

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

TAYLOR MADE TRANSPORTATION
SERVICES, INC.

and

Case 05-CA-36646

KIMBERLY TUTT, AN INDIVIDUAL

**ANSWERING BRIEF
OF THE COUNSEL FOR THE ACTING GENERAL COUNSEL**

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I. INTRODUCTION

The sum of the record evidence shows that Respondent Taylor Made Transportation Services, Inc. suspended and terminated Kimberly Tutt because it believed that she discussed her wage rate with other employees. Here, it is undisputed that Respondent has maintained not one, but several handbook rules that prohibit employees from revealing their pay rates. Respondent then hears reports that Tutt has disclosed her pay rate. On the eve of Tutt's suspension and termination, Respondent publishes a memo to all employees "reminding" them that if they disclose their pay rates, they can be fired. Then, Respondent gives two *irreconcilable* reasons for her suspension and discharge. First, Respondent tells Tutt and the Maryland Division of Unemployment Insurance that the *only* reason for Tutt's separation was that she disclosed her pay rate to others. Then, after the NLRB charge is filed and Respondent obtains counsel, Respondent explains that Tutt's disclosure of her pay rate had "absolutely nothing" to do with her suspension and discharge.

Which of these explanations should be credited? The one that is consistent with (1) the testimony given to state officials on three separate occasions, (2) the company's long-established rules, (3) a recently-issued company memorandum, (4) arose before the filing of a federal NLRB charge, and (5) Ms. Tutt's trial testimony, *or* the reasons Respondent offered at trial that are inconsistent with all of the earlier evidence? The Acting General Counsel argues that the Board should adopt the ALJ's decision to credit this first sequence of events and the record evidence showing that Tutt was suspended and fired because Respondent believed she engaged in protected activity, find the violations alleged in the amended complaint, and order Respondent to remedy its unlawful conduct.

II. UNCHALLENGED FINDINGS AND CONCLUSIONS THAT RESPONDENT HAS WAIVED

Under Section 102.46(b)(2) of the Rules and Regulations of the National Labor Relations Board (herein call the Board Rules), any exception to a ruling, finding, conclusion, or recommendation not specifically urged is deemed waived. The following findings and conclusions of the Judge are among those not specifically challenged by Respondent:

A. *Unchallenged Findings Relevant to Respondent's Unlawful Rules that Prohibit Employees from Discussing Wages.*

Respondent has not excepted to Judge Rosenstein's finding that it maintained the rules alleged in the Amended Complaint, to his conclusion that these rules violate Section 8(a)(1), or to the portions for his Remedy and Order requiring Respondent to rescind its rules. Specifically, Respondent has not excepted to:

1. *Unchallenged Findings Relevant to Respondent's Handbook Rules.*

- Since on or about November 30, 2010, Respondent in its Employee Handbook has maintained the following rule:

NON-DISCLOSURE

Such confidential information includes, but is not limited to the following examples:

- ◆ Compensation data (ALJD 2:15-24)

- Between on or about November 30, 2010, until on or about April 22, [2011], Respondent, in its Employee Handbook maintained the following rule:

PAYDAYS

All employee pay rates are confidential and should not be disclosed verbally, written, or electronically posted for deliberate expose [sic] of rates without a valid reason.

This could lead to disciplinary actions up to and including termination. (ALJD 2:25-34)

- Since on or about April 22, [2011], Respondent, in its Employee Handbook, has maintained the following rule:

PAYDAYS

All Taylor Made Transportation, Inc. employees are encouraged to use good judgment regarding disclosing pay rates, which could lead to additional expense and disruption for Taylor Made Transportation Services, Inc. (ALJD 2:35-43)

- Since in or around April 2011, Respondent, in its Employee Handbook, has maintained the following rule:

EMPLOYEE CONDUCT AND WORK RULES

Taylor Made Transportation Services, Inc. expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization.

The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

- Unauthorized disclosure of business “secrets” or confidential information.
 - Disclosure of confidential pay rates without validity. (ALJD 2:20-3:8)
- ...I find that the Respondent has violated Section 8(a)(1) of the Act by promulgating a policy that explicitly prohibits employees from discussing their compensation. Since the Respondent’s confidentiality provisions contained in its Employee Handbook explicitly restricts employees from discussing their compensation including pay rates it restricts Section 7 activity and would likely have a chilling effect on those rights such that the mere maintenance of those provisions violates Section 8(a)(1) of the Act even in the absence of enforcement. (ALJD 5:40-47)
 - Paragraphs 1 and 2(a) of the Judge’s recommended Order. (ALJD 9:12-32)

2. *Unchallenged Findings Relevant to Respondent’s April 20, 2011 Memo to Employees.*

- On or about April 20, [2011], Respondent published the following memorandum to its employees:

This is a reminder that all employee pay rates are confidential. It is against company policy to disclose or discuss your pay rate whether [sic] it is verbal, written, electronically communicated or by any other means, to deliberately make others aware of your hourly rate of pay without validity.

As all of our employees are valued this would unfortunately lead to disciplinary actions up to and including termination.

We ask that all Taylor Made Transportation Services, Inc. employees adhere to this policy. (ALJD 3:10-24)

- On April 20, [2011], by a memorandum to all employees that was stapled to their paychecks, [Human Resources Director Maryce] Willis reminded the work force that all employee pay rates are confidential and it is against company policy to disclose or discuss pay rates with the admonition that disclosure could lead to disciplinary actions up to and including termination. (ALJD 4:6-9)
- Lastly, I also find that the Respondent violated Section 8(a)(1) of the Act when, on April 20, it published the memorandum set forth above that reminded employees that pay rates are confidential and if they discussed or disclosed that information it could lead to disciplinary action up to and including termination. Therefore, it follows that the overbroad confidentiality provision has been applied to restrict the exercise of Section 7 rights, and is unlawful in violation of the Act. (ALJD 6:1-5)

B. Unchallenged Findings Relevant to Kimberly Tutt's Suspension and Termination.

- On April 12, [2011], [Human Resources Director Maryce] Willis was made aware from concerns raised by co-workers that [Kimberly] Tutt was discussing her rate of pay with fellow employees. (ALJD 4:1-3)
- [Transportation Supervisor James] Kearney testified that prior to prior to April 20, [2011], he had cautioned Tutt on at least three occasions regarding the excessive volume of her cell-phone and suggested she turn down the call alert due to its graphic language. Kearney acknowledged that Tutt complied with both of these requests and he did not inform Willis or any other supervisor about these conversations nor did he memorialize the discussions. (ALJD 4:13-19)
- On April 25, [2011 – during Tutt's suspension meeting], Willis further informed Tutt that the entire management team was doing damage control and all employees when hired were encouraged to use good judgment regarding pay rates. (ALJD 4:32-34)
- Tutt's transfer from the Social Security Administration to the Center for Medicare and Medicaid Services (CMS) was not disciplinary in nature. (ALJD 3:39)

- In this regard, it is no coincidence, that shortly after Willis and [Owner, President, and CEO Allen R.] Taylor learned on April 12, [2011], that Tutt had disclosed confidential financial information, a memorandum was issued on April 20 to all employees that disclosing confidential information could subject them to disciplinary actions up to and including termination. (ALJD 7:45-49)
- I note that Willis' April 25, [2011] talking points reference Tutt's disclosure of confidential information. I also note that the majority of the reasons advanced by Willis in her testimony for Tutt's suspension and termination do not appear in her April 25, [2011] talking points. (ALJD 8:1-2 and fn.4)
- Additionally, I credit Tutt's testimony that during the termination meeting on April 29, [2011], both Willis and Taylor addressed the issue of disclosing confidential financial information that was contrary to the Respondent's policy and was grounds for termination. Indeed, Tutt's termination report relies on a violation of Respondent's policies and procedures as a reason for her termination. (ALJD 8:3-5)
- I also note that Willis conceded [in GCx5] that while Tutt received a warning for inappropriate cell-phone usage, she would not have been terminated for that offense and she worked to the best of her ability. (ALJD 8:8-11)

III. FACTS

A. *Respondent's Business Operation.*

Respondent Taylor Made Transportation Services, Inc. is a full-service transportation company that provides shuttle services, cab runs, and ambulance services. (Tr. 13:14-17) Among Respondent's clients are the Social Security Administration and the Center for Medicare and Medicaid Services (CMS). (Tr. 81:4-10) Respondent employs approximately 57 full-time and part-time employees. (Tr. 13:18-21)

Allen Taylor is the president and CEO of Respondent. (ALJD 3:28-30; Tr. 191:12-13) Serving under Taylor are several supervisors, including Maryce Willis, Lionel Saxon, and James Kearney. Willis is Respondent's Human Resources Manager. (ALJD 3:29-30; Tr. 12:14-15) She had held this position at Respondent for almost six years, though she had over 20 years of HR

experience. (Tr. 12:10-17; 14:6-9) Willis assists in the hiring and recruiting of employees, reviews any “discrepancies” (concerns) employees may have, and she also handles employee discipline. (Tr. 12:18-21; 13:1-5) Saxon is Respondent’s Operations Manager, whose duties include handling the operation of the company at all of its different sites and supervising the employees at Respondent’s main facility. (Tr. 178:6-14) Kearney is Respondent’s on-site supervisor at CMS. Kearney’s duties entail making sure the Respondent’s service runs as expected, ensuring the safety of Respondent’s clients, doing payroll, scheduling, and investigating accidents. (Tr. 153:14-21; 154:10-16)

B. Tutt’s Employment at Respondent.

The Respondent, by Willis, hired Kimberly Tutt on March 1, 2011. (Tr. 35:19-23; 69:15-18; ALJD 3:35) At the time she was hired, Tutt received a copy of Respondent’s employee handbook and signed an acknowledgment of receipt. (Tr. 69:19-21; 91:13-15; 92:12-16) Respondent initially hired Tutt to fill in for absent drivers working at the Social Security Administration (SSA), but on April 1, 2011, Respondent transferred her to work at CMS. (Tr. 36:2-4; 81:4-17; 119:14-19; 120:12-13) At the time of her termination on April 29, 2011, Tutt’s job duties as a shuttle driver included taking Social Security employees from one Social Security building to another. (Tr. 70:3-8; 155:6-9)

Roger Jones supervised Tutt while she worked at SSA.¹ (Tr. 82:1; 120:1) Following her transfer to CMS, Kearney supervised Tutt, who himself had just started working for Respondent. (Tr. 70:9-11; 153:22-24)

About a month (or halfway) through her tenure at Respondent, Tutt was reassigned from Social Security to CMS. Respondent does not have any documentation reflecting this transfer,

¹ Although there were several instances in the record where Jones is mentioned, Respondent did not call him as a witness or explain his absence.

but both Willis and Allen Taylor testified that Tutt's transfer was not disciplinary. (Tr. 145:11-13; 145:5-6; 205:25-206:4) Tutt corroborated this when she testified that no Respondent supervisor ever told her that her transfer was disciplinary or the result of any unprofessional conduct. (Tr. 80:5-11) Instead, Tutt explained that she was transferred because she wasn't getting enough hours at Social Security, where the number of hours she worked depended on whether other employees came to work. (Tr. 83:4-7; 85:2-4) In addition, Respondent has not excepted to the judge's finding that Tutt's transfer to CMS was not disciplinary. (ALJD 3:39) By moving Tutt to CMS, Respondent was placing her on its biggest contract, which it had spent years obtaining, and which accounted for 50% of its business. (Tr. 32:14-15; 193:23-194:4)

Despite these undisputed facts surrounding her transfer, Respondent's witnesses attempted to paint a different picture. Willis testified that "...we moved her from one [site] because she was disruptive, she didn't get along with the supervisor, she complained about not getting enough hours, and we moved her from there to another client's side where we had two supervisors who were unable to get Ms. Tutt to change her unprofessional behavior." (Tr. 35:11-16) Willis also testified that she believed Supervisor Jones wrote a memo referencing Tutt's allegedly disruptive behavior, but this document was not produced at the hearing. (Tr. 121:12-13) In his testimony, Allen Taylor described Tutt as a malcontent who constantly complained and "just wasn't happy." (Tr. 192:3-13)

On April 1, 2011, Tutt, Kearney, and eight other employees began working on the new CMS contract. (Tr. 154:4-7; 168:18-20) Kearney testified that it was fair to say that everyone was new to that contract. (Tr. 168:23-169:8) Kearney explained that during the first few days everyone was together on the vans training with representatives from CMS. During that training, CMS contracting officer Marla Fowlkes made a comment to the effect of "your employees can't

be talking like that to each other on the shuttle.” Kearney testified that he believed Fowlkes was referring to Tutt, notwithstanding her statement “to each other” implying that more than one employee was involved. (Tr. 156:8-15)

Kearney testified that he had weekly meetings with Fowlkes. He explained that he would characterize his conversations with Fowlkes as sort of setting up the ground rules going forward, so Kearney could discuss with all eight drivers what CMS’ expectations were.² (Tr. 168:23-169:8; 158:20-24)

Also on April 1, Respondent’s supervisors Willis, Kearney, and Saxon met with Tutt to discuss her work. Tutt testified that the subject of the meeting was that she was supposed to watch what she said on the bus because she had been talking about dinners her sister was selling. Tutt explained that because they were in training, she asked Kearney if they were going to get off work early that day, so she could tell her sister when to expect her. (Tr. 87:1-4; 98:3-6; 87:10-16) Kearney corroborates that Tutt asked something to the effect of what time was she going to get off work because she wanted to tell her sister when to expect her. (Tr. 176:18-22) Tutt estimates this meeting lasted about five minutes. (Tr. 90:18-20) Tutt specifically denied that Respondent mentioned her use of a cell phone during this meeting, and testified that Willis did not warn or caution her about her use of a cell phone while driving. (Tr. 96:19; 98:7-16) The judge found that during the meeting, Tutt was advised to keep a professional demeanor while representing Respondent and to watch her conduct and conversations around clients and fellow employees. (ALJD 3:44-48)

² Although Kearney testified that he had weekly meetings with CMS, Respondent only introduced Kearney’s notes for a single week. Kearney and Willis admitted that Tutt was not specifically mentioned in his meeting minutes, and that Tutt was not given a copy of this document. (Tr. 141:12-14; 169:12-14; 169:18-19.)

C. *Respondent's Handbook Rules.*

It is undisputed that at various times within the six-month period preceding the filing of the charge, Respondent has maintained an employee handbook that contains the following rules:

1. Non-Disclosure

Since on or about November 30, 2010, Respondent has maintained a "Non-Disclosure" rule that provides, in part,

...Such confidential information includes but is not limited to the following examples:

* Compensation data

2. Paydays.

Between on or about November 30, 2010, until on or about April 22, 2011, Respondent maintained a rule that provides:

All employee pay rates are confidential and should not be disclosed verbally, written, or electronically posted for deliberate expose [sic] of rates without a valid reason. This could lead to disciplinary actions up to and including termination.

3. Paydays – Revised.

Since on or about April 22, 2011, Respondent replaced the Paydays rule described above with the following handbook provision:

All Taylor Made Transportation, Inc. employees are encouraged to use good judgment regarding disclosing pay rates, which could lead to additional expense and disruption for Taylor Made Transportations Services, Inc.

4. Employee Conduct and Work Rules.

Since sometime in April 2011, Respondent has maintained the following rule in its Employee Handbook:

...Taylor Made Transportation Services, Inc. expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization.

...The following are examples of infractions of rules of conduct that may result in disciplinary action, up to and including termination of employment:

- * Unauthorized disclosure of business “secrets” or confidential information.

...

- * Disclosure of confidential pay rates without validity.

D. The April 20 Paycheck Memo.

Tutt testified that employees are paid bi-weekly on Wednesdays, and that she received her paychecks from Supervisor Kearney. (Tr. 70:23-71:4) On April 20, 2011, Respondent distributed a memorandum to its employees with their paychecks. (Tr. 70:16-21; 170:20-171:1) This memo was authored by Willis and its subject line is “Confidentiality of Pay Rates.” It reads:

This is a reminder that all employee pay rates are confidential. It is against company policy to disclose or discuss your pay rate whether [sic] it is verbal, written, electronically communicated or by any other means, to deliberately make others aware of your hourly rate of pay without validity.

As all of our employees are valued, this would unfortunately lead to disciplinary action up to and including termination.

We ask that all Taylor Made Transportation Services, Inc. employees adhere to this policy.

Thank you. (GCx4)

In its Answer to the Amended Complaint, Respondent admits that it distributed this memo to its employees on April 20, and Respondent has not excepted to the judge’s finding that this memo was distributed to employees. (GCx1-J; ALJD 4:6-10) Allen Taylor testified that Respondent distributed a retraction, but no evidence of this retraction was introduced into the

hearing record. (Tr. 203:5-13) Operations Manager Lionel Saxon testified that he was not aware of any document retracting the April 20 memo. (Tr. 187:5-10) Willis testified that this memo was a mistake, and shouldn't have happened, but denied that this memo was the reason Tutt was fired. (Tr. 140:17-21)

E. Respondent Suspends Tutt.

Tutt testified that on Sunday, April 24, she received a call from Willis telling her to report to Respondent's office the following morning instead of reporting for work. Tutt asked Willis why she had to come to the office, and Willis said that she couldn't give that information out over the phone. (Tr. 71:25-72:16) On April 25, Tutt met with Willis alone in her office. (Tr. 72:24-25)³

Tutt testified that Willis told her that Kearney had reported that she wasn't keeping the company's cell phone plugged into the charger. Tutt responded by asking why would she keep the phone plugged in if it was already charged? Willis then told Tutt that she had been at Respondent all weekend from some "big discrepancy from the other side" or something – about discussing pay rates.⁴ (Tr. 73:2-9)

After hearing this, Tutt asked, "What do that have to do with me?" Willis responded that she and Taylor were doing an investigation. When Tutt again asked how she was involved in this, Willis accused Tutt of discussing her pay rate. Willis said, "I had all of these employees come to me saying that you discussed your pay rate with them." Tutt denied discussing her pay rate with other employees. Willis then told Tutt that she was suspended. (Tr. 16:11-13; 73:11-21)

³ Willis testified that Allen Taylor was in the office briefly during this suspension meeting. However, Taylor corroborates Tutt's account because he denied that he was there. (Tr. 31:15-18; 196:6-11)

⁴ Willis testified earlier that one of her job duties was to review any "discrepancies" employees may have, which she described as "concerns."

During her testimony, Willis confirmed that Respondent had received reports that Tutt was discussing her pay rate with other employees, and that she had this information at the time of Tutt's suspension meeting. (Tr. 34:10-14) Willis also admitted that she told Tutt during the suspension meeting that others had come to Respondent about Tutt disclosing her pay rate, and that she told Tutt that other employees were upset that they were paid less than her. (Tr. 21:25-22:5; 22:16-23:8; ALJD 4:31-33) Willis also admitted that these employee complaints were disruptive to Respondent. (Tr. 24:5-9)

Although Willis admits to discussing these pay-disclosure concerns during the suspension meeting, she denies these complaints were the reason for Tutt's suspension. Instead, Willis said there were a "host of reasons." Willis testified that Tutt was suspended for her excessive cell phone usage, because she was insubordinate, engaged in solicitation, and was a disruption in the workplace. Willis explained that Tutt was disruptive because she 'complained constantly, non-stop about her hours, not getting enough hours, her pay rate, the fact that she wanted particular days to work and not to work, and wanted more days.' (Tr. 16:15-17:14) In addition to these reasons, Willis later added that Tutt's cell phone had "vulgarity" but she couldn't provide any additional detail. (Tr. 18:8-18)

Tutt denies that Willis said anything during the suspension meeting about the ringer on her cell phone being inappropriate, or anything about graphic or vulgar language. (Tr. 74:8-14) Tutt also denied that Willis mentioned anything about unprofessional conduct, insubordination, or about Tutt being a disruption. (Tr. 74:15-18; 74:22-75:1) When asked what she meant by "solicitation," the only detail Willis provided was that Tutt was "soliciting the other drivers to have, I guess, come sort of dinners and that type of thing along with the clients, giving out her

cell phone number.” (17:20-23) Tutt denied that Willis mentioned anything about her soliciting other employees during the suspension meeting. (Tr. 19-21)

1. The Suspension Memo.

Willis testified that she drafted a document memorializing Tutt’s suspension. (23:25-24:1; REx2) Willis admitted that Tutt was not given a copy of this memo, but claims that she “highlighted all the aspects of the entire document” to Tutt. (Tr. 73:22-74:1; 139:3-4; 139:22:140:7)

The memo states that Willis discussed the following concerns with Tutt:

Usage of personal cell phone while working per Mr. Kearney’s memo dated 04-22-2011...

Reiterated that Taylor Made encourages employees to use good judgment regarding sharing possible confidential information with others. I advised her that it had been brought to the attention of Mr. Taylor that employees were coming to him upset stating that Ms. Tutt has discussed financial information with them, specifically pay rates. Though we realize that rate may be discussed we again encourage the use of good judgment when doing so. Mr. Taylor and the entire management team, at this point are doing damage control. I advised Ms. Tutt that during the orientation, I (Ms. Willis) called each person into my office (individually) to discuss their rate of pay and each one was encouraged to use good judgment regarding rates.

At trial, Willis conceded that there was nothing in her memo about Tutt’s allegedly inappropriate or vulgar ringtone or about keeping Respondent’s cell phone plugged into the charger. (Tr. 142:7-12) There is also no mention in the suspension memo about Tutt soliciting other employees or Respondent’s clients. The judge found, without exception from Respondent, that the majority of the reasons advanced by Willis in her testimony for Tutt’s suspension and termination do not appear in her contemporaneous memo, and thereby implicitly credited Tutt’s account of what topics were discussed during the suspension meeting. (ALJD 7:48-8:2 and fn4)

F. Respondent Discharges Tutt.

On April 29, 2011, Tutt was called to a meeting with Willis at Respondent's office. Tutt and Willis were the only people present during this meeting. (Tr. 75:2-17) According to Tutt, Willis began the meeting by saying that "This is the hardest part of my job. We're going to have to let you go." Tutt asked Willis why she was being fired, and Willis responded, "For discussing your pay rate." When Tutt denied discussing her pay rate, Willis replied that all of the other employees from the other side were upset about Tutt discussing her pay rate. (Tr. 75:19-25)

Tutt testified that as she was getting ready to leave Respondent's office, Allen Taylor came in and said he wanted to hear Tutt's side of the story. Tutt, on her own, asked why she would keep Respondent's cell phone plugged in when it was already charged. Tutt then told Taylor that she didn't discuss her pay rate with anyone. According to Tutt, Taylor then said that Tutt might be able to come back to work at Respondent in two or three years after all of this died down. (Tr. 77:15-22) Taylor denies this conversation with Tutt occurred, but he admits he was in the office and wished her good luck. (Tr. 196:12-21) The ALJ credited Tutt's account that she was told during her termination meeting by both Willis and Taylor that disclosing confidential financial information was in violation of Respondent's policy and was grounds for termination. (ALJD 8:3-6)

Tutt specifically denied that Willis listed any reasons for her termination besides Tutt discussing her pay rate with other employees. (76:1-4) Tutt denied that Willis said that she was fired for using her personal cell phone, for graphic or vulgar language, for failing to keep Respondent's cell phone plugged in, for engaging in solicitation, or for unprofessional conduct. (Tr. 76:5-77:11)

Willis denied that Tutt was fired for disclosing her pay rate. (Tr. 24:23-25:1; 138:2-6) Instead, Willis claims that Tutt was fired for the same reasons that she was suspended. (Tr. 19:8-10) Willis said that she was careful in explaining all of the reasons to Tutt why she was being fired, and that she explained the fact that Tutt was no longer a fit for Taylor Made. (Tr. 15:14-18)

Willis testified that she has terminated other employees besides Tutt because they were not a “good fit” for Taylor Made, for lack of professional behavior, and for violations of the rules in the employee handbook. (Tr. 37:2-4) Allen Taylor also testified that “a number” of other employees had been suspended or terminated for using cell phones while driving, and that Respondent has written records to substantiate these suspensions and discharges. (Tr. 193:12-15; 200:11-19) Operations Manager Saxon testified that Respondent has terminated other employees for violating its cell phone polices or policies in the Employee Handbook. (Tr. 183:8-11) Respondent, however, did not introduce evidence of similar suspensions or discharges into the hearing record.

Taylor testified that he had the final word in decisions about terminations, suspensions, and hiring. (Tr. 191:14-17) He explained that the bases for Tutt’s suspension and termination were the same. (Tr. 193:19-21) Taylor claims that Tutt was suspended because of her lack of professionalism – the complaints he received from CMS, the memos he received from Kearney played a major factor. (Tr. 192:18-22) He also cited Tutt’s use of her cell phone while operating the vehicle, her cell phone ringer, her failure to plug in Respondent’s cell phone, and that she was still in her probationary period. (Tr. 192:23-193:3; 193:21-194:1; 194:15-24; 200:25-201:8) Later, Taylor testified that Tutt’s accusation that Respondent had lied to her about the hours she would receive played a major factor in her termination. (Tr. 194:25-195:4)

Taylor testified that the termination decision was made in consultation with Willis and recommendations from Respondent's supervisors. (Tr. 195:16-21). Taylor testified that Willis and Kearney made the recommendation that Tutt wasn't a "perfect fit" for Respondent. (Tr. 200:25-201:8) However, Kearney and Saxon testified that they had no involvement in Tutt's suspension or termination. (Tr. 174:14-15; 183:23-25; 184:1-3; 190:7-12)

G. Unemployment Insurance Proceedings.

Following her termination from Respondent, Tutt filed a claim for unemployment insurance benefits. Although she was initially denied unemployment benefits, Tutt filed an appeal and eventually received them.

1. The Unemployment Process.

Walter Krysiak is the Administrator of Wage Records for the Department of Labor, Licensing and Regulation, Division of Unemployment Insurance (DUI), which are agencies of the State of Maryland.⁵ (Tr. 42:13-17; 22:24). Krysiak has worked for the DLLR (or its predecessors) for approximately 39 ½ years. (Tr. 42:18-21)

Krysiak testified that claims for unemployment benefits are typically initiated either by telephone or on the Internet. Using the employee's social security number, the DUI determines the employee's eligibility for benefits. If the individual is separated from the employer for lack of work, it's a straightforward process and benefits are paid. If the employee is discharged for his conduct, or quits work, then it's the DUI's responsibility to adjudicate the issue. (Tr. 44:6-15)

⁵ The ALJ took administrative notice of the Maryland Labor and Employment Code Title 8, which among other things, establishes the DUI and specifies the powers and duties of the Division and its agents. The DUI is sometimes referred to in the record as the Department or Office of Unemployment Insurance. (Tr. 43)

According to Krysiak, it's the employer's responsibility to send the DUI information detailing the exact reason why the person was discharged or separated from employment. (Tr. 44:20-22) This information is provided on a document called a "207" form. (Tr. 54:2-9)

Unless the separation is because of lack of work, the DUI sets up telephone appointments with the employee-claimant and the employer's representative. The purpose of these appointments is to gather additional evidence about why the employee was separated from the job. (Tr. 44:25-45:5) Both the claimant and employer are afforded an opportunity to make statements to the DUI, and provide rebuttal to the testimony of one other. (GCx5; Tr. 45:22-46:1; 55:1-3)

A DUI employee called a claims specialist, who conducts these telephone appointments, is trained to adjudicate claims for unemployment insurance. Additionally, the DUI has an automated computer system that guides the claims specialist through what types of questions to ask the parties about the claimant's separation from the job. (Tr. 45:6-15; 18-21) While these telephone conversations are not recorded, it is a standard procedure for the claims specialist to provide the claimant and employer the opportunity to review their draft statements and make any correction or changes before their statements are finalized in the DUI's records. (Tr. 49:5-8; 54:16-23; 55:4-7)

If, after these telephone interviews, there is enough information to make a benefits determination, the claims specialist will render a determination. However, if there is insufficient evidence to make this determination, the DUI will schedule a JAVA predetermination hearing. (Tr. 46:5-10) A JAVA hearing is typically conducted on the telephone, with both the claimant and employer present on the call at the same time and can hear each other's testimony. (Tr. 46:11-15; 62:1-3) Although Krysiak testified that a JAVA hearing "normally" lasts about an

hour, there is no record evidence about how long Tutt's JAVA hearing lasted. (Tr. 62:10-12)

After the JAVA hearing concludes, the DUI makes a benefits determination. (Tr. 46:16-18)

Krysiak testified that normally in a discharge situation, the burden of proof is on the employer to display evidence of misconduct by the claimant-employee. If the employer fails to show this misconduct by a preponderance of the evidence, then normally unemployment insurance benefits are allowed. (Tr. 57:6-58:3)

As the DUI Administrator of Wage Records, Krysiak testified that the information gathered during these telephone interviews and JAVA hearing are captured on the document admitted into evidence as GCx5. (Tr. 46:19-47:15)

Krysiak testified that if an employee files a claim against an employer for unemployment insurance and is awarded benefits, that causes an adverse affect on the employer's experience rate, which means that the employer would pay more in unemployment insurance taxes. (Tr. 59:17-21) In her testimony, Willis said that she also understood this relationship between paid unemployment benefits, and the rate charged to Respondent. (Tr. 27:9-24)

2. *Tutt's Unemployment Claim*

On April 29, 2011, Tutt filed a claim for unemployment insurance benefits. DUI's records show that Willis completed the 207 form and listed "Fired-Failed to Follow Instructions" as the reason for Tutt's separation (GCx5), which is inconsistent with her trial testimony that when Willis first submitted her response to the claim, she listed no reason at all. (Tr. 28:15-17)

On May 6, 2011, Willis informed DUI that:

the [claimant] was discharged by myself for breaching confidentiality...it was brought to my attention on 04/12/2011 that claimant disclosed her pay rate to other employees....In our employee handbook, it covers the non disclosure of any financial information. In addition she was told verbally upon hire not to disclose her financials to anyone.

After quoting the Taylor Made employee handbook provision on Non-Disclosure, Willis added, “[Tutt] received a warning for violation of the cell phone usage policy, but would not have been terminated for that offense, only warned. Otherwise, she worked to the best of her ability.”

(GCx5)

At trial, Willis provided a completely different version of her DUI testimony. Willis explained that she said that Tutt was fired for a host of things, but when it came to the pay rate issue, the Division “grabbed on to that piece and ran with it.” (Tr. 29:1-5) Instead, Willis testified, she explained that Respondent had had a wage-disclosure policy in place, but that policy had been changed. (Tr. 29:13-16) Willis testified that she “made it very clear that [Tutt] was not released because of divulging any kind of pay rate. That was not the issue.” (Tr. 25:23-26:17)

On other areas, Willis’ memory was not as clear. Willis testified at trial that she did not recall telling DUI that Tutt would not have been terminating for violating the company cell phone policy, that she did not recall telling DUI that Tutt would have only received a warning for violating the cell phone policy, and she did not recall telling DUI that Tutt worked to the best of her ability. (Tr. 39:19-23; 40:6-18)

Tutt informed the DUI that she was discharged by Willis for violating the non disclosure agreement. She said that on her last day of work, she was informed that she had been accused of revealing her pay rate to other employees, and that Respondent was going to conduct an investigation. Tutt denied disclosing her pay rate to others. (GCx5) The DUI records corroborate Tutt’s testimony about what Willis told her what she was suspended and fired.

On May 10, 2011, Willis provided Respondent’s rebuttal statement. Willis told the DUI that the employees who came to her were not willing to provide a statement, however, they told

me [Tutt's] specific pay rate to the penny. The only people who have access to that specific information is the individual employee, the company, and the client. She added that, "All of the pay rates are different for each employee. Even when we have group discussions, an individual's pay rate is only discussed with that individual and myself." (GCx5)

The DUI conducted a JAVA hearing on May 26, 2011. Both Tutt and Willis were present on the call. Willis testified that:

...[Tutt] was placed on unpaid suspension from 4/25 to 29/11, after there were several calls from other employees complaining that Ms. Tutt was making more per hour than they were making; Each one that complained knew exactly her hourly rate, \$19.16. There was no way that they should have known the amount because it is confidential and our policy that she received and signed for states that disclosing pay is grounds for immediate dismissal. (GCx5)

At trial, Willis admitted that she told the Division that there was no way that other employees could know Tutt's pay rate unless she told them. (Tr. 29:6-9) At the JAVA hearing, Willis continued,

On 3/31/11, we had 9 employees who went through the training class for the Federal Govt Site that Ms. Tutt was awarded. No wages are ever posted; each site pays a different amount & I, the client and the employee are the only ones that are privy to that information. During Ms. Tutt's unpaid suspension an investigation was conducted and each employee that came forth; each knew what she was making, \$19.16. They each stated that Ms. Tutt was the one that told them of her wages and each wanted the same amount of money per hour. She was discharged by me and Mr. Taylor, company owner, for failure to follow policy in disclosing her wages. (GCx5)⁶

After the conclusion of the JAVA hearing, the DUI issued a nonmonetary determination in which Tutt's application for unemployment benefits was denied because the Division found that by breaching Respondent's confidentiality policy, her actions were a "deliberate and willful

⁶ The statement that the complaining employees "wanted the same amount of money per hour" as Tutt, coupled with Willis' trial testimony (Tr. 21:25-22:5; 22:16-23:8) supports the ALJ's findings that Willis informed Tutt during her suspension meeting that employees were upset because Tutt had disclosed her rate of pay that was higher than some of her co-workers. (ALJD 4:31-32 – presumably, the other employees weren't upset because they wanted a *decrease* in pay) Similarly, this statement shows that after receiving these complaints, Willis determined that Tutt had violated Respondent's policies by discussing her wages. Accordingly, Respondent's Exceptions #4 and #5 should be overruled.

disregard of standards of behavior” which amounted to gross misconduct within the meaning of the Maryland Unemployment Insurance Law.

Tutt filed a timely appeal of the Division’s determination to deny her benefits. Although Respondent was present for every other hearing in Tutt’s case, Respondent did not appear at the appeals hearing. (Tr. 66:21-67:3) At the hearing, the Division found that, “...The claimant last worked for the employer on or about April 21, 2011, before being terminated because the employer believe she had disclosed her pay rate to co-workers.” (GCx6) After reviewing Tutt’s unemployment file, Krysiak testified that there was no evidence in the file showing that Respondent ever challenged the factual conclusion that Tutt was terminated because Respondent believed she disclosed her pay rate to others.⁷ (Tr. 58:16-25)

IV. ARGUMENT

A. The ALJ’s Conclusion that Respondent Unlawfully Suspended and Discharged Tutt is Fully Supported by the Record Evidence.

Respondent attacks the judge’s conclusion that Tutt was suspended and discharged in violation of Section 8(a)(1) by claiming that the Acting General Counsel has failed to show that protected conduct was a motivating factor in Tutt’s suspension and discharge. But Respondent ignores the abundant record evidence that supports the judge’s conclusion that Tutt’s suspension and discharge were illegal.⁸

⁷ At the hearing, Respondent made much about Respondent’s address listed on GCx6, and implied that the address was incorrect. While Respondent asked Krysiak and Tutt if they were knew of the 2916 Lafayette Ave address (they didn’t), Respondent never asked Willis, Taylor, or any of Respondent’s witnesses about that address. No witness testified that this was not Respondent’s present or former address. In any event, Krysiak testified that the Division gets its address information from Respondent. (Tr. 67:17-19)

⁸ Tutt’s suspension and discharge are analyzed together because Respondent’s witnesses admitted that the reasons for her suspension and discharge were the same.

B. Legal Framework.

The appropriate legal framework is *Wright Line*, 251 NLRB 1083, 1089 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). See also *NLRB v. Transportation Management Corp.* 462 U.S. 393 (1983); *Elko General Hospital*, 347 NLRB 1425, 1426-1427 (2006).

Under the *Wright Line* standard, a prima facie case is presented when the General Counsel establishes (1) union and/or protected concerted activity; (2) employer knowledge of that activity;⁹ (3) animus towards the union and/or protected concerted activity;¹⁰ and (4) an adverse action against the employee which was motivated at least in part by its animus toward the union and/or protected concerted activity.¹¹ *Farmer Bros.* 303 NLRB 638, 649 (1991); *T.K. Harvin & Sons, Inc.*, 306 NLRB 510, 527-528 (1995). Motive is a question of fact, and the Board may infer discriminatory motivation from either direct or circumstantial evidence and the record as a whole. *Tubular Corp. of America*, 337 NLRB 99, 99 (2001).

A mistaken belief by an employer that an employee engaged in union or protected activity is tantamount to knowledge and is sufficient for finding a violation. *CGLM, Inc.*, 350 NLRB 974, 979-980 (2007); *Superior Micro Film*, 201 NLRB 555 (1973), enf. 485 F.2d 681 (3rd Cir. 1973).

⁹ Knowledge can be established by direct evidence, or may rest upon circumstantial evidence from which a reasonable inference of knowledge may be drawn. *Montgomery Ward*, 316 NLRB 1248, 1254 (1995).

¹⁰ Like knowledge, animus may be established through direct evidence, or by circumstantial evidence. *Limestone Apparel Corp.*, 255 NLRB 722, 736 (1981) (timing of discharge persuasive evidence of employer motivation); *Laidlaw Transit, Inc.*, 315 NLRB 79, 84 (1994) (timing alone may suggest animus as a motivating factor in employer actions.)

¹¹ There can be no serious dispute that Tutt suffered an adverse action when Respondent suspended and discharged her.

Once the General Counsel has established a prima facie case that the protected conduct was a motivating factor in the employer's action against the employee, the burden shifts under *Wright Line* to the employer to demonstrate that it would have taken the same action even in the absence of the protected conduct. *Wright Line*, 251 NLRB at 1089. If the reasons proffered by the employer are not supported by credible evidence and are therefore pretextual, the Board finds that the employer has not met its burden and that the employer's motivation is unlawful. *BMD Sportswear Corp.*, 283 NLRB 142 (1987). Likewise, an employer's burden is not carried by merely showing that it had a legitimate reason for taking the adverse action. Rather it must "persuade" that the action would have (not could have) taken place in the absence of the protected conduct "by a preponderance of the evidence." *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984), *Hotel Del Coronado*, 345 NLRB 306, 307 (2005). If the employer fails to carry its burden of persuasion, a violation will be found. *Bronco Wine Co.*, 256 NLRB 53 (1981).

C. *Protected Concerted Activity and Respondent's Knowledge.*

The judge found that Tutt's discussions, on her own and the employees' behalf, about their compensation fall within the ambit of protected concerted activity. (ALJD 6-7) Moreover, it is long established that it is a concerted protected activity for employees to discuss their wage rates. *Automatic Screw Products, Inc.*, 306 NLRB 1072 (1992); *Scientific-Atlanta, Inc.*, 278 NLRB 622, 625 (1986); *Triana Industries*, 245 NLRB 1258 (1979). The Board recognizes that concerted activity at its inception involves a speaker and a listener. Even in the post-*Meyers* era¹², the Board has treated speech between employees about their wage rates and other terms and conditions of employment as fundamental to group activity; an employer violates the Act by maintaining a rule restricting talk of wages, or even where supervisors merely "request" that

¹² *Meyers Industries*, 268 NLRB 493, 497 (1984) (Meyers I); *Meyers Industries*, 281 NLRB 882, 887 (1986) (Meyers II)

employees not discuss working conditions. *Leather Center Inc.*, 312 NLRB 521, 527 (1993); *Automatic Screw Products, Inc.*, 306 NLRB 1072 (1992); *Scientific-Atlanta, Inc.* 278 NLRB 622, 625 (1986).

Discussions of working conditions are a classic concerted protected activity, sometimes termed the “grist” or “sinew” upon which and from which more advanced group action develops. Were employers permitted to quash concerted discussions of employment terms at their inception, more advanced and persistent activities such as group protests, job actions, unionization, and union decertification efforts would be foreclosed. Thus, expression to other employees of dissatisfaction with working conditions is within the protection of Section 7 of the Act.

As the Third Circuit explained in *Jeannette Corp. v. NLRB*, 532 F.2d 916, 919 (3d Cir. 1976), in the context of discussion about wages:

dissatisfaction due to low wages is the grist on which concerted activity feeds. Discord generated by what employees view as unjustified wage differentials also provides the sinew for persistent concerted action. The possibility that ordinary speech and discussion over wages on an employee’s own time may cause ‘jealousies and strife among employees’ is not a justifiable business reason to inhibit the opportunity for an employee to exercise Section 7 rights.

Respondent appears to concede that it believed Tutt was discussing her wages with other employees, but also with “folks on the van” and “anyone else who would listen,” yet strangely tries to fault Tutt because she didn’t bring her concerns directly to Respondent’s management. (Exceptions Br. at 12) Respondent cites *Asheville School, Inc.*, 347 NLRB 877 (2006) for the proposition that the Board upheld the discharge of an employee who was “griping” and disclosed confidential wage information. But that case is plainly distinguishable from the facts of this case. In *Asheville School*, the terminated employee was a payroll accountant who disclosed pay

information regarding *other* employees that had been entrusted to her. *Asheville School*, 347 NLRB 877 at fn. 2. That situation is not at all like the case here, where Respondent acted because it believed that Tutt disclosed *her own* wage information.

Here the evidence and Respondent's own admissions establish that Respondent had knowledge – at the very least a belief – that Tutt had revealed her wage rate to other employees.¹³ Both Tutt and Willis confirm that Willis told Tutt during her suspension meeting that word had gotten back to Taylor that Tutt had been discussing her pay rate with other employees. Moreover, the memorandum that Willis wrote about Tutt's suspension explicitly admits Respondent's knowledge. In her own words, Willis states, "I advised [Tutt] that it had been brought to the attention of Mr. Taylor that employees were coming to him upset stating that Ms. Tutt has discussed financial information with them, specifically pay rates." Further, Tutt testified that Willis explicitly told her during her termination meeting that she was being fired for disclosing her pay rate to other employees. Finally, Willis demonstrated that Respondent believed Tutt had discussed her wages when she told the Division of Unemployment Insurance that "it was brought to my attention on 04/12/2011 that claimant disclosed her pay rate to other employees." In its Exceptions, Respondent does not even attempt to dispute that it had, at the very minimum, a belief that Tutt had discussed her wage rate with other employees. Thus, there can be no serious dispute that this element of the *Wright Line* test has been satisfied.

D. Respondent's Animus.

Although Respondent claims that "the ALJ failed to show that Taylor Made exhibited any animus toward such protected activity," (Exceptions Br. at 9) Respondent's animus is

¹³ For additional discussion of Respondent's belief that Tutt engaged in protected conduct, please see the Acting General Counsel's Cross-Exceptions.

demonstrated by its direct statements, its several handbook rules, its April 20 memo, the timing of Tutt's discharge, its shifting reasons for her discharge, and the implausible explanations it has advanced.

1. Respondent's statements.

The record shows that Respondent made several statements directly linking protected activity with Tutt's suspension and discharge. First, there is the testimony of Tutt herself when she relayed what Willis said to her during her suspension and discharge meetings.¹⁴ Tutt was the only witness who attempted in her testimony to relay the actual words exchanged in any meeting.¹⁵ She forthrightly explained that Willis directly and unequivocally said that she was being suspended and discharged because Respondent had information that Tutt had disclosed her pay rate to other employees. Even Willis admits that she mentioned Tutt disclosing her pay rate during the suspension meeting, and she never offered any justification for doing so if Tutt's alleged disclosure was completely unrelated to her suspension. The judge specifically credited Tutt's testimony that she was told in her discharge meeting that she was fired for breaching Respondent's rule about disclosing confidential financial information. (ALJD 8:3-5)

Willis' statements to the Division of Unemployment Insurance also reveal Respondent's animus. On three separate occasions – May 6, 2011, May 10, 2011, and May 26, 2011 – Willis told the DUI that Tutt was fired for disclosing her wage rate to others. At the JAVA hearing,

¹⁴ Respondent's attempt to insulate Allen Taylor's decision-making authority from any statements attributed to Willis should be rejected (see Exceptions Br. at 8-9) Respondent has admitted in its Answer that Willis is a supervisor and agent within the meaning of Section 2(11) and (13) of the Act. Additionally, Taylor testified that he did not personally participate in Tutt's suspension and termination, and that he trusted Willis to accurately convey to Tutt the reasons for her suspension and discharge. (Tr. 196:6-11; 201:23-202:13) Similarly, he authorized Willis to represent Respondent before the Maryland Division of Unemployment Insurance. (Tr. 202:14-18)

¹⁵ In this regard, Tutt's testimony that Willis said she was suspended because of a "big discrepancy" – the same word Willis used when she testified that she reviews employee discrepancies, shows Tutt's ability to accurately recall what was said during this meeting, and adds a ring a truth to her testimony.

Willis made the causal relationship as plain as can be: “She was discharged by me and Mr. Taylor, company owner, for failure to follow policy in disclosing her wages.” Animus can be established by a direct employer statement in opposition to protected activity. *W.H. Scott d/b/a Scott’s Wood Products*, 242 NLRB 1193 (1979).

2. *Respondent’s Handbook Rules and April 20 Memo.*

At the time of her suspension and discharge, Respondent maintained several handbook provisions that prohibited employees from discussing their wages. Additionally, the April 20 memo – issued just days before Tutt’s suspension – plainly informs employees that if they discuss their wages they can be fired. The judge found that these rules and memo violate Section 8(a)(1), and Respondent has not taken exceptions to this finding. Respondent’s multiple rules regarding employees discussing their wages demonstrates the company’s animus against employees releasing this information, especially where the rules threaten employees with termination. Willis demonstrated her frustration when she admitted during her testimony that Tutt’s alleged wage revelation cause Taylor Made to go into “damage control” and caused disruption to Respondent because other employees were now demanding the “same amount of money per hour.” (GCx5, p.4)

Beyond these explicit statements showing that Respondent took a very negative view of employees discussing their wages, animus is demonstrated by the timing of the publication of the April 20 memo and Tutt’s suspension and discharge. Timing is a significant factor in ascertaining motive. *LB&B Associates, Inc.*, 346 NLRB 1025, 1026 (2005); *Desert Toyota*, 346 NLRB 118, 120 (2005); *Detroit Paneling Systems*, 330 NLRB 1170 (2000). This memo was distributed to employees on the day before Tutt’s last day of work, and only five days before she was suspended. Moreover, the April 20 memo was distributed shortly after Willis admitted that

Respondent first heard allegations that Tutt was discussing her pay rate with other employees. As noted in his decision, the judge specifically relied on the timing of Tutt's suspension and discharge vis-à-vis the date when Respondent first learned of protected activity (April 12) in finding the existence of animus. (ALJD 7:20-25)

3. *Respondent's Shifting Defenses.*

Since Tutt's suspension and discharge, Respondent has offered a litany of reasons for its actions, but the only reason that has remained consistent is its belief that Tutt had engaged in protected conduct. When an employer provides shifting reasons for discharging an employee, the Board often finds that the proffered reasons are pretextual and the true reason is animus.

Seminole Fire Protection, 306 NLRB 590 (1992).

Respondent initially and unambiguously told the Division of Unemployment Insurance – on three separate occasions – that Tutt was fired for disclosing her pay rate to other employees. All of these statements to DUI preceded the filing of the unfair labor practice charge in this matter. At trial, however, Willis and Taylor explained – and not always consistently – that Tutt was fired for a host of reasons *except* for discussing her pay rate. The document allegedly closest in time to Tutt's suspension was Willis' suspension memo. That memo references only one basis for Tutt's suspension – her usage of her personal cell phone while working as set forth in Kearney's April 22 memo.¹⁶ Further, when examining Kearney's memo, the closest statement in it to discipline is his statement that "Tutt was cautioned on the use of her cellphone." The

¹⁶ That memo stated that "Tutt was *cautioned* on the use of her cellphone on Wednesday, April 22, 2011 [sic – April 22 was a Friday and Tutt's last day of work was April 21]. I *recommended* that the company cellphone be plugged in to the charger instead of her personal cell phone. I had previously *suggested* that she turn down the call alert of her phone due to the graphic language. She lowered the volume of her call alert and stated the company phone was fully charged." (emphasis added)

remaining statements are phrased in terms of “recommendations” and a “suggestion” (which the memo explains Tutt followed.)¹⁷

During her trial testimony, Willis discovered additional reasons for Tutt’s suspension and discharge that were not previously documented. She explained that Tutt was suspended and fired because of her (1) excessive cell phone usage (2) because she was insubordinate; (3) engaged in solicitation; (4) and was a disruption in the workplace. Later Willis added that Tutt’s cell phone had “vulgarity” but she couldn’t provide any specific detail.¹⁸ Willis also described Tutt as engaging in “unprofessional behavior” and not being a “good fit” for Taylor Made. Willis admitted that none of these additional reasons were included in her suspension memo, which was allegedly written closer in time to Tutt’s discipline, and she offered no explanation why these other suspension/termination factors were omitted.¹⁹

¹⁷ Respondent takes exception to the judge’s finding that Kearney did not issue Tutt any written warning or impose discipline, citing page 3, fn2 of the judge’s decision. (Exception #3). That portion of the decision states that “During the period that Kearney supervised Tutt (April 1-21), he did not issue her any written warnings or impose discipline.” The judge’s finding is completely consistent with Kearney’s trial testimony and the record evidence. There is *no* evidence of any written warning or discipline given to Tutt by Kearney during that time period. Even his memo dated 4/22 was only given to Respondent’s management, not to Tutt. Kearney also testified that although he gave Tutt several verbal admonishments about her cell phone usage, he didn’t document them, and *did not report them to Willis or any other Respondent supervisor*. (Tr. 160:1-161:12) Therefore, Respondent could not have relied on a “long history” of reprimands because this information was never reported to decision-makers Willis or Taylor.

¹⁸ Willis’ lack of knowledge about what “vulgarity” came over Tutt’s cell phone and her inability to clearly define Tutt’s alleged solicitation is in direct conflict with Willis’ testimony that she followed her practice of carefully and fully investigating the allegations against Tutt before firing her. (Tr. 14:17-15:3; 31:1-6) The Board will consider, as evidence of unlawful motivation, an employer’s failure to conduct a full and fair investigation into the underlying circumstances of what caused the employee to be disciplined. *Firestone Textile Company*, 203 NLRB 89, 95 (1973) (failure to conduct full and fair investigation is evidence of discriminatory intent).

¹⁹ It is also worth noting how during the testimony at trial and in its Exceptions, Respondent appears to exaggerate Tutt’s transfer from Social Security to CMS and the April 1 meeting with Tutt (e.g. “The facts clearly indicate Tutt was a difficult employee that had to be transferred to a new location...” Exceptions Br. at 10). No supervisor testified that the April 1 meeting was disciplinary, and Willis’ explanation at trial adds that Tutt’s cell phone usage was discussed during the meeting even though her own contemporaneous memo and the testimony of the other supervisors does not corroborate this version of events. Finally, if Tutt was such a horrible employee as Respondent suggests, it is inexplicable why it would transfer her to a hard-fought contract that accounted for 50% of its revenue. Because it is undisputed that Tutt’s transfer was not disciplinary, and that Tutt was transferred to work for Respondent on the CMS contract, Respondent’s Exception #1 should be overruled.

During his testimony, Allen Taylor added that Tutt's failure to plug in Respondent's cell phone and that she was on her probationary period as factors in her termination. He also added that Tutt's accusation that Respondent had lied to her about the hours she would be working played a "major factor" in her termination.²⁰

Respondent's explanation about Tutt's cell phone usage (which again was the only basis for her discipline in Willis' suspension memo or Kearney's 4/22 memo) as a cause of her suspension and discharge is directly contradicted by Willis' testimony to the Division of Unemployment Insurance and by Kearney's trial testimony and shows the pretextual nature of Respondent's case. At trial, Respondent has made much about Tutt's cell phone usage, whether it was "excessive" (though Respondent has never defined what level constitutes excess), the ringtone, or failing to keep the phone plugged in. Yet only a week after Tutt's discharge (May 6), Willis told the DUI that "[Tutt] received a warning for violation of the cell phone usage policy, but *would not have been terminated for the offense, only warned*. Otherwise, she worked to the best of her ability."(emphasis added) At trial, when she was confronted with these statements, Willis testified that she did not recall making them. (Tr. 39:19-23; 40:6-18) "Failure to recall" does not qualify as a clear denial or refutation of record evidence. *Indian Hills*, 321 NLRB 144, 150 (1996). The judge specifically relied on Willis' statements to the DUI that Tutt would not have been terminated for violating Respondent's cell phone policy. (ALJD 8:8-10) Additionally, Willis' testimony to the DUI is corroborated by Kearney's trial testimony that he intended his April 22 memo to be a *written warning* to Tutt about her cell phone usage. (Tr. 162:10-12)

²⁰ Any argument that Tutt referring to Respondent as a "liar" removed her from the protection of the Act should be rejected under the Board's *Atlantic Steel* test. 245 NLRB 814 (1979); *Trover Clinic*, 280 NLRB 6, 6-7 (1986)(distributing a cartoon with a nervous-looking character with the following caption: "I've been beaten, kicked, lied to, cussed at, swindled, taken advantage of and laughed at, but the only reason I hang around this place is to see what happens next!" held protected.)

The judge's conclusion that Respondent did not assert its present defense until after the unfair labor practice charge was filed on May 31 is supported by the DUI records and Tutt's testimony. (ALJD 7:37-43; Exception #9) First, Respondent indisputably had several handbook rules that threatened employees with discharge for discussing their pay rates. Then, on April 20, 2011, it issued a memo reinforcing this message. Tutt credibly testified that Respondent informed her that she was suspended and terminated for breaching these rules. Then, on three separate occasions – May 6, 2011, May 10, 2011, and May 26, 2011 – Willis told the DUI that Tutt was fired for disclosing her wage rate to others. Given this background, and the timing of the May 31 NLRB charge, the judge had ample evidence to support his conclusion that Respondent's shifted its reasons for suspending and discharging Tutt after it learned that she filed her charge with the Board. Similarly, the judge was entitled to take this timeline into consideration in evaluating Respondent's motivation to fabricate the reasons for Tutt's suspension and discharge.

This evidence demonstrates that as this case has progressed, the number of faults Respondent has searched for has escalated. If Respondent was confident in its reasons for suspending and discharging Tutt, there would be no reason to continually embellish the acts that led to her suspension and termination.

4. *Implausible Explanations.*

Finally, Respondent has evidenced its discriminatory motive by advancing wholly implausible explanations for its conduct. The Board has held that when an employer's witnesses offer a far-fetched explanation for events, it is appropriate to conclude that such explanation was offered to mask a discriminatory motive. *Feldkamp Enterprises*, 323 NLRB 1193, 1204 (1997). Here, Respondent has done this at two separate junctures.

First, the record evidence suggests that Willis' suspension memo is a complete *post-hoc* fabrication. She spends the majority of her memo describing how Respondent encourages employees to use "good judgment" in disclosing pay rates (mentioned three times in one paragraph) and that Respondent realizes that pay rates may be discussed. Initially, one must wonder why Willis is even bothering to discuss everything employees are *permitted* to do when she herself denies that Tutt's alleged discussion of her pay rate had anything to do with her suspension and termination. Instead, this paragraph appears at best to be gratuitous, but in all likelihood was crafted to provide an exculpatory document should Tutt's discipline ever be challenged.

Moreover, the memo doesn't fit with other contemporary events. Only days preceding this suspension memo, Willis herself authored an all-employee memo threatening employees with discharge if they discussed their pay rates. Then, over the ensuing weeks after Tutt's discharge, she repeatedly informed DUI that Tutt was fired for discussing her pay rate. With the April 20 memo and Tutt's unemployment proceedings as bookends, the intervening suspension memo is an obvious non-sequitur. Because this memo appears to be a total fabrication, the ALJ was wholly entitled to disregard it as persuasive evidence, and to question the veracity of the person who claims she prepared it.

Beyond the suspension memo, Willis also attempts to lay fault with the Division of Unemployment Insurance. Willis claims that when DUI heard accusations that Tutt was fired for disclosing her pay rate, the Division "grabbed on to that piece and ran with it" (Tr. 29:1-5), thereby insinuating that it was DUI, and not Respondent, that advanced this unlawful theory for Tutt's discharge.

Essentially, Willis would have the ALJ and the Board believe the following series of incredible events took place: (1) Respondent has several established rules prohibiting employees from discussing their wages; (2) five days before Tutt's suspension, Respondent issues a memo telling all employees that they will be terminated if they disclose their pay rates; (3) Respondent completely rescinds all of those rules, though it has produced no documentary evidence to substantiate this claim; (4) Willis tells DUI that Respondent had these rules, *but they have since been changed* and she "made it very clear that Tutt was not released because of divulging any kind of pay rate." (Tr. 29:13-16; 25:23-26:17); and (5) even though Respondent bears a burden of proof in unemployment proceedings, and Respondent specifically disavowed this reason was a factor in Tutt's discharge, the Division took it upon itself to fabricate Willis' testimony to the contrary and rely on a patently unlawful reason for Tutt's discharge. This explanation is completely preposterous. It offends any sense of truth by insinuating that state employees knowingly created official government records containing false statements, and demonstrates Respondent's unlawful motivation in its suspension and discharge of Tutt.²¹

E. Respondent's Attacks on the Unemployment Reports Should Be Rejected.

In its Exceptions, Respondent attacks the DUI reports and testimony from the Division's representative by misrepresenting the evidence and the judge's conclusions. First, Respondent misrepresents the testimony of Mr. Krysiak by claiming that he "admitted that the hearing was more than an hour and that the report was not complete." (Exceptions Br. at 8, citing Tr. 62-63) However, this is not Mr. Krysiak's testimony. Instead, he testified that *in general*, JAVA

²¹ Similarly, Respondent's argument that it has asserted its present defense since April 1, but the DUI reports failed to record it (Exceptions Br. at 12) is simply another baseless and failed attempt to deflect fault away from Respondent and onto the DUI. Respondent has offered no justification why DUI agents would have failed to properly record any reasons advanced by Respondent for Tutt's suspension and discharge.

hearings are “normally about an hour” but he never testified how long the specific hearing involving Tutt and Respondent lasted. Additionally, he never testified that the report in GCx 5 was not complete. To the contrary, his certification in GCx 5 and his trial testimony confirm that this report is an authentic copy of the report kept in the Division’s files. Instead, Respondent appears to argue that there are *additional* records in the Division’s possession that are not reflected in the report in GCx5 or the hearing record.

Perhaps unintentionally, Respondent’s Exceptions concede this point: “The record reflects that the JAVA Hearing Report was not complete in nature since it lacked the leading questions asked of Taylor Made²², the notes of the hearing officer and certification that the report included the entirety of the hearing. *The JAVA Hearing Report does not purport to be a full and complete detail of the hearing.* (Exceptions Br. at 8, emphasis added) The hearing report was offered as the Division’s official record of the hearing and its subsequent determinations. It does not purport to be, nor was it represented to be a *complete* transcript or other record of the hearing (Krysiak testified that there is no transcript or recording), and Respondent errs when it excepts to the judge’s finding that the report was “complete and accurate” because the judge never made such a finding – either at the pages cited by Respondent or anywhere else. (Exception #8)

What Respondent is really arguing is that there is a possibility that DUI has *additional* records or notes generated during Tutt’s unemployment case, and that these additional records would somehow support its case here. To this end, Respondent argues that the judge erred by placing *any* weight on the JAVA hearing report. (Exceptions Br. at 8) But this argument was implicitly rejected by the ALJ, and should likewise be rejected by the Board. First, Respondent has not claimed that the DUI records in evidence are in and of themselves false, but only that

²² There is no evidence in the record supporting this statement that the Division asked leading questions while adjudicating Tutt’s claim for unemployment benefits.

there could be more records in existence. Even after GCx5 and GCx 6 were admitted into evidence, Respondent did not question Willis about her statements to DUI or ask her to specifically deny them. Additionally, to any extent there are additional records, Respondent had an equal opportunity to discover and subpoena them as the Acting General Counsel – Respondent certainly knew that it had given relevant statements to DUI, and presumably would have sought to introduce them if they were useful to its case. Apparently, Respondent chose not to do so.

Respondent claims that “the evidence presented by General Counsel during the hearing was full of credibility issues” and “the General Counsel’s case only provided conflicting testimonies with no reconciliation.” (Exceptions Br. at 8) But what Respondent conspicuously leaves out is that the ALJ resolved those credibility disputes in favor of the Acting General Counsel when he credited Tutt’s testimony *and* the contemporaneous statements Willis made to DUI. (ALJD 8:3-11) The judge was entitled to make these credibility determinations based on many factors, including the demeanor of the witnesses, the timing of the statements, and their motivation at the time their statements were made.

The judge never found, as Respondent implies, that the DUI records wholly supplanted the judge’s determination of why Tutt was discharged. Instead, the judge’s decision makes clear that the DUI records, when taken in context with the live testimony of Willis and Tutt, demonstrate that Tutt’s account was more believable. After all, Tutt’s version of events is the only version that has remained consistent, while Willis’ trial testimony directly contradicts the statements she gave to DUI and is inconsistent with the handbook rules and April 20 memo that Respondent admits it maintained.

F. Respondent Has Not Demonstrated That It Would Have Taken the Same Action in the Absence of Its Belief That Tutt Engaged in Protected Conduct.

As described above, Respondent must show not that it could have, but that it *would have* taken the same action against Tutt, even in the absence of its belief that she engaged in protected Section 7 activity. The judge correctly found that Respondent has wholly failed in this showing.

Although it claims that it has disciplined and terminated employees in the past for similar misconduct as Tutt is accused of engaging in, Respondent completely failed to offer a single document to substantiate its claims. Because these documents are completely within Respondent's control, and it has offered no justification why they were not produced at the hearing, it is appropriate for the Board to draw an adverse inference from Respondent's failure to produce documents that presumably would support its defense. *International Automated Machines*, 285 NLRB 1122, 1122-1123 (1987) (when a party fails to call a witness who may reasonably be assumed to be favorably disposed to the party, an adverse inference may be drawn regarding any factual question on which the witness is likely to have knowledge.)²³

Similarly, Respondent has failed to produce any documents substantiating its claims that it received "daily" complaints from CMS officials about Tutt's behavior, testimony from other employees or Respondent's clients about Tutt's alleged misconduct, or written records showing that she was disciplined for what Respondent paints as two months of continuous unprofessional conduct.

Even in its Exceptions, Respondent exaggerates Tutt's work history. For example, Respondent claims, "This point should be emphasized in the Board's analysis, Tutt was called into Taylor Made's offices within a month of employment to discuss her performance."

(Exceptions Br. at 10) But, *none* of Respondent's supervisors testified that this meeting was

²³ Likewise the Board would be entitled, to any extent relevant to the complaint allegations, to draw an adverse inference from Respondent's failure to call Supervisor Jones or explain his absence.

disciplinary, and Tutt testified without contradiction that the meeting lasted only five minutes. Respondent also refers to what it describes as Supervisor Kearney's verbal "reprimand" of Tutt, her failure to plug in the company cell phone, and her "explicit" ringtone. (Exceptions Br. at 10) But Kearney testified that he never informed any Respondent supervisor about these "reprimand" discussions with Tutt, that the company cell phone was fully charged, and that Tutt complied with his request to lower the call alert on her phone. Certainly, Willis and Taylor could not have relied on a history of "reprimands" that they didn't know about, or Tutt following Kearney's instructions to lower the volume of her ringer. Finally, Respondent's statement that "Taylor Made provided evidence to show disciplinary action was taken throughout Tutt's employment with the company" (Exceptions Br. at 5) is wholly unsupported by the record, as there was no evidence introduced showing that Respondent took disciplinary action against Tutt before she was suspended, let alone "throughout her employment."

Finally, Respondent's burden is made even harder because it has to show that it did not discipline her for discussing her wages, and this position puts it in direct conflict with its own established employee rules, but also the testimony of Willis to the Division of Unemployment Insurance. Respondent failed to demonstrate to the ALJ why its rules and prior testimony should have been disregarded in favor of the reasons it articulated at trial, and the Board should affirm the judge's credibility determinations that Respondent's trial defenses were pretextual.

V. CONCLUSION

The administrative law judge credited Charging Party Kimberly's Tutt's sworn testimony that Respondent's officials, in discharging her, told her the action was because she had discussed her wages with other employees. The Board should affirm this credibility determination, which

finds considerable objective support in the record. Thus, the Maryland Division of Unemployment Insurance records confirmed that Respondent's officials advanced this reason in explaining the discharge to the State. Further, Respondent indisputably maintained four rules that unlawfully prohibited employees from discussing their pay rates with one another. Beyond that, Respondent admits that it suspected Tutt of disclosing her pay rate to other employees, and even published a "reminder" memo about the unlawful policies shortly before it discharged Tutt. The Board should affirm the administrative law judge's credibility resolutions, finding the Respondent suspended and discharged Charging Party Kimberly Tutt because she discussed her wages with other employees, find the violations alleged in the amended complaint, and order Respondent to remedy its unlawful conduct.

Respectfully submitted,

/s/ Patrick J. Cullen

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Dated this 26th day of January, 2012.

STATEMENT OF SERVICE

I hereby certify that on January 26, 2012, copies of the Answering Brief of the Counsel for the Acting General Counsel were served by e-mail on the following party:

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and that Kimberly Tutt was advised by telephone of the contents of the Answering Brief of the Counsel for the Acting General Counsel and a copy was served by UPS overnight delivery on her at:

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