if he did not like the situation. In addition, the discovery phase of the Federal lawsuit was ongoing at that time, and Luongo was scheduled to be deposed in late October or early November. Given Luongo's reaction to the lawsuit exhibited in February, his extreme reaction to Jerez' suggestion that a union would have prevented the problems which prompted the lawsuit, and his advice to plaintiff Piorier thereafter that if the suit was not dropped counterclaims could be brought against the plaintiffs, it is clear that Luongo harbored animus toward Jerez up until the time of his discharge. See *Flannery Motors*, 321 NLRB 931 (1996).

Based on the above, I find that Respondent has not met its burden of proving that it would have discharged Jerez even in the absence of his union and concerted activities, and therefore, I conclude that his discharge violated Section 8(a)(3) and (1) of the Act. *Wright Line*, supra.

1. Walter Magnuson

a. General Counsel's case

Magnuson engaged in protected concerted activities by participating as a plaintiff in the Federal lawsuit brought against Respondent. He received no disciplinary warnings in the 3 years prior to the institution of the suit. However, about 3 weeks after the lawsuit was filed, he received a warning for using foul language toward the chef. That discipline is not at issue here. Indeed, Magnuson conceded that his conduct was not proper behavior. In addition, the personnel manual provides that such behavior is grounds for immediate discharge. Nevertheless, according to his

testimony, cursing was commonplace in the kitchen, and there was no evidence of others who have received discipline for engaging in such conduct.

Accordingly, there appears to have been a change in Respondent's handling of infractions of its rules. Thus, prior to the institution of the lawsuit, there was no evidence that discipline was given for violations of, at least this rule. Following the filing of the suit, discipline was imposed.

The lawsuit was filed 15 months before Magnuson's discharge. Respondent argues that the passage of such a long period of time must negate any inference that it bore animus against the plaintiffs. That argument would have merit if no activity in the lawsuit had occurred between the time of the filing of the suit and the discharge. However, as set forth above, Adler gave a deposition on April 22, 1997, at which Magnuson was present, and assisted the Charging Party's attorney.

Adler testified here that she was surprised to see Magnuson, and the event was not pleasant. I credit Magnuson's testimony that Adler's attitude toward him changed immediately following her appearance at the deposition. Thereafter, within 2 months, Magnuson was denied a day off which he had requested, his work shifts were reduced, and he was discharged, the basis for which being one lateness and three disciplinary notices, only one of which he was shown at the time of the actual incident.

Based on the above evidence, I find that the General Counsel has made a showing that Magnuson's protected concerted activities motivated the Respondent's decision to deny him time off, reduce his work shifts, and discharge him.

Having found that the General Counsel has established that the protected, concerted activities of Magnuson were motivating factors in the discriminatory actions taken against him, the burden shifts to the Respondent to establish that it would have taken such action even in the absence of his protected activities. *Wright Line*, 251 NLRB 1083, 1089 (1980).

b. The alleged refusal to grant time off and the reduction of work shifts

The complaint alleges that in mid-May 1997 Respondent unlawfully refused to grant time off to Magnuson, and reduced his work shifts.

I find that Magnuson made a timely request in mid-April to be absent from work on May 11, Mother's Day. He asked for a block of time off, from May 7 through May 18. According to his testimony, which I credit, Adler told him "okay" and asked him to make a written request, which he did. Adler conceded that it was possible that he may have asked for that time off.

Magnuson made repeated requests for the day off, and was told to make his request to Sue. He was ultimately refused the day off, and received a warning notice.

Although I agree with Respondent that Magnuson was liberally granted time off both before and after the filing of the lawsuit, the question is why he was not granted Mother's Day off. I found, above, that Respondent was motivated in not granting him that time off because of his protected, concerted activities. In this regard it is significant that in mid-April he asked for, and received permission from Adler for the time off, whereas Adler's deposition took place later, on April 22. Immediately after the deposition, her attitude toward Magnuson changed, and he was later denied permission to take Mother's Day off.

Adler testified that Magnuson's request to be off on Mother's Day was not granted because that day was historically very busy, and that all staff members were required to be on duty. However,

that testimony was contradicted by Piorier's uncontradicted testimony, which I credit, that he was granted Mother's Day off by Adler in order to celebrate his birthday. I find that he was not out of town, as testified by Adler. Even if he was going to be out of town, applying Adler's reasoning, he would have been ordered to report to work anyway since all staff members were required to be at the restaurant on Mother's Day. Adler's attitude toward Piorier's request for the day off was markedly different than that for Magnuson. She told Piorier that he should not worry, and that she would work something out. Although Piorier was also a plaintiff, the difference is that Magnuson was present at Adler's deposition, and assisted Charging Parties' attorney there.

It is significant that Magnuson had always received time off for the periods of time he requested, and in fact received this entire time off, from May 7 through 18, except for May 11, Mother's Day.

Adler seemed to have known that Magnuson requested Mother's Day off. When asked on cross-examination whether it was possible that Magnuson asked her repeatedly for that time off, Adler answered that "it's possible he may have mentioned it, yes." She also conceded that it was possible that he first requested the day off in early April, and in her pretrial affidavit stated that although she did not recollect that he asked for certain time off during that time period, if he had done so, she would not have scheduled him for Mother's Day.

Thus, Adler's explanations for not granting Magnuson's request for Mother's Day off is contradictory. First, she stated that all wait staff were required to work as it was a busy day. Second, she would have given him the day off if she knew that he requested it.

Further, as set forth above, other wait staff could have been assigned to perform overtime work that day. Respondent's wait staff had historically and consistently worked overtime.

The warning notice given to Magnuson erroneously stated that he was scheduled to work two shifts that day, and that he did not call in to say that he would be absent. Adler conceded that both statements were false. Thus, the notice made it appear that Magnuson's refusal to work that day constituted greater misconduct since he would not be covering two shifts, and had not given advance notice that he would be absent. In fact, Magnuson was only scheduled for one shift and had given Respondent ample notice, approximately 3 weeks, that he needed the day off for a rehearsal. He had also called in that morning to remind Sue that he would not be in. She could have made arrangements for a replacement then, if one was needed.

I accordingly find and conclude that Respondent has not met its burden of proving that it would not have granted Magnuson Mother's Day off in the absence of his concerted activities. *Wright Line*, supra.

With respect to the complaint allegation that Magnuson's work shifts were reduced, the evidence establishes that on his return to work following his time off until May 18, his name was not on the shift schedule. He was given inconsistent explanations by Adler as to the reason. Adler told him that she did not know when he would be returning to work, and also said that she had to first employ the full time employees. He was not scheduled for any shifts that week—the week ending May 25—and in fact his name was removed from the schedule completely following his return to work on May 19. He was given only one shift the following week, but then was scheduled for about five shifts the following week—the week ending June 1—which was more shifts than his normal workweek. He normally worked about three shifts per week.

Although there was testimony by the General Counsel's witnesses that scheduling was done according to seniority, Respondent's personnel manual stated that schedules are adjusted to meet the fluctuating demands of the business. Apparently this was a change from the previous manual, in effect just one month before, which stated that scheduling was determined by seniority and performance.

Based on the inconsistent explanations by Adler, I cannot find that Respondent has met its burden of proving that it would not have scheduled Magnuson for his normal work shift on his return from leave on May 19. Thus, there was no distinction between full time and part time employees, and but for his requests for time off, Magnuson would have worked the same number of shifts, three, as other employees worked during the weeks that he was not scheduled for any shifts, and during the week that he was scheduled for only one shift.

c. *The discharge of Magnuson*

Magnuson's discharge was based on his refusal to work on Mother's Day, a customer complaint received in April, a two-shift suspension for cursing the chef, and because he was late to work on June 7, the day of the private party.

I have found above, that Respondent's refusal to grant Mother's Day off to Magnuson was an unfair labor practice. It should be noted that Adler said nothing adverse to Magnuson until his discharge regarding his not working on Mother's Day. With respect to the customer complaint, Adler did not speak with the customer, and the matter seemed to be resolved with Magnuson's agreeing to be "extra attentive" in the future. As set forth above, customer complaints are a daily part of the restaurant business, and no evidence has been presented that anyone was lawfully discharged for a customer complaint.

Magnuson's late arrival to work for the private party had no adverse effect on the party itself. Adler conceded that he could have worked through the lunch period provided by Respondent. No evidence has been adduced to show that a written warning for lateness had been issued to any other employee in June 1997.

Timecards for the period July through December 1997 were received in evidence. Charging Parties argue that they indicate that on numerous occasions the wait staff arrived late to work. That coupled with the parties' stipulation that only 1 written disciplinary notice for lateness was issued during that time leads Charging Parties to contend that lateness was tolerated by Respondent. I cannot agree. First, the timecards of course do not indicate whether any of the employees received permission to arrive late to work, or whether they called in late, which might have excused the lateness. Second, the time period involved, July through December 1997, which followed Magnuson's discharge, is remote in time to Magnuson's June 7 discharge. Thus, there was no evidence of tolerated latenesses prior to Magnuson's discharge.

It must be noted that Respondent employed a progressive discipline system at the time of Magnuson's discharge. It appears that the system was not employed. Thus, the five steps of documented verbal warning, written warning, final written warning, and suspension pending investigation were not followed prior to the fifth step—his termination. As to the Mother's Day matter, and the customer complaint, Magnuson was not advised that either matter had been considered so serious as to warrant a written warning. He gave uncontradicted testimony that he was not shown the warnings until the time of his discharge. Clearly, he was not given an opportunity to correct his allegedly improper behavior, as con-

templated by the progressive discipline system. He was not given a final written warning, or suspended pending termination.

I note that the personnel manual states that in some instances progressive discipline may not apply, and depending on the infraction, immediate termination may result. However, Magnuson's alleged infractions clearly did not encompass the types of violations contemplated by the manual for immediate termination, and immediate termination for a single infraction was not imposed. Adler stated that on reviewing the infractions set forth in Magnuson's file she believed that it was appropriate that he be discharged.

Finally, in answer to Respondent's argument that certain plaintiffs remained employed by Respondent and were not discharged, the Board has held that "an employer's failure to eliminate all union adherents does not prove that its actions toward a few were untainted by antiunion bias." *George A. Tomasso Construction Corp.*, 316 NLRB 738, 742 (1995).

I accordingly find and conclude that Respondent has not met its burden of proving that it would have discharged Magnuson even in the absence of his concerted activities. *Wright Line*, supra.

CONCLUSIONS OF LAW

1. The Respondent 127 Restaurant Corp., d/b/a Le Madri Restaurant, is an employer within the meaning of Section 2(2), (6), and (7) of the Act.

2. By warning its employees that it would be futile for them to engage in union activity, Respondent violated Section 8(a)(1) of the Act.

3. By discharging its employees Luis Jerez and Walter Magnuson, Respondent violated Section 8(a)(3) and (1) of the Act.

4. By refusing to grant time off to Walter Magnuson because he engaged in protected concerted activity, Respondent violated Section 8(a)(3) and (1) of the Act.

5. By reducing the work shifts of Walter Magnuson because he engaged in protected concerted activity, Respondent violated Section 8(a)(3) and (1) of the Act.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged employees, it must offer them reinstatement and make them whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall also be ordered to make whole Walter Magnuson for the reduction of his work shifts during the weeks ending May 25 and June 1, 1997.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁹

¹⁹ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

DECISIONS OF THE NATIONAL LABOR RELATIONS BOARD
ORDER

The Respondent, 127 Restaurant Corp. d/b/a Le Madri Restaurant, New York, New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Warning and informing its employees that it would be futile for them to engage in union activity.
 - (b) Discharging or otherwise discriminating against any employee because of their union or protected concerted activities.
 - (c) Refusing to grant time off to employees because they engaged in protected concerted activity.
 - (d) Reducing the work shifts of employees because they engaged in protected concerted activity.
 - (e) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act.
 - (a) Within 14 days from the date of this Order, offer Luis Jerez and Walter Magnuson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.
 - (b) Make Luis Jerez and Walter Magnuson whole for any loss of earnings and other benefits suffered as a result of the discrimination against them, in the manner set forth in the remedy section of the decision.
 - (c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharges, and to the unlawful refusal to grant time off to Magnuson, and to the unlawful reduction of work shifts of Magnuson, and within 3 days thereafter notify the employees in writing that this has been done and that the discharges will not be used against them in any way.
 - (d) Preserve and, within 14 days of a request, make available to the Board or its agents for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.
 - (e) Within 14 days after service by the Region, post at its facility in New York, New York, copies of the attached notice marked "Appendix."²⁰ Copies of the notice, on forms provided by the Regional Director for Region 2, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately on receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are

²⁰ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since February 28, 1996.

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

APPENDIX

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

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in union activity or protected concerted activity.

WE WILL NOT warn our employees that it would be futile for them to engage in union activity,

WE WILL NOT refuse to grant time off to our employees because they engaged in protected concerted activity.

WE WILL NOT reduce the work shifts of our employees because they engaged in protected concerted activity.

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

WE WILL, within 14 days from the date of the Board's Order, offer Luis Jerez and Walgreen Magnuson full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

WE WILL make Luis Jerez and Walter Magnuson whole for any loss of earnings and other benefits resulting from their discharge, less any net interim earnings, plus interest.

WE WILL make Walter Magnuson whole for any loss of earnings and other benefits resulting from our unlawful refusal to grant him time off, and for our unlawful reduction of his work shifts.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharges, and discriminatory treatment of Luis Jerez and Walter Magnuson, and WE WILL, within 3 days thereafter, notify each of them in writing that this has been done and that the discharges and other discriminatory actions will not be used against them in any way.

127 RESTAURANT CORP., D/B/A/ LE MADRI RESTAURANT