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

CSS HEALTHCARE SERVICES, INC.

Petitioner/Cross-Respondent

v.

NATIONAL LABOR RELATIONS BOARD

Respondent/Cross-Petitioner

**ON PETITION FOR REVIEW AND CROSS-APPLICATION
FOR ENFORCEMENT OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD**

**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

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UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CSS Healthcare Services, Inc.)
)
Petitioner/Cross-Respondent)
)
v.) Nos. 10-10568-BB &
) 10-10914-BB
) Board Case No. 10-CA-37628
National Labor Relations Board)
)
Respondent/Cross-Petitioner)

CERTIFICATE OF INTERESTED PERSONS

Pursuant to Rule 26.1-1 of this Court’s Rules, the Respondent/Cross-Petitioner, the National Labor Relations Board (“the Board”), by and through the undersigned Deputy Associate General Counsel, hereby certifies that the following persons and entities have an interest in the outcome of this case:

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this 7th day of June 2010

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**BRIEF FOR
THE NATIONAL LABOR RELATIONS BOARD**

**STATEMENT OF SUBJECT MATTER AND APPELLATE
JURISDICTION**

This case is before the Court on the petition of CSS Healthcare, Inc. (“the Company”) to review, and the cross-application of the National Labor Relations Board (“the Board”) to enforce, the Board’s Order issued against the Company. The Board’s Order, which issued on January 29, 2010, and is reported at 355 NLRB No. 5, is final under Section 10(e) and (f) of the National Labor Relations

Act (29 U.S.C. § 151, 160(e) and (f)), as amended (“the Act”). The Board’s Order was issued by a properly-constituted, two-member Board quorum within the meaning of Section 3(b) of the Act (29 U.S.C. §153(b)).¹

The Board had subject matter jurisdiction over the unfair labor practice proceeding under Section 10(a) of the Act, as amended (29 U.S.C. § 160(a)), which authorizes the Board to prevent unfair labor practices affecting commerce. The Court has jurisdiction over this case pursuant to Section 10(e) and (f) of the Act (29 U.S.C. § 160(e) and (f)), and venue is appropriate because the unfair labor practice occurred in Georgia.

The Company filed its petition for review on February 9, 2010, and the Board filed its cross-application for enforcement on March 2, 2010. Both were timely filed; the Act imposes no time limit on such filings.

¹ The First, Second, Fourth, Seventh, and Tenth Circuits have upheld the issuance of decisions by the same two-member quorum. *Teamsters Local Union No. 523 v. NLRB*, 590 F.3d 849 (10th Cir. 2009), *petition for cert. filed*, ___ U.S.L.W. ___ (U.S. May 17, 2010) (No. 09-1404); *Narricot Indus., L.P. v. NLRB*, 587 F.3d 654 (4th Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3629 (U.S. April 15, 2010) (No. 09-1248); *New Process Steel, L.P. v. NLRB*, 564 F.3d 840 (7th Cir. 2009), *cert. granted* 130 S.Ct. 488 (Nov. 2, 2009); *Snell Island SNF LLC v. NLRB*, 568 F.3d 410 (2d Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3130 (U.S. Sept. 11, 2009) (No. 09-328); *Northeastern Land Servs. v. NLRB*, 560 F.3d 36 (1st Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3098 (U.S. Aug. 18, 2009) (No. 09-213). The D.C. Circuit has issued the only contrary decision. *Laurel Baye Healthcare of Lake Lanier, Inc. v. NLRB*, 564 F.3d 469 (D.C. Cir. 2009), *petition for cert. filed*, 78 U.S.L.W. 3185 (U.S. Sept. 29, 2009) (No. 09-377). On November 2, 2009, the Supreme Court granted a writ of certiorari on the issue in *New Process*, and argument was held on March 23, 2010.

STATEMENT REGARDING ORAL ARGUMENT

This case involves the application of well-settled principles to straightforward facts and thus the Board believes that argument would not be of material assistance to this Court. In the event, however, that the Court believes that argument is necessary, the Board is fully prepared to participate and assist the Court in its resolution and understanding of this case.

STATEMENT OF THE ISSUE PRESENTED

Whether substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act by discharging Victoria Torley for engaging in concerted activities that are protected by the Act.

STATEMENT OF THE CASE

Acting on an unfair labor practice charge filed by Victoria Torley, the Board's General Counsel issued a complaint against the Company. The complaint alleged that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Torley for engaging in protected concerted activities. (D&O 2.)² Following a hearing, an administrative law judge found merit to the

² "D&O" refers to the Board's consecutively-paginated Decision and Order, including the decision of the administrative law judge. The Decision and Order, which issued on January 29, 2010, and was corrected by the Board in one minor respect on March 19, 2010, is contained in Volume III of the record. The Company's Record Excerpts does not contain the Board's corrected Decision and Order. For the Court's convenience, the Board has submitted a copy of the

unfair labor practice allegation. The Company filed exceptions with the Board. On review, the Board affirmed the judge's findings and adopted his recommended order with a minor modification to the remedial language in one provision of the Order.

STATEMENT OF FACTS

I. THE BOARD'S FINDINGS OF FACT

A. Background; in April 2008, the Company Hires Victoria Torley To Work as a Behavior Specialist and To Perform Other Duties

The Company, which is not unionized, is located in Jonesboro, Georgia. It provides in-home health services for young, elderly, and mentally-impaired individuals. (D&O 2; Vol II GCX 1(c).) The Company's chief executive officer is John Agulue. (D&O 2; Vol I Tr 293.) His wife, Rose Agulue, is the director of nursing. (D&O 4; Vol I Tr 19, Vol II GCX 1(c) p.2, Vol II GCX 1(f).)

corrected Decision and Order in a separate Supplemental Record Excerpts. "Vol I Tr" refers to the transcript of the unfair labor practice hearing, contained in Volume I of the record. "Vol II GCX" refers to the General Counsel's exhibits, contained in Volume II of the record. "Vol II CEX" refers to the Company's exhibits, contained in Volume II of the record. References preceding a semicolon are to the Board's findings; those following are to the supporting evidence. "Br" refers to the Company's opening brief.

John Agulue is also the chief executive officer of a corporate entity called Georgia Community Care Solutions (“GCCS”).³ (D&O 2; Vol I Tr 14-15, 157.) Agulue formed GCCS as a separate company so that it could become a provider of mental health services for the State of Georgia (“the State”) under a program called Intensive Family Intervention (“IFI”). (D&O 2; Tr 14, 157-59, 364-65, Vol II CEX 13.) Around late October 2007, Agulue hired Victoria Torley and one other employee, Dollmeishia Adams, to work at the newly-formed GCCS. Agulue instructed Torley and Adams to prepare, and then file, an IFI application with the State; he also asked them to look for other sources of revenue and to apply for other programs or grants that were consistent with IFI. (D&O 2-3; Vol I Tr 14, 54, 197-98.) Torley and Adams learned that, in order for GCCS to become an IFI provider, it would also have to apply to become a provider under the State’s Adult Core program. Agulue reviewed their work and the applications. (D&O 3; Vol I Tr 14, 98, 136.) Adams left GCCS in March to take another job. (D&O 3; Vol I Tr 202.) By April, Torley had completed work on the applications. (D&O 3; Vol I Tr 15, 88, 134-35.) The only remaining step was to wait for a response from the State, which could take up to a year. (D&O 3; Vol I Tr 15, 207.) With the

³ GCCS was not a party to the proceedings before the Board and is not a party in the proceedings before the Court. It is discussed here to provide relevant background information.

application work completed, Agulue told Torley to go home and that he would call her if he had any work. (D&O 3; Vol I Tr 15, 100.)

Two weeks later, Agulue asked Torley—who had many years of experience working with developmentally disabled individuals in a variety of settings—to join the Company as a behavior specialist. (D&O 3; Vol I Tr 15-16, 101.) The Company’s behavior-specialist position is part of its Mentally Retarded Waiver Program (“MRWP”), which is a work program, under Medicaid, for individuals with developmental disabilities and mental health issues. (D&O 3; Vol I Tr 16.) Agulue explained to Torley that the Company’s former behavior specialist was no longer employed with the Company, and he therefore needed Torley to review and draft behavior support plans for the Company’s clients. (D&O 3; Vol I Tr 16.)

Torley accepted Agulue’s offer of employment, and, in April, she began working for the Company as a part-time behavior specialist. (D&O 3; Vol I Tr 15-17.) The Company provided her with an office and supplies; paid her salary by the hour; and required her to sign in and out (and, later, punch a timecard, after it switched to a new timekeeping system). (D&O 3; Vol I Tr 57-62.) Agulue assigned and reviewed Torley’s work. (Vol I Tr 17, 58.) On some occasions, Nikita Davis, the program manager for the MWRP, also assigned and reviewed Torley’s work. (Vol I Tr 58-59.)

For a month, Torley primarily performed behavior-specialist duties. (D&O 3; Vol I Tr 17.) Agulue then asked her to take on some additional duties for the Company. (D&O 3; Vol I Tr 17.) Specifically, he assigned Torley to review and upgrade the Company's policies and procedures as part of the Company's application for accreditation from a national accrediting body acceptable to Medicaid. (D&O 3; Vol I Tr 17-18, 25.) He also assigned her to review the Company's files, policies, and procedures in order to prepare for an upcoming state audit of the Company's programs. (D&O 3; Vol I Tr 17-18, 24-25, 155, 343.) Torley worked on those assignments in addition to continuing her duties as a behavior specialist. (D&O 3; Vol I Tr 27, 42-43, 120.) She then began working at the Company full-time because of these additional responsibilities. (D&O 3; Vol I Tr 18, Vol II GCX 8-9.)

B. At Staff Meetings, Torley and Other Employees Raise Concerns About Their Terms and Conditions of Employment; John Agulue Does Not Implement Employees' Proposals for Changes

Torley, along with her co-workers, attended weekly staff meetings chaired by John Agulue. She also attended MRWP staff meetings led by Program Manager Davis. (D&O 2-4; Vol I Tr 18-19.) Rose Agulue sometimes attended the meetings too. (Vol I Tr 19.) No manager ever told Torley that she did not have to attend these meetings or that anything discussed at the meetings did not apply to her. (D&O 4; Vol I Tr 18-19, 28, 33, 39.) At a June 23 staff meeting, John Agulue

introduced Torley as a new employee who “will create the behavior plans.” (D&O 4; Vol II GCX 7.)

During numerous staff meetings, Torley and other employees voiced concerns about various aspects of their terms and conditions of employment at the Company. (D&O 4-5; Vol I Tr 19-23.) Specifically, at meetings in June and July, employees expressed their displeasure about the following items: the lack of health care at the Company; the Company’s sick leave and vacation policies; and the Company’s rate of mileage reimbursement for the employees’ use of their personal vehicles for work-related matters. (D&O 4; Vol I Tr 20-21, 23.) Also, around this time, the Company posted an announcement describing its new sick-leave policy. Under that policy, employees would have to present a doctor’s note for all absences—including one-day absences. During a staff meeting, employees told Davis that they were upset about this policy, which they viewed as unfair and impractical. (D&O 4; Vol I Tr 19-21, 23.)

Employees viewed the Company’s doctor’s-note requirement as a “culminating” issue in their list of concerns, and they were upset that the Company had not addressed their concerns. (D&O 4; Vol I Tr 20.) Thus, employees asked Davis to bring their concerns to John Agulue’s direct attention, so that the Company could develop work policies that met “industry standard[s].” (D&O 3; Vol I Tr 21, 23.) Employees presented Davis with specific proposals to take to

Agulue. (D&O 4; Vol I Tr 21, 23.) One proposal recommended increasing the mileage reimbursement rate by 50 cents. Another proposal suggested switching to a rolling accrual of vacation and sick days. (D&O 4; Vol I Tr 23.) Davis presented the employees' proposals to Agulue. (D&O 4; Vol I Tr 23.) During an employee meeting in July, Davis told employees that, although Agulue "liked" the employees' proposals, he said that he could not implement them because he was very busy. (D&O 4; Vol I Tr 23-24.)

C. Auditors Notify John Agulue of Deficiencies that Must Be Corrected; They Also Notify Him that, Because GCCS Is a Related Entity, Its State Program Applications Will Be Placed on Hold Until the Audit Is Completed

Meanwhile, in July, as part of the State's audit of the Company, a team of auditors visited the Company's facility to review the Company's programs and files. (D&O 4; Vol I Tr 25, 342-43.) On August 18, the auditors returned to the Company's facility to conduct an exit meeting about their July review. (D&O 4; Vol I Tr 25.) The auditors explained to John Agulue and others that there were across-the-board deficiencies in the Company's programs. (D&O 4; Vol I Tr 25-26, 350-51.)

State officials notified John Agulue that, until the audit was completed, the Company could not admit any new clients and that, in light of the audit results, GCCS' state applications would be placed on hold. (D&O 4; Vol I Tr 26, 350-51.) According to the State's routine practice, during an audit, state program

applications of any entities related to the audited entity are placed on hold pending completion of the audit and corrective action plans. (D&O 4, 6-8; Vol I Tr 368-71.)

Torley continued to perform her duties as a behavior specialist and work on matters relating to the audit. (D&O 4; Vol I Tr 27-28.) Among other things, she corrected deficiencies in the Company's behavior policies and programs—including revising, rewriting, and updating pre-existing policies—so that the Company could pass the audit. (D&O 4; Vol I Tr 27-28.)

D. Torley and Her Co-Workers Continue To Raise Concerns With the Company About Their Terms and Conditions of Employment; in Response, John Agulue Asserts that the Employees Are Actually “Independent Contractors,” Which Creates an Uproar

As part of their effort to improve their terms and conditions of employment, Torley and her fellow employees again asked Program Manager Davis to take their concerns to John Agulue. (Vol I Tr 27-28.) At staff meetings, Davis told employees that Agulue reiterated that he was too busy to make any changes. (D&O 4; Tr 28.)

While looking into the issues discussed at staff meetings, Torley discovered that employees could form a “collective-bargaining unit,” and that doing so would give them more leverage to negotiate with the Company, as well as provide them with protection against retaliation. (D&O 4; Vol I Tr 28.) Torley also discovered

that the Company had legally erred (in her view) by failing to present employees with an employee handbook when they were hired. (D&O 4; Vol I Tr 29.) Torley shared this information with approximately ten of her co-workers at an informal meeting that she initiated on August 29. (D&O 4; Vol I Tr 29.)

Later that day, Torley and ten of her co-workers met with John and Rose Agulue. (D&O 4; Vol I Tr 30.) During this meeting, Davis again presented John Agulue with the employees' proposals for changes to their terms and conditions of employment. (D&O 4; Vol I Tr 30.) Agulue did not agree to implement the proposals. (D&O 4; Vol I Tr 30-32.) He responded to the proposals by telling the employees that they were not, actually, employees, but were, instead, "independent contractors" for their first 90 days with the Company. (D&O 4; Vol I Tr 30.) Agulue's out-of-the-blue announcement created an uproar among the employees. One employee, who was very upset about Agulue's statement, said that she would not have accepted her job if she had been aware of this. (D&O 4; Vol I Tr 30.) After Torley asked about her own employment status, Rose Agulue assured her that she was an employee. (D&O 4; Vol I Tr 31.) In light of John Agulue's statement at this meeting, Torley subsequently researched legal issues regarding "employee" status versus "independent contractor" status. (D&O 4; Vol I Tr 32.)

At a staff meeting on September 2, at which Rose Agulue was also present, Torley and Davis asked John Agulue to provide employees with a copy of the

Company's employee handbook, as employees were still waiting to see this document. (D&O 4; Vol I Tr 32, 40-41.) Agulue stated that he did not know where the handbook was. He also told employees to wait until the handbook had been revised. (D&O 4; Vol I Tr 32, 40.) Torley and Davis, however, reminded Agulue that employees would have been hired under the terms contained in the original handbook—not the revised version. (D&O 4; Vol I Tr 40.) Agulue again stated he could not find the employee handbook. (D&O 4; Vol I Tr 40.)

After this meeting, Torley told her co-workers that she had researched the issue of “employee” status versus “independent contractor” status under the law, and that, in her view, they were employees, as opposed to independent contractors. (D&O 4; Vol I Tr 32, 38.)

E. During a Meeting with John Agulue, Torley Tells Him, Among Other Things, that the Employees Constitute a “Collective Bargaining Unit”

On the morning of September 3, Torley met with John Agulue in his office. No one else was present. (D&O 4; Vol I Tr 41.) She told Agulue that she was invoking “whistleblower status.” She also said, among other things, that the employees were a “collective bargaining unit.” (D&O 4; Vol I Tr 41-42.) Torley and Agulue discussed issues about “employee” versus “independent contractor” status and the need for the Company to provide the employees with an employee handbook. (Vol I Tr 42.) Then, Agulue started questioning Torley's qualifications

as a behavior specialist, and told her that the Company did not need a full-time behavior specialist. (Vol I Tr 42.) Torley reminded Agulue that she had never assumed full-time duties as a behavior specialist, and that she was also working on the other projects Agulue had assigned her. (D&O 4; Vol I Tr 42-43.) Agulue stated that whenever the Company needed a behavior specialist, it brought in someone from the outside and let them go when the work was completed. (D&O 4; Vol I Tr 43.) Torley reminded Agulue that he had introduced her to the visiting audit committee as the behavior specialist. Torley stated that if there were any repercussions against anyone who was part of the “collective bargaining unit,” she would file a complaint. (D&O 4; Vol I Tr 43.)

F. Later That Day, Rose Agulue Asks Torley Why She Was “Creating Trouble In” the Company; Torley Denies Agulue’s Accusation, and Tells Her that All the Employees Have Concerns About Their Employment Status and Terms of Employment

Later that day, Torley and Davis were in Torley’s office working on the audit. (D&O 5; Vol I Tr 44.) Rose Agulue entered, and asked Torley why she “was creating trouble in” the Company. (D&O 5, 8; Vol I Tr 44.) Torley stated that she was not trying to create trouble—she was just trying to verify her co-workers’ employment status and to look into their terms of employment. (D&O 5; Vol I Tr 44-45.) Agulue stated that the Company had been good to Torley by giving her a job and that she should be grateful. (D&O 5; Vol I Tr 45.) Torley

repeatedly told Agulue that it was not about her—it was about the entire MRWP staff, and “we all have concerns.” (D&O 5; Vol I Tr 45.) Torley and Agulue went back and forth about topics including “employee” versus “independent contractor” status, hours of work, and the employee handbook. (D&O 5; Vol I Tr 45.) When Torley stood up to leave, because she thought that the conversation was taking a turn that was not constructive, Rose Agulue blocked the doorway. (D&O 5; Vol I Tr 45.) Eventually, Torley was able to exit the office. (D&O 5; Vol I Tr 45.)

The next day, state auditors came back to the Company’s facility to review the steps the Company had taken to clear the deficiencies noted during the auditors’ previous visit. (D&O 5; Vol I Tr 48.) The auditors asked to meet with the behavior specialist, and Agulue brought Torley to the meeting. Torley presented the auditors with the behavioral plan she had developed for the Company. (D&O 5; Tr 48.) In the presence of John Agulue, the state auditors told Torley that they were very satisfied with the work she had done to correct the deficiencies in the behavior-support program. (D&O 5; Vol I Tr 48-49, 353-55.)

G. At a Staff Meeting, Torley Tells John Agulue that His Proposal To Modify Employees’ Lunch Break Could Create a Hardship for Employees Who Use Child Care; Agulue Tells Torley that She Should Not Be Talking; Later that Day, Agulue Discharges Torley

Several employees had told John Agulue that they did not feel that the Company’s 30-minute allowance for lunch was an adequate amount of time.

(D&O 6; Vol I Tr 51.) During a staff meeting on September 8, at which Rose Agulue was also present, John Agulue stated that he was looking into the lunch-break issue, and that one possible option would be to extend the workday at either the beginning or the end to accommodate an hour for lunch. (D&O 6; Vol I Tr 51.) Torley stated that some employees have concerns about child care, and a change in their work hours might present a hardship. (D&O 6; Vol I Tr 51.) Agulue asked Torley if she was speaking for herself. (D&O 6; Vol I Tr 51.) She answered that she was not. (D&O 6; Vol I Tr 51.) Agulue then told Torley that if she did not have anything to say for herself, she should not be talking. (D&O 6, 8; Vol I Tr 51.) At that point, other employees shared their concerns about the effect of a schedule change on their child-care arrangements. (D&O 5; Vol I Tr 52.)

That afternoon, Agulue came to Torley's office, and the two engaged in a short discussion. (D&O 6; Vol I Tr 53, 127.) Torley asked a co-worker to come into her office to witness the conversation. (D&O 6; Vol I Tr 53.) The co-worker, who saw that Agulue was in Torley's office, did not want to get involved in the matter, and went away. (D&O 6; Vol I Tr 53.) Agulue told Torley she was fired and that she should pack up her things and leave. (D&O 6; Vol I Tr 53.)

II. THE BOARD'S CONCLUSIONS AND ORDER

On the foregoing facts, the Board (Chairman Liebman and Member Schaumber) found that the Company violated Section 8(a)(1) of the Act (29 U.S.C.

§ 158(a)(1)) by discharging Torley. The Board's Order requires the Company to cease and desist from engaging in the unfair labor practices found, and from, in any like or related manner, interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Section 7 of the Act (29 U.S.C. § 157).

(D&O 1-2, 8.) Affirmatively, the Board's Order requires the Company to reinstate Torley to her former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges; to make Torley whole for any loss of earnings or benefits resulting from her unlawful discharge; to remove any record of the unlawful discharge from Torley's records; to make available to the Board any records necessary for determining backpay; and to post a remedial notice. (D&O 8-9.)

SUMMARY OF ARGUMENT

Substantial evidence supports the Board's finding that the Company violated Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)) by discharging Torley because she engaged in concerted activities protected under the Act.

As a preliminary matter, the Board reasonably found that Torley was an "employee" under Section 2(3) of that Act (29 U.S.C. §152(3)), and therefore entitled to the Act's protections. Although the Company argued before the Board that Torley was an "independent contractor" excluded from the Act's protections, it does not press that argument before the Court, and it makes no factual or legal

arguments with respect to the Board's finding. It has thereby waived any challenge to the Board's finding that Torley was a statutory "employee." In any event, the Board's finding is supported by substantial evidence.

The Board reasonably found that Torley engaged in protected concerted activities, and that the Company unlawfully discharged her because of those activities. First, substantial evidence supports the Board's finding that Torley engaged in protected concerted activities. Employees, including Torley, discussed a host of mutual concerns about their terms and conditions of employment, and they developed specific proposals for changes. The Company's chief executive officer, John Agulue, was aware of employees' concerns and proposals, but he did not make any changes. Torley took concrete steps in furtherance of employees' effort to obtain changes. Among other things, she initiated an employee meeting to share the results of her research into employees' concerns about working conditions. In response, Rose Agulue, the Company's director of nursing and wife of the Company's chief executive officer, asked Torley why she was trying to create "trouble" in the Company, and the two went "round and round" about issues that were of concern to employees. That same day, during an employee meeting, Torley spoke up for her co-workers about a lunch-break issue, but John Agulue told her not to talk if she was not speaking for herself. Torley's actions fit squarely

within the definition of protected concerted activity, and the Company has provided no reason for unsettling the Board's finding.

Substantial evidence also supports the Board's finding that the Company discharged Torley because she engaged in protected concerted activities. As noted above, the Company was aware of Torley's protected concerted activities, and its negative attitude toward Torley's protected concerted activities was on full display through Rose and John Agulue's above-described conduct. The Board further explained that the timing of Torley's discharge was very suspicious—John Agulue discharged her just hours after he had told her not to speak during an employee meeting.

In addition, the Board reasonably found that the Company's claim that it would have discharged Torley even in the absence of her protected concerted activities was pretextual. As the Board stated, the pretextual nature of the Company's defenses is evident from the fact that it has advanced "shifting reasons" for why it discharged Torley. Agulue could not settle on one reason for why he discharged her, and he testified that he did not go into the meeting with Torley with any intention of discharging her. Moreover, with respect to Torley's alleged failure to secure funding for state programs, credited testimony from state employees established that the State's suspension of those applications had nothing to do with Torley.

The Company's challenges to the Board's finding are without merit. The Company argues that, because Georgia is an "at will" employment state, it was entitled to discharge Torley for any reason. The Company is just wrong about this. Regardless of Georgia's labor policies, it is *federal law*, in the form of the National Labor Relations Act, that makes it unlawful for an employer to discharge an employee for engaging in concerted activities protected by Section 7 of the Act. Equally unavailing is the Company's claim that, in order to engage in "protected concerted activities," employees must contact an "outside channel." The Company purports to find support for its novel position in *Eastex, Inc. v. NLRB*, 437 U.S. 556 (1978), but the Company has completely distorted the holding of that case. It is bedrock law that internal company complaints qualify as protected concerted activity; *Eastex* in no way disturbed that principle. Finally, there is no merit to the Company's claim that Torley's "uncorroborated testimony" cannot constitute substantial evidence necessary to support a violation. First, Torley's testimony was, in fact, corroborated in several respects, and the judge, who evaluated the witnesses' demeanor, reasonably determined that she was a more credible witness than John Agulue, who provided shifting accounts of various events. In any event, it is well established that Torley's testimony, which was credited, is legally sufficient to support a finding that the Company committed an unfair labor practice.

ARGUMENT**SUBSTANTIAL EVIDENCE SUPPORTS THE BOARD'S FINDING THAT THE COMPANY VIOLATED SECTION 8(a)(1) OF THE ACT BY DISCHARGING TORLEY BECAUSE OF HER PROTECTED CONCERTED ACTIVITIES****A. The Company Has Waived any Challenge to the Board's Finding that Torley Is an Employee Under the Act; In Any Event, the Board's Finding Is Supported by Substantial Evidence**

The Act's protections extend to "employees" as defined in Section 2(3) of the Act (29 U.S.C. §152(3)), but not to "independent contractors," who are excluded, under that section, from the definition of the term "employee." Before the Board, the Company argued that Torley was an "independent contractor" excluded from the Act's protections. However, the Board reasonably found (D&O 7) that Torley was an "employee" entitled to the protections of the Act.

In its opening brief, the Company no longer presses (Br 11) its argument that Torley was an "independent contractor," nor does it raise any challenge to the Board's factual or legal analysis of this issue. By failing to provide any argument or cite to any authority related to this finding, the Company has waived any challenge to this finding in this Court. *Doe v. Moore*, 410 F.3d 1337, 1349 n.10 (11th Cir. 2005) (to preserve an issue on appeal, the brief must actually argue the issue with support from authority and the record. Fed. R. App. P. 28(a)(9)(A).

Therefore, the Company has waived any challenge to the Board’s finding that Torley was an “employee” under Section 2(3) of the Act.

In any event, substantial evidence supports the Board’s finding that Torley was a statutory “employee” of the Company. As the Supreme Court has made plain, the test for differentiating between “employees” who are protected by the Act and “independent contractors” who are not, requires an evaluation, under common-law agency principles, of “all incidents of the work relationship,” with “no one factor being decisive.” *NLRB v. United Insurance Co. of America*, 390 U.S. 254, 258 (1968). In making this determination, the Board has consistently applied the multi-factor common-law agency test set forth in Restatement of Agency, Section 220—as interpreted by the Supreme Court in *United Insurance*—and considers all the incidents of the individual’s relationship to the employing entity on a case-by-case basis. *See, e.g., Argix Direct, Inc.*, 343 NLRB 1017, 1020 (2004); *Roadway Package System*, 326 NLRB 842, 850 (1982); D&O 7.⁴ The Board’s employee-status determination is entitled to significant

⁴ The common-law agency factors include: (1) the extent of control that the employing entity exercises over the details of the work; (2) whether the individual is engaged in a distinct occupation or work; (3) the kind of occupation, including whether, in the locality in question, the work is usually done under the employer’s direction or by a specialist without supervision; (4) the skill required in the particular occupation; (5) whether the employer or the individual supplies the instrumentalities, tools, and the place of work for the person doing the work; (6) the length of time the individual is employed; (7) the method of payment, whether by the time or by the job; (8) whether the work in question is part of the

deference. Indeed, the Board’s finding “should not be set aside just because a court would, as an original matter, decide the case the other way.” *United Insurance*, 390 U.S. at 260. Stated otherwise, such Board determinations must be enforced if they meet the familiar substantial evidence standard—that is, if a reasonably jury could have reached the same conclusion as the Board on the record before it. *See, e.g., NLRB v. Columbian Enameling & Stamping Co.*, 306 U.S. 292, 300 (1939); *NLRB v. Deaton, Inc.*, 502 F.2d 1221, 1223 (5th Cir. 1974). And, finally, it is settled that the party asserting that an individual is not an “employee” under the Act has the burden of proof. *BKN, Inc.*, 333 NLRB 143, 144 (2001). *See also NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 710-12 (2001).

Applying the above-mentioned principles, the Board reasonably explained (D&O 7) that it was clear that the nature of Torley’s employment with the Company established that she was an “employee,” and not an “independent contractor.”⁵ Thus, as the Board found, Torley worked full-time and exclusively

employer’s regular business; (9) whether the parties believe they are creating an employment relationship; and (10) whether the principal is in the business. Restatement (2d) of Agency § 220 (1957).

⁵ As the Board stated (D&O 7), the only relevant question is whether Torley was a statutory “employee” when she worked for *the Company*. Her prior employment with GCCS, which was not a party to the proceedings before the Board, has no bearing on this question. (D&O 7.)

for the Company. (D&O 7; Vol I Tr 57-62.) She was accountable to the Company for her work. (D&O 7; Vol I Tr 57-62.) The Company paid her on an hourly basis for the hours she worked. (D&O 7; Vol I Tr 57-62.) The Company required her to account for her time by signing in and out and, later, punching a time card when it switched to a new time-keeping system. (D&O 7; Vol I Tr 57-62.) The Company provided Torley with an office in which to work and provided her with the “instrumentalities and tools” for doing her job. (D&O 7; Vol I Tr 57-62.) Finally, as the Board found, Torley bore no entrepreneurial risk in performing her work for the Company. (D&O 7.) As noted above, the Company paid her based strictly on the number of hours she worked, and did not, for example, pay her a fee based on whether she met any particular performance benchmarks. (D&O 7.)

In sum, the Board properly “weigh[ed] all of the evidence in the record” (D&O 7), noted the “dearth of evidence suggesting true independence” (D&O 7), and reasonably found that the Company had not met its burden of establishing that Torley was not a statutory “employee.” As shown above, the Company has not even attempted to unsettle this finding.

B. Substantial Evidence Supports the Board's Finding that the Company Violated Section 8(a)(1) of the Act by Discharging Employee Torley Because of Her Protected Concerted Activities

1. General principles and standard of review

Section 7 of the Act (29 U.S.C. § 157) guarantees employees “the right to self-organization, to form, join or assist labor organizations . . . and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection” That broad protection applies with particular force to unorganized employees who, having no collective-bargaining representative, must “speak for themselves as best they [can].” *NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 14, 17 (1962).

The right to engage in concerted activity is protected by Section 8(a)(1) of the Act (29 U.S.C. § 158(a)(1)), which makes it an unfair labor practice for an employer “to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in [S]ection 7.” Thus, an employer violates Section 8(a)(1) of the Act by discharging an employee for engaging in concerted activity protected by Section 7 of Act. *See, e.g., NLRB v. Lummus Indus. Inc.*, 679 F.2d 229, 233 (11th Cir. 1982); *Gold Coast Restaurant Corp. v. NLRB*, 995 F.2d 257, 263-64 (D.C. Cir. 1993); *Meyers Indus., Inc.* 268 NLRB 493, 497 (1984) (“*Meyers I*”) (a Section 8(a)(1) discharge violation will be found if the employer knew of the concerted

nature of the activity, the concerted activity was protected by the Act, and the discharge was because of the protected concerted activity), *remanded on other grounds sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), on remand *Meyers Indus., Inc.*, 281 NLRB 882 (1986) (“*Meyers II*”) (explaining and reaffirming *Meyers I*), *enf’d sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987).

The Board’s findings of fact are “conclusive” if they are supported by substantial evidence on the record considered as a whole. Section 10(e) of the Act (29 U.S.C. § 160(e)); *see Universal Camera Corp. v. NLRB*, 340 U.S. 474, 493 (1951); *NLRB v. Malta Constr Co.*, 806 F.2d 1009, 1010 (11th Cir. 1986). On review, a court may not displace the Board’s choice between fairly conflicting views of the evidence, “even though the court would justifiably have made a different choice had the matter been before it de novo.” *Lummus Indus. Inc.*, 679 F.2d at 232. In discrimination cases, such as this one, judicial review is limited “to determining whether the Board’s inference of unlawful motive is supported by substantial evidence—not whether it is possible to draw the opposite inference.” *NLRB v. McClain of Georgia*, 138 F.3d 1418, 1424-25. Moreover, judicial review of the Board’s credibility determinations is particularly limited. As this Court has recognized, “special deference” is owed to the administrative law judge’s

credibility determinations, “which will not be disturbed unless they are inherently unreasonable or self-contradictory.” *Id.* at 1422 (citation omitted).

As shown below, Torley engaged in protected concerted activities, and the Company unlawfully discharged her because of those activities.

2. The Board Reasonably Found that Torley Engaged in Concerted Activities Protected by the Act

a. Applicable principles regarding protected concerted activities squarely establish that Torley engaged in such activities

Whether employee activity is deemed “concerted” is not governed by adherence to any formalistic rules. *See NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 16-17 (1962). The Act does not require that “employees combine with one another in any particular way,” or that the employees formally become a group or designate a spokesperson. *NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 835 (1984). The only requirement for determining that employee activity is “concerted” is that the employee acted “with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Rockwell Int’l Corp. v. NLRB*, 814 F.2d 1531, 1534 (11th Cir. 1987) (quoting *Meyers I*, 268 NLRB at 493).

Concerted activity may therefore take the form of group action, “[t]wo individuals acting together” (*Brown & Root, Inc. v. NLRB*, 634 F.2d 816, 818 (5th Cir. 1981)), or a single employee acting upon a group concern. *Rockwell*, 814 F.2d

at 1535. Further, a “conversation may constitute a concerted activity although it involves only a speaker and a listener . . . [if] it was engaged in with the object of initiating or inducing or preparing for group action in the interest of the employees.” *Mushroom Transport. Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). *Accord Meyers II*, 281 NLRB at 882.

Concerted activity also includes employee actions that “arose out of” or “served as a continuation of” prior concerted activity. *Dayton Typographic Service, Inc. v. NLRB*, 778 F.2d 1188, 1191-92 (6th Cir. 1985) (employee’s complaints about unpaid overtime “arose out of” and continued the concerted activity that began with a meeting of four employees to discuss the issue). *See also Alton H. Piester, LLC v. NLRB*, 591 F.3d 332, 340-41 (4th Cir. 2010) (employee’s conduct was concerted, because it was a continuation of concerted activity that began at an employee meeting); *Ewing v. NLRB*, 861 F.2d 353, 361 (2d Cir. 1988) (employee’s action “is concerted if it stems from prior concerted activities”). Moreover, “to protect concerted activities in full bloom, protection must necessarily be extended to ‘intended, contemplated or even referred to’ group action.” *Hugh H. Wilson Corp. v. NLRB*, 414 F.2d 1345, 1347 (3d Cir. 1969). Thus, it is plain that Section 7 protects “concerted activities whether they take place before, after, or at the same time” as the employees’ communication with the employer. *Washington Aluminum*, 370 U.S. at 14.

In determining whether concerted activity is also protected, that is, is engaged in for the purposes of “mutual aid or protection” (29 U.S.C. § 157), the Supreme Court has indicated that the phrase should be liberally construed to protect concerted activities directed at a broad range of concerns. *Eastex, Inc. v. NLRB*, 437 U.S. 556, 563-68, 567 n.17 (1978). Accordingly, concerted activities are protected “if they might reasonably be expected to affect terms or conditions of employment.” *Brown & Root*, 634 F.2d at 818. *Accord Rockwell*, 814 F.2d at 1536. Such protected concerted activity includes “discussion among employees about subjects affecting their employment . . . when directed toward future action.” *Cadbury Beverages Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998). *Accord NLRB v. Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir. 1981).

Finally, whether employee activity is concerted and protected is for the Board to determine “in the first instance[,]” and its determination is entitled to considerable deference if it is reasonable. *NLRB v. City Disposal Sys., Inc.*, 465 U.S. 822, 829 (1984). Therefore, the Board’s determination that employees have engaged in protected concerted activity “cannot be lightly overturned.” *NLRB v. Rock Bottom Stores, Inc.*, 51 F.3d 366, 370 (2d Cir. 1995).

b. Torley engaged in concerted activities protected by the Act

Substantial evidence supports the Board’s finding that Torley engaged in protected concerted activities. To begin, during numerous staff meetings, employees, including Torley, discussed a host of mutual concerns regarding their working conditions, including the following items: the lack of health insurance at the Company; the Company’s unsatisfactory mileage-reimbursement rate for employees’ use of personal vehicles for work matters; the Company’s unsatisfactory vacation and sick-leave-accrual policies; and the Company’s new requirement that employees present a doctor’s note for all sick leave absences—even those for just one day. (D&O 4.) All of these items, as well as other items that employees discussed among themselves and later with John and Rose Agulue—such as the length of their lunch hour and the lack of an employee handbook—are aspects of their terms and conditions of employment, and the Company does not argue otherwise.

As a result of these discussions, and based on their desire to see the Company implement changes that would be consistent with “industry standards,” employees, including Torley, asked Program Manager Davis to take their concerns and proposals for changes directly to John Agulue. Davis did so, but Agulue did not implement their suggestions. (D&O 4.) Employee group discussions about these matters and their related actions trying to get Agulue to address their

concerns constitute protected concerted activities. *See, e.g., Cadbury Beverages, Inc. v. NLRB*, 160 F.3d 24, 28 (D.C. Cir. 1998) (protected concerted activity includes “discussion among employees about subjects affecting their employment . . . when directed toward future action”). *Accord NLRB v. Datapoint Corp.*, 642 F.2d 123, 128 (5th Cir. 1981).

Torley followed up on the meetings by taking concrete actions in furtherance of employees’ shared goal of obtaining improvements in their working conditions. One of her efforts involved researching the issues she and her co-workers were concerned about. During her research, Torley discovered that employees could form a “collective bargaining unit” that would give them leverage and protection as they tried to improve their working conditions. Also, based on the results of her research, Torley thought that the Company had erred by never presenting employees with an employee handbook. (D&O 4; Vol Tr 28-29.) In order to share what she learned, Torley initiated a meeting with fellow employees, and approximately ten attended. (D&O 4; Vol I Tr 28-29.) In short, Torley continued the concerted activities that had begun with the employee meetings. Her activities are classic examples of protected concerted activity. *See Dayton Typographic Serv., Inc. v. NLRB*, 778 F.2d 1188, 1191-92 (6th Cir. 1985); *Alton H. Piester, LLC v. NLRB*, 591 F.3d 332, 340-41 (4th Cir. 2010).

Torley took additional actions in furtherance of her co-workers' goal of effectuating changes in their working conditions. She researched an issue of great importance to her fellow employees, and shared the results of that research with them. Afterwards, at a meeting with employees, John Agulue rejected the employees' proposals, and then surprised them by announcing that they were "independent contractors," not "employees" for their first 90 days of employment. His statement "created a storm" among the employees. (D&O 4; Vol I Tr 30.) One employee indicated that she would not have taken a job with the Company had she known that this was Agulue's position. (Vol I Tr 30.) Torley, who was also upset about Agulue's announcement, repeatedly asked him about her own employment status. (D&O 4; Vol I Tr 31.)

Because Agulue's announcement was a matter of great concern to employees, and went to the very heart of their status at the Company, Torley decided to look into the validity of Agulue's position. (D&O 4; Vol I Tr 32.) During a discussion that occurred after another employee meeting, she told her co-workers that, based on her research, she believed they were "employees," and not "independent contractors." (D&O 4; Vol I Tr 32.) Torley's actions, which were taken in pursuit of addressing her co-workers' concerns about their employment status with the Company, constitute additional examples of protected concerted activity.

Torley continued her activity on behalf of her co-workers. Thereafter, on September 3, Torley met alone with John Augule. During this meeting, she told him, among other things, that employees were a “collective bargaining unit,” and that if Augule took action against anyone in the “collective bargaining unit,” she would file a complaint. (D&O 5; Vol I Tr 43.) Mere hours later, Rose Agulue came to Torley’s office, and asked her why she was “trying to create trouble in” the Company. Torley, speaking up for co-workers, explained that it was not about her—it was about the staff, and that all staff employees had concerns. (D&O 5; Vol Tr 45.) Significantly, during this encounter, Torley and Rose Agulue had a lengthy discussion about the Company’s failure to provide an employee handbook and about whether the employees were “employees” or “independent contractors”—two issues that were of concern to Torley’s co-workers. (D&O 5; Vol I Tr 45.) This constitutes further evidence of Torley’s protected concerted activity. *See NLRB v. Talsol*, 155 F.3d 785, 791, 796-97 (6th Cir. 1998) (employee engaged in protected concerted activity when he raised issues at a meeting which he had previously discussed with other employees).

Finally, further evidence of Torley’s protected concerted activity was on full display when, during a staff meeting, Torley took a leading role in speaking up about another issue that was troubling employees. (D&O 6; Vol I Tr 51-52.) At the meeting, Agulue, who knew that employees were not satisfied with their 30-

minute lunch break, mentioned that the Company could give employees a longer lunch break if they agreed to an extension of the workday. (D&O 6; Vol I Tr 51.) Torley stated that Agulue's proposal could present a hardship to employees with child-care arrangements. Agulue asked Torley if she was speaking for herself. (D&O 6; Vol I Tr 51.) When Torley replied that she was not, Agulue told her that if she did not have anything to say for herself, she should not be talking. (D&O 6; Vol I Tr 51.) At that point, other employees shared with Agulue their concerns about the effect of a longer workday on their child-care arrangements. (D&O 6; Vol I Tr 52.) During this meeting, Torley was, in effect, acting as a spokeswoman for employees who had concerns about Agulue's proposal: she was directly relaying her co-workers' concerns to Agulue. This is yet another plain example of her engaging in protected concerted activity.⁶

⁶ The Company cites several cases that do nothing to advance its cause. *Gulf Coast Oil Company*, 97 NLRB 1513 (1945), and *Michigan Lumber Fabricators, Inc.*, 111 NLRB 579 (1955), both involved employees who, unlike Torley, engaged in *unprotected* activities, namely, holding union meetings away from the plant during working hours without the employer's permission. *Southwest Latex Corp. v. NLRB*, 426 F.2d 50 (5th Cir. 1987), is also inapposite. In *Southwest Latex Corp.*, the employer was unaware of any concerted activity. That is hardly the present case because, as shown, uncontradicted evidence established that the Company was aware that Torley and her co-workers were seeking changes in their terms and conditions of employment. Further, in *Southwest Latex Corp.*, the employee acted only on his own behalf. Torley, by contrast, engaged in a host of concerted activities that, contrary to the Company's claim (Br 17), in no way could be minimized as mere personal "griping."

3. The Company Discharged Torley Because of Her Protected Concerted Activities

a. Applicable principles for establishing that a discharge was unlawfully motivated

As discussed above, an employer violates Section 8(a)(1) of the Act if it discharges an employee because the employee engaged in protected concerted activity. In determining whether an employer acted with an unlawful motive when it discharged an employee, the Board applies the test articulated in *Wright Line, a Div. of Wright Line, Inc.*, 251 NLRB 1083, 1089 (1980), *enforced on other grounds*, 662 F.2d 899 (1st Cir. 1981), and approved by the Supreme Court in *NLRB v. Transp. Mgmt. Corp.*, 462 U.S. 393, 397, 401-03 (1983). Under that test, if substantial evidence supports the Board's finding that an employee's protected activity was a "motivating" factor in the employer's adverse action against the employee, the Board's conclusion that the action was unlawful must be affirmed, unless the record, considered as a whole, compels acceptance of the employer's affirmative defense that the same action would have been taken even in the absence of any protected activity. *Transp. Mgmt. Corp.*, 462 U.S. at 395, 397-403. *Accord NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

Where, as here, it is shown that the neutral reasons advanced by the employer for its action were a pretext—that is, the reasons either did not exist or were not in fact relied upon—the inquiry is logically at an end; at that point, there

is no remaining predicate for finding that the employer would have taken the adverse action even in the absence of the employee's protected activity. *Wright Line*, 251 NLRB at 1084. In other words, evidence of pretext will "conclusively restore the inference of unlawful motivation." *NLRB v. United Sanitation Serv.*, 737 F.2d 936, 939 (11th Cir. 1984). *See also Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966) (false reason for discharge supports the inference that employer desires to conceal unlawful motive).

As this Court has recognized, "the task of determining motive is particularly within the purview of the Board." *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423, 1428 (11th Cir. 1985) (internal marks omitted). *See also, Passaic Daily News v. NLRB*, 736 F.2d 1543, 1551-52 (D.C. Cir. 1984). Motive is a question of fact, and because employers rarely articulate an unlawful motive, the Board may rely on both direct and circumstantial evidence in determining an employer's motive. *NLRB v. Link-Belt Co.*, 311 U.S. 585, 602 (1941). *Accord Purolator Armored*, 764 F.2d at 1429. Factors supporting a finding of unlawful motivation include, among others, the employer's knowledge of the employee's protected concerted activity, the timing of the adverse action, and the inability of the employer's proffered justification to withstand scrutiny. *See e.g., NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418, 1424 (11th Cir. 1998).

As shown above, the Board’s findings of fact are “conclusive” if supported by substantial evidence. Because the question of motive is a factual one, judicial review of that issue is limited “to determining whether the Board’s inference of unlawful motive is supported by substantial evidence—not whether it is possible to draw the opposite inference.” *McClain of Georgia, Inc.*, 138 F.3d at 1424.

b. The Board’s finding that the Company had an unlawful motive for discharging Torley is supported by substantial evidence

Substantial evidence supports the Board’s finding that the Company discharged Torley because she engaged in protected concerted activities. The Board reasonably inferred unlawful motive from the Company’s awareness of Torley’s protected concerted activities; Rose Agulue’s statement to Torley that she was “causing trouble in” the Company; John Agulue’s effort to keep Torley from speaking out during a meeting about employees’ lunch break; the suspicious timing of the Company’s decision to discharge Torley; and the pretextual nature of the Company’s proffered reasons for terminating Torley.

To begin, the Board reasonably found, based on uncontradicted evidence, that the Company was aware of Torley’s protected concerted activities. John and Rose Agulue were aware that many employees were unhappy about several aspects of their working conditions, and that employees wanted the Company to make changes that would be consistent with “industry standards.” Indeed, as the Board

noted (D&O 7), Agulue acknowledged being aware that employees had concerns about working conditions, because Davis brought these concerns to his attention.

In addition, the Agulues had conversations with Torley which made it clear that she was engaged in protected concerted activities. Thus, on the morning of September 3, Torley told Agulue, among other things, that the employees were a “collective bargaining unit.” Agulue responded by questioning her status as a behavior specialist. (D&O 4-5; Vol I Tr 41-42.) Suspiciously, that very afternoon, Rose Agulue, the Company’s admitted agent and supervisor under the Act (D&O 8), entered Torley’s office and asked her why she was trying to “create trouble in the” Company. Following Agulue’s confrontational question—and her additional statement to Torley that that the Company had been “good to” her by giving her a job when she needed one—Torley told Agulue that all of the employees had concerns about their working conditions at the Company. Torley and Agulue went “back and forth” for about 15 minutes on whether employees were “employees” or “independent contractors,” and whether employees would get an employee handbook, before Torley was finally able to extricate herself from the conversation and exit the office. (D&O 5, 8; Vol I Tr 44-45.)

The Board reasonably found (D&O 8) that the Company had a negative attitude toward Torley’s protected concerted activities. As the Board explained (D&O 8), Rose Agulue’s statement to Torley about “causing trouble” indicates that

the Company saw Torley as an instigator—indeed, the very “caus[e]” of—employees’ efforts to better their working conditions at the Company. For seven decades, the Board has recognized that statements similar to Rose Agulue’s demonstrate an employer’s negative attitude toward an employee’s protected concerted activities. *See Cudahy Packing Company.*, 24 NLRB 1219, 1227 (1940) (referring to employer’s phrase, “caused all the trouble,” as evidence of unlawful motive for layoff). *See also QIC Corporation*, 212 NLRB 63, 68 (1974) (referring to employer’s phrase, “causing trouble,” as evidence of unlawful motive for discharge). Notably, the Company does not even try to challenge these findings.

Moreover, as the Board also reasonably found (D&O 8), the Company’s awareness of, and negative attitude toward, Torley’s protected concerted activity were on full display just a few days later. That morning, at a staff meeting with John Agulue, employees discussed their continuing concerns about their short lunch break. After Agulue mentioned that one possibility would be to give employees an earlier starting time or a later ending time to accommodate a longer lunch break, Torley stated that this could pose a hardship for employees with child-care arrangements. Agulue asked Torley if she was speaking for herself; Torley answered “no.” He then told Torley that if she did not have anything to say for herself, she should not be talking. Agulue’s effort to stop Torley from speaking about a matter that was of concern to some of her co-workers indicates, as the

Board reasonably found (D&O 8), that he had a hostile reaction toward her continuing to speak up about working conditions. Indeed, his conduct dovetails neatly with Rose Agulue's view of Torley as a key troublemaker among employees.

Further, the Board reasonably explained (D&O 8) that the timing of Torley's discharge was suspicious. Thus, it is undisputed that hours after Agulue demonstrated his hostility toward Torley's protected concerted activity by telling her not to speak unless speaking for herself, he discharged her. (D&O 8.) The very close proximity in time between Agulue's hostile reaction to Torley's speaking up about a collective concern and her discharge is a significant factor in finding unlawful motive. *See, e.g., NLRB v. Brewton Fashions, Inc.*, 682 F.2d 918, 923 (11th Cir. 1982); *NLRB v. Henry Colder Co.*, 907 F.2d 765, 768 (7th Cir. 1990); *NLRB v. S.E. Nichols, Inc.*, 862 F.2d 952, 959 (2d Cir. 1988).

4. The Company's Proffered Reasons for Discharging Torley Were Pretextual; Therefore, It Failed to Show That It Would Have Discharged Torley Absent Her Protected Concerted Activities

Because the General Counsel demonstrated that the Union's opposition to Torley's protected concerted activity was a motivating factor in her discharge, it was incumbent on the Company to demonstrate, as an affirmative defense, that it would have discharged Torley absent her protected concerted activities. The Board reasonably found (D&O 8) that the Company failed to prove its defense

because the rationales it proffered for Torley's discharge were false. The pretextual nature of the Company's rationales establishes that its real motive was "one that it desired to conceal—an unlawful motive." *Shattuck Denn Mining Corp.*, 362 F.2d at 470. *See also NLRB v. Goya Foods of Florida*, 525 F.3d 1117, 1127 (11th Cir. 2008); *Laro Maintenance Corp. v. NLRB*, 56 F.3d 224, 230 (D.C. Cir. 1995) (employer's false reason supported finding of unlawful motive).

As the Board reasonably explained (D&O 1 n.2 & 8), the pretextual nature of the Company's defenses is evident from the fact that the Company advanced "shifting reasons" for why it discharged Torley. John Agulue claimed that he discharged Torley because she "failed to deliver" on her promises to secure "program funding" for GCCS. (D&O 8; Vol I Tr 277, 289.) However, Agulue testified that he did not even meet with Torley with any intention of discharging her, but decided to discharge her because she "caused a commotion" during their meeting—apparently because she wanted a co-worker to witness her conversation with Agulue. (D&O 8; Vol I Tr 193.) Simply put, Agulue could not settle on a reason for why he discharged Torley, and he admitted that he did not even go into the meeting with Torley with any intention of taking that action. These shifting and inconsistent rationales are persuasive evidence that Agulue was trying to conceal the real, unlawful reason for the discharge. *See, e.g., Van Vlerah Mechanical, Inc. v. NLRB*, 130 F.3d 1258, 1264 (7th Cir. 1997) (significant that

employer's defenses were shifting and inconsistent); *NLRB v. Henry Colder Co.*, 907 F.2d 765, 769 (7th Cir. 1990) (shifting reasons "seriously undermine[d]" employer's attempt to portray discharge decision as based on anything other than employee's protected concerted activities); *NLRB v. Howard Elec. Co.*, 873 F.2d 1287, 1291 (9th Cir. 1989) (stating that shifting reasons for action against employee demonstrated pretextual nature of employer's defense). Notably, the Company has not attempted to challenge the Board's finding that it presented shifting rationales for the discharge.⁷

Moreover, with respect to Torley's alleged failure to secure state program funding, credited testimony from state employees established that the State's suspension of GCCS's state program applications (the IFI application and IFI-related applications) had *nothing to do* with Torley. Torley had filed the applications with the State and had completed any necessary follow up work. (D&O 5.) As the Board explained, the state employees' credited testimony established that "it was the deficiencies in the [Company's] existing programs, uncovered during the State's audit, which led the State to suspend processing any

⁷ In its brief, the Company claims, in passing, "that there was no longer a need for a behavior specialist." (Br 13-14.) The Company's apparent presentation of this unsupported, post-hoc assertion gets it nowhere. As the Board explained, John Agulue stated that Torley's status as a behavior specialist was not the reason he discharged her. (D&O 8; Vol I Tr 277.)

applications from Agulue’s agencies.”⁸ (D&O 7; Vol I Tr 350, 368-71, 375.)

Thus, the testimony of neutral witnesses also showed that Agulue’s claim that Torley was responsible for the delay in state program funding was false and that the Company’s assertion that she was discharged for this reason was pretextual.

In sum, the Board reasonably found that the Company’s claim that it would have discharged Torley even in the absence of her protected concerted activities was pretextual.

5. The Company’s Remaining Contentions Are Without Merit

First, the Company claims (Br 16-19) that, because Georgia is an “at will” employment state in which an employer can discharge an employee for any reason, it was entitled to discharge Torley for whatever reason it wanted. But, regardless of Georgia’s own labor policies, it is federal law, in the form of the National Labor Relations Act, that makes it unlawful to discharge an employee for engaging in concerted activities protected by Section 7 of the Act. *NLRB v. Red Top, Inc.*, 455 F.2d 721, 726 (8th Cir. 1972). *Accord NLRB v. Soft Water Laundry, Inc.*, 346 F.2d 930, 934 (5th Cir. 1965). And this federal law applies in all states, whether they are “at will” employment states or not, just as the federal law that it is unlawful to

⁸ In this regard, it is undisputed that it was the State’s routine practice to suspend state program applications until the audit was complete, and the corrections were made. State employees confirmed that John Agulue had been informed of this policy in August, well before he discharged Torley. (D&O 5; Vol I Tr 350, 368-71.)

discharge an employee for discrimination based on race applies in all states. *See, e.g., NLRB v. McClain of Georgia, Inc.*, 138 F.3d 1418 (11th Cir. 1998) (employer, located in Georgia, unlawfully discharged an employee for engaging in Section 7 rights); *Rockwell Int'l. Corp. v. NLRB*, 814 F.2d 1530 (11th Cir. 1987) (employer, located in Georgia, unlawfully discharged an employee for engaging in protected concerted activities); *Lincoln v. Board of Regents of University System of Georgia*, 697 F.2d 928 (11th Cir. 1983) (employer, located in Georgia, unlawfully discharged employee on the basis of her race). In sum, federal law in this case has guaranteed employees the rights in Section 7 of the Act and nothing in any state's law can remove those protections.

The Company next contends that, in order for employees to have a viable claim that they engaged in “protected concerted activity,” the employees must show that they sought to improve their lot as employees “through channels outside the immediate employee-employer relationship.” (Br 24, quoting *Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). The Company completely distorts the holding of *Eastex*. *Eastex* does not require that the activity, in order to be protected and concerted, invoke outside channels. To the contrary, it is bedrock law that internal company complaints qualify as protected concerted activity. *See, e.g., NLRB v. Washington Aluminum Co.*, 370 U.S. 9, 11-12 (1962) (complaint raised internally); *Rockwell Int'l Corp. v. NLRB*, 814 F.2d at 1534-35 (complaints raised internally

during an employee meeting); *NLRB v. Charles H. McCauley Associates, Inc.*, 657 F.2d 685, 686-88 (5th Cir. 1981) (same); *NLRB v. Henry Colder Co.*, 907 F.2d 765, 765-68 (7th Cir. 1990) (same). *Eastex* did not change that law and impose a requirement that protected concerted activity involve contacting outside channels. Rather, it made clear that, even in situations where the employee skipped making the internal complaint, the Act conferred protected-concerted-activity status on certain purely external complaints about terms and conditions of employment.⁹

Finally, although the Company does not raise any direct challenge to the judge's decision to credit Torley, and it does not even explain which, if any, factual findings based on her testimony it disputes, it seems to argue (Br 28) that Torley's credited testimony cannot constitute "substantial evidence" necessary to support an unfair labor practice finding, because it was "uncorroborated."¹⁰ This argument is without merit.

⁹ The Company also cites *Eastex's* observation that a concerted activity may not be protected if its relationship to "employees' interests as employees" is "so attenuated that it cannot fairly be deemed to come within the 'mutual aid or protection' clause." *Eastex Inc.*, 437 U.S. at 568. This observation has nothing to do with the present case. Torley's activities, and those of her co-workers, were *directly related* to improving various aspects of their terms and conditions of employment. They sought better working conditions for themselves and tried to get the Company to address those matters.

¹⁰ The judge, who examined the demeanor of the witnesses, acknowledged (D&O 2) that "[t]he resolution of this case turns in large part on who was the better witness," and he reasonably went on to find that Torley was the more credible witness. By contrast, many examples demonstrate that Agulue was not a credible

First, the Company overreaches in characterizing Torley’s testimony as “uncorroborated.” As the judge found, the credited testimony of other witnesses confirmed Torley’s account of matters relating to, among other things, her tenure with GCCS, her status as a behavior specialist, and her work on the audit corrections. (D&O 4-5.) Moreover, Torley’s testimony was far more corroborated than Agulue’s, who the Company would seemingly have this Court credit. Further, the Company ignores that much of Torley’s testimony—for example, her testimony about her September 3 meeting with John Agulue and her testimony about her meeting on that same date with Rose Agulue—was uncontradicted. (D&O 4, 8.) In any event, it is well established that uncorroborated testimony, when credited, is legally sufficient to support a finding that an unfair labor practice was committed. *See, e.g., Bowling Transp., Inc. v. NLRB*, 352 F.3d 274, 285 (6th Cir. 2003).

In sum, the Board reasonably found that the Company unlawfully discharged Torley because she engaged in protected concerted activities. The Company has provided no grounds for disturbing that finding.

witness, most notably his shifting accounts of various events. *See, e.g., D&O 5, 8.* The Board’s credibility determinations are entitled to great deference, and the Company has provided no basis for unsettling them. *See case cited at p.25-26.*

CONCLUSION

For the foregoing reasons, the Board respectfully requests that the Court enter a judgment denying the Company's petition for review and enforcing the Board's Order in full.

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June 2010

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CSS HEALTHCARE SERVICES INC.)	
)	
)	
Petitioner/Cross-Respondent)	Nos. 10-10568-BB,
)	10-10914-BB
)	
v.)	Board Case No.
)	10-CA-37628
NATIONAL LABOR RELATIONS BOARD)	
)	
)	
Respondent/Cross-Petitioner)	

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the Board certifies that its final brief contains 11,055 words of proportionally-spaced, 14-point type, and the word processing system used was Microsoft Word 2003.

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Dated at Washington, DC
this 7th day of June, 2010

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

CSS Healthcare Services, Inc.)
)
) Petitioner/Cross-Respondent)
)
 v.) Nos. 10-10568-BB &
) 10-10914-BB
) Board Case No. 10-CA-37628
 National Labor Relations Board)
)
) Respondent/Cross-Petitioner)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the Board has this date sent to the Clerk of the Court by U.S. Priority Mail and electronic filing the required numbers of the Board's brief in the above-captioned case, and has served two copies of the brief by U.S. Priority Mail upon the following counsel at the address listed below:

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Dated at Washington, DC
this 7th day of June 2010