

Northfield Urgent Care, LLC and Jennifer Grossman. Case 18–CA–019755

March 15, 2012

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS FLYNN
AND BLOCK

On September 30, 2011, Administrative Law Judge Paul Buxbaum issued the attached Decision. The Respondent filed exceptions and a supporting brief.¹

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

The Board has considered the decision and the record in light of the exceptions and brief, and has decided to affirm the judge's rulings, findings,² and conclusions, and to adopt the recommended Order.³

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Northfield Urgent Care, LLC, Northfield, Minnesota, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

Catherine L. Homolka, Esq. and *James L. Fox, Esq.*, for the General Counsel.

Jonathan K. Reppe, Esq., of Northfield, Minnesota, for the Respondent.

Jennifer L. Grossman, of Shakopee, Minnesota, for the Charging Party.

¹ Counsel for the Acting General Counsel submitted a "letter in lieu of a reply brief."

² The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

³ No exceptions were filed to the judge's dismissal of the following complaint allegations, all of which involved 2011 conduct: (1) Respondent created an impression of surveillance on January 19 when meeting with employee Gina Ledman; (2) Respondent created an impression of surveillance on January 19 when meeting with employee Michael Borucki; (3) Respondent unlawfully threatened Ledman on January 21; (4) Respondent prohibited Ledman from discussing her terms and conditions of employment with other employees on January 21; (5) Respondent engaged in surveillance of employees' protected concerted activities on January 31; and (6) Respondent unlawfully threatened Borucki on February 6. In addition, the Respondent did not except to the judge's finding that it maintained an unlawful handbook rule stating that "[n]o employee may ever discuss issues of personal salaries or raises with other employees other than management."

DECISION

STATEMENT OF THE CASE

PAUL BUXBAUM, Administrative Law Judge. This case was tried in Minneapolis, Minnesota, on July 13, 2011.¹ The charge was filed April 13, and amended on May 16. The complaint issued on May 31.

The complaint alleges that the Employer, Northfield Urgent Care, LLC, engaged in a series of violations of the Act consisting of prohibiting employees from discussing their terms and conditions of employment with each other; conducting unlawful interrogations of employees; creating an impression that employees' activities were under surveillance by the Employer; engaging in actual surveillance of employees' protected activities; threatening employees with sanctions due to their participation in protected activities; imposing such sanctions due to those activities; and maintaining and enforcing a rule in its handbook that prohibits employees from discussing their salaries with other employees. Most significantly, the complaint further alleges that the Employer demoted and terminated an employee, Michael Borucki, and terminated a second employee, Jennifer Grossman, because those employees had engaged in protected concerted activities. Each of these actions is alleged to have violated Section 8(a)(1) of National Labor Relations Act (the Act).

On June 14, the Employer, through its counsel, filed an answer to the complaint admitting certain of the factual allegations relating to several alleged violations. In particular, the answer admitted that Borucki was given an unfavorable evaluation, disciplined, demoted, and ultimately discharged and that Grossman was disciplined twice and ultimately discharged. (See GC Exh. 1(g), R. answer, at pars. 15, 16, 23, 28, 30, 32, and 35.) The answer also admitted that the Employer conducted an interrogation of an employee on February 8. (See GC Exh. 1(g), R. answer, at par. 33.) Finally, the answer admitted that the Employer has maintained and enforced a confidentiality rule in its handbook that prohibits employees from discussing their compensation with other employees. (See GC Exh. 1(g), R. answer, at par. 36.) All other material allegations of the complaint were denied.

For the reasons I will describe in detail in this decision, I find that the Employer did commit a series of unfair labor practices of the types alleged in the complaint. Among those violations of the Act were the disciplinary actions taken against Borucki and Grossman, including their terminations. I have also concluded that the Acting General Counsel failed to meet his burden of proof in establishing several other violations, including those related to allegedly unlawful surveillance and the creation of an impression of such surveillance.

On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

¹ All dates are in 2011, unless otherwise indicated.

² I found the transcript of the testimony to be remarkably accurate. No corrections are necessary. I do note that the hardcopy provided to me contains a duplicating error that omits parts of the testimony at p. 42. Because the Board now requires the preparation of electronic cop-

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability corporation, operates a medical clinic providing urgent care and occupational health services at its facility in Northfield, Minnesota, where it annually derives gross revenues in excess of \$500,000; purchases and receives at its Northfield facility goods and supplies valued in excess of \$50,000 from suppliers located within the State of Minnesota which, in turn, purchase those goods and supplies directly from points located outside the State of Minnesota; and provides services valued in excess of \$50,000 to customers located within the State of Minnesota which, in turn, purchase goods and services valued in excess of \$50,000 directly from suppliers located outside the State of Minnesota.

The Respondent admits³ and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Although not specifically alleged in the complaint, I also find that the Respondent is a health care institution within the meaning of Section 2(14) of the Act.⁴

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The Facts*

In April 2009, Kevin J. Bardwell, M.D., founded Northfield Urgent Care, LLC, as a limited liability corporation licensed in the State of Minnesota and located in Northfield. As described in its handbook, the Company operates a “free-standing, walk-in medical office that provide[s] quick, efficient, and quality Urgent Care and occupational health services.” (Jt. Exh. 2, p. 1.) It currently employs approximately 10 persons, who are under the supervision of its owner, Dr. Bardwell.

In order to understand some of the issues in this case, it is necessary to outline the nature of the Employer’s routine operations. Four persons staff the clinic during each shift. The first employee that a prospective patient encounters is the receptionist. That staff member is stationed at the front desk. As described by Wanita Parker, the manager of the front desk operation, the receptionist’s key duty is to register incoming patients. This involves the creation of a medical chart that is used to document the patient’s treatment at the clinic. Typically, the registration process takes approximately 20 minutes. Receptionists have some discretion to short circuit this process if they perceive the incoming patient to be in distress. In such circumstances, they can take the patient to the so-called “trauma room” where the patient can be evaluated immediately. Use of this expedited procedure is relatively rare as it is reserved for such emergency situations as those involving chest pain or bleeding.

ies of its transcripts, I was able to download that defective page and have placed a complete copy beside the incomplete original.

³ See GC Exh. 1(g), R. answer, pars. 3, 4, 5, and 6, admitting all of the pertinent factual allegations that form the necessary predicate to a finding of jurisdiction.

⁴ In particular, the uncontroverted evidence clearly establishes that the Respondent is a “health clinic” that is “devoted to the care of [the] sick” as defined in that subsection of the Act.

After being registered by the receptionist, an incoming patient is placed in an examination room. The second employee that such a patient would ordinarily encounter is the nurse. It is the nurse’s duty to take the patient’s vital signs and elicit and record such information as the patient’s medications and allergies. After that, the patient is examined by the medical provider that is on duty. Dr. Bardwell testified that the medical providers employed by the clinic consist of either physicians, physician’s assistants, or nurse practitioners. The provider takes the patient’s history, performs a physical examination, makes a diagnosis, and provides treatment.

The remaining employee on each shift is a radiology technician. In the event that the provider determines that an X-ray is required to assist in diagnosis, the patient is taken to the technician’s room where the necessary equipment is located. After taking the X-ray, the technician makes the resulting study immediately available to the provider. The technician also performs other duties, including participation in the clinic’s occupational health services such as drug testing.

As one would expect, the work processes performed by the four employees are not mechanical and their workday varies depending on the number of patients and their presenting medical problems. This was well described by Sandra Landon, the clinic’s nurse manager. As she explained:

With the type of practice we have, it’s either feast or famine: we’re either running or there’s no one there. If there is no one there and our work is done, we can take a break, we can converse, we can do what we need to do.

(Tr. 151.)

Turning now to the persons most involved in the controversies presented in this case, Dr. Bardwell, as the clinic’s owner, retains ultimate management authority as to all of the clinic’s operations. He also serves as one of the clinic’s medical providers. The parties are in agreement that he is a supervisor within the meaning of the Act. His wife, Kim Bardwell, is an employee of the clinic, serving as one of its receptionists. While she is not alleged to be a supervisory employee, the parties are in agreement that she is an agent of the Employer within the meaning of the Act. (See GC Exh. 1(e), complaint at par. 3(b), and GC Exh. 1(g), R. answer at par. 9.)

Michael Borucki was hired by the clinic in April 2009 to serve as a radiation technologist. In March 2010, Borucki received a new set of job duties. As he explained, he was assigned “to do sales and marketing as well as [being] the radiology technologist.” (Tr. 74.) In particular, his new duties consisted of soliciting “local companies to send their occupational health services to Northfield Urgent Care.” (Tr. 74.) He testified that he devoted 20 to 30 hours per week to the marketing work, including weekly meetings with Bardwell to discuss this aspect of his work. His combined duties took approximately 45 hours per week. As part of this redesign of his job, Borucki was transferred from an hourly pay classification to a salaried position.

In his own testimony, Dr. Bardwell confirmed the nature of this alteration in Borucki’s job description in 2010. He reported that he gave Borucki this “promotion” that “almost doubled his salary.” (Tr. 222.) As Bardwell succinctly explained, “[Bo-

rucki] continued to work his radiology technician position but also took on sales and marketing for the clinic.” (Tr. 222.)

In January 2010, Bardwell hired Jennifer Grossman, a physician’s assistant. As she explained, her work consisted of, “being the medical provider in an urgent care setting.” (Tr. 23.) She worked 12-hour shifts that always included 3 weekdays per week. In addition, she worked another shift on alternate weekends.

Finally, Gina Ledman was hired at the inception of the clinic’s operations in 2009. She is a licensed practical nurse and her job duties were to serve as the clinic’s staff nurse during her shifts. Her employment at the clinic was interrupted in May 2010 because she resigned after a dispute with Bardwell. She resumed her duties as a nurse for the clinic in the following September.

Our nations’ recent economic history has resulted in the unfortunate reality that current labor law litigation often takes place against a backdrop of financial distress. Such was the case here. Dr. Bardwell testified that, beginning in November 2010, the volume of patients was lower than one would have expected and, as a result, “the clinic was struggling a bit.” (Tr. 221.)

Faced with declining revenue, Bardwell met with his bookkeeper and with a consultant experienced in urgent care operations to develop a plan to address the shortfall. They discussed various alternatives including layoffs, cross-training to permit employees to perform multiple job duties, alteration in the clinic’s hours of operation, and cuts in employees’ benefit programs. Ultimately, after these discussions, Bardwell rejected any of these possible solutions and decided to impose an across-the-board pay cut of 10 percent for all employees. He testified that, in coming to this decision, he clearly recognized that the pay cut was “going to be a hardship, it’s going to be a tough one to swallow.” (Tr. 221.)

On January 4, Bardwell conducted two evening meetings to announce his decision regarding the pay cut. He began by convening a “leadership meeting,” with Managers Parker and Landon, the payroll person, and Borucki. (Tr. 75.) As Borucki testified, Bardwell “discussed how the clinic wasn’t doing very well and that he had made a decision to give us a 10-percent pay cut.” (Tr. 75.) Borucki challenged that, asking Bardwell “if there was any alternative to this, if we could maybe, possibly, look at cutting benefits, possibly the 401(k) match, and he said no, he didn’t want to do that.” (Tr. 77–78.)

Immediately after the conclusion of the management meeting, Bardwell held a meeting with all regularly scheduled employees. After first discussing various other topics relating to the clinic’s operations, Bardwell told the assembled staff that, “the clinic wasn’t doing very well financially and, due to that, everybody was going to take a 10-percent pay cut.” (Tr. 170.) He added that the cut would become effective in 6 days. Under cross-examination by counsel for the Respondent, Nurse Ledman agreed with counsel’s assertion that, “Dr. Bardwell in that meeting stat[ed] that he was open to ideas and wanted to hear from people about suggestions to cut costs at the clinic[.]” (Tr. 189.)

As Bardwell had foreseen, the pay cut proved to be very unpopular among the staff members. On January 7, Grossman,

Borucki, Parker, and Ledman were on duty. During periods when there was no patient activity, they engaged in discussions about the situation. Nan Rodgers, an off-duty receptionist, happened to stop by the clinic and joined some of those discussions. As Grossman described it,

[W]e were just grasping at anything . . . that we could possibly do to save money so that we wouldn’t have to take a pay cut, because everyone was basically saying that, you know, we’re all kind of scraping by as it is and 10 percent is going to be a big deal.

(Tr. 27–28.) Among the money saving ideas being discussed were ending the Employer’s match to the 401(k) plan, adding an employee contribution to the health insurance premium, eliminating the cleaning service, changing the compensation arrangements for the casual employees, and increasing the number of hours spent by Dr. Bardwell as the clinic’s medical provider. As Ledman summed up the conversations, “[W]e kind of just brainstormed throughout the day.” (Tr. 173.)

Among these discussions was one during the lunch hour involving Ledman, Borucki, and Grossman. At that time, they agreed that nobody was comfortable with the idea of approaching Bardwell face-to-face to express the views of the employees. As Grossman explained, “[W]e were worried that that person would [be] targeted.” (Tr. 28.) To avoid this problem, Borucki raised the suggestion of writing an anonymous letter to Bardwell putting forth the employees’ suggestions for alternatives to what he described as a “drastic pay cut.” (Tr. 78.) They agreed on this course of action.

On the following day, Grossman undertook the task of drafting the letter to Bardwell. She indicated that, while laying out the views of the employees, she also “tried to contain the anger/resentment” felt by the staff. (GC Exh. 3.) On completing the draft, she emailed it to Borucki and Ledman with a request that they make suggestions and propose changes. In that email she also reported that she had looked into the requirements for receiving unemployment compensation and concluded that clinic employees who quit due to the pay cut would be eligible for benefits because the termination of their employment would have been caused by an action of the Employer.

Ledman provided uncontroverted testimony that, on this date, January 8, she stopped by the clinic and spoke with the on-duty staff consisting of Stacey Garry, Michelle Stowe, and Dave Collins. She described what occurred at that time:

[A]s soon as I walked in, everybody asked about what I think about the pay cut. And I said that I wasn’t happy and that Mike and Jennie weren’t happy and most everybody else wasn’t happy. And I told them about the letter and that we were probably going to write a letter but we didn’t know for sure, you know, if we should put names on it or whatnot. And they said, “We agree with you. . . . Nobody’s happy. We’re not happy either, but we don’t want to be—we don’t want our names on it.” But they thought it was a good idea to write the letter.

(Tr. 174–175.)

On the next day, Ledman replied to Grossman’s email with a rather acerbic missive. She began by telling Grossman that,

while the draft “looks great,” she thought it was actually “too nice.” (GC Exh. 3.) She also discussed the possibility of collecting unemployment benefits but worried that Bardwell would be able to thwart this plan. However, she ultimately opined that, “I doubt he’d be smart enough to figure out” how to avoid paying unemployment benefits. (GC Exh. 3.)

Grossman and Ledman had sent copies of their email exchange to Borucki’s email account at the clinic. He testified that he read Grossman’s draft letter to Bardwell on January 10 and that, “it looked good to me. I didn’t have anything to add.” (Tr. 81.) He told Grossman that he was satisfied with the language of the draft and that she should send the letter to Bardwell.

Having secured the approval of Ledman and Borucki, Grossman “put the letter in a sealed envelope on [Bardwell’s] desk.” (Tr. 31.) Bardwell testified that he found it there on January 12. A review of the contents of the letter reveals that it was an articulate expression of the staff’s unhappiness with the pay cut, coupled with an effort to suggest specific alternatives. Thus, Grossman began by noting that the employees “enjoy working here,” but had “serious concerns” about the pay cut. (GC Exh. 2.) She went on to express an understanding that the clinic was “financially in distress,” but asserted that “other alternatives outside of cutting our wages . . . should be exhausted first.” (GC Exh. 2.) She then set out four specific proposals for reducing the clinic’s operating expenses along the lines that had been discussed among the employees. She concluded by asking Bardwell to “please take our suggestions under advisement,” noting that the staff would also be “happy to sit down together as a collective group and brainstorm or participate in ways to help this clinic save money—other than cutting wages.” (GC Exh. 2.) The letter was signed as being from, “The Concerned NUC Staffers.” (GC Exh. 2.)

It should be noted that the letter was sufficiently pointed to warn Bardwell that, “in order to maintain our quality of life we may be forced to find employment elsewhere,” and also sufficiently critical as to advise him that “we are frustrated that such a drastic decision was made without our input, on extremely short notice, and without exhausting other avenues of revenue saving.” (GC Exh. 2.) Nevertheless, I find it clear that the tone of the letter was, at all times, respectful and civil. Grossman took pains to express the staff’s desire “to continue working here and help make this a successful clinic,” while indicating that nobody preferred the alternative of seeking other employment. (GC Exh. 2.)

Bardwell testified as to his immediate reaction on reading the letter:

I was upset. Not so much the content of the letter upset me, because it—I knew there would be some fallout—I mean some reaction, obviously, with the pay cut—but the fact that it was anonymous I guess is what upset me the most.

(Tr. 250.) Bardwell conceded that his response was to conduct a series of meetings with individual employees.

Various employees testified that Bardwell did meet with them to discuss the letter. Borucki reported that he was scheduled to have one of his regular meetings with Bardwell on January 12. He testified that, at this meeting, Bardwell was “obvi-

ously upset” and asked “if I knew who drafted the letter.” (Tr. 81.) By contrast, Bardwell testified that he never asked Borucki if he wrote the letter.

As is often true in lawsuits, both of these very highly interested witnesses were somewhat evasive in describing this conversation. Thus, when Borucki was asked how he responded to Bardwell’s inquiry regarding authorship of the letter, he reported that he did not recall his “exact response to that.” (Tr. 81.) Given the stressful nature of the discussion and its importance to both parties, I find this answer to be unpersuasive and difficult to credit. Similarly, by reporting that he never asked Borucki if he wrote the anonymous letter, Bardwell engaged in evasion by failing to address the real issue posed in Borucki’s account. Thus, it will be recalled that Borucki never claimed that Bardwell asked him if he wrote the letter. Bardwell’s description of the meeting never addressed the actual question that Borucki claimed he was asked, which was if he knew who did author the letter.⁵

Whatever the precise contours of the discussion, I find Borucki’s assertion that Bardwell interrogated him regarding authorship of the letter is credible and consistent with Bardwell’s own testimony that he conducted a series of employee meetings about the letter. The reliability of Borucki’s account is also greatly enhanced by the evidence that I am about to describe regarding the contents of Bardwell’s other meetings with employees concerning the letter.

Among those other meetings regarding the letter was a conversation between Bardwell and Nurse Manager Landon in January. Landon testified that Bardwell showed her a copy of the letter and asked if she knew who wrote it. She reported that she told him that, “it was probably Jennie, Michael, and Gina.” (Tr. 147.)

Bardwell conducted a particularly telling meeting regarding the letter on January 13. He was working at the clinic with Nurse Ledman and called her into his office to discuss the pay cut issue and the anonymous letter. Ledman described their conversation as follows:

[H]e asked me about the conversations from the Friday before and if I was partaking in any of those. . . . And he told me that these conversations are toxic and we’re not supposed to be talking about the pay cut. . . . And then he asked me if I knew about the letter, and I said that I didn’t. And then he showed me the letter, and—and I read the letter. And he asked me if I knew who wrote the letter . . . and I said I didn’t. And then he said that he was upset about the letter and that he knew that Jennie wrote the letter because it seemed like her vocabulary or her style of writing or something like that. And I said that I didn’t know. And then he said that he didn’t appreciate the anonymous nature of the letter and the fact that there are threats in the letter.

⁵ This is significant because Bardwell clearly testified that, on reading the letter, he assumed from the writing style and choice of wording that it had been written by Grossman. Thus, it is far more likely that Bardwell had asked Borucki if he knew who wrote the letter, rather than asking if Borucki, himself, had written it. I credit Borucki’s testimony as to this point.

(Tr. 176–177.) With regard to Bardwell’s final assertion that the letter contained threats, it is important to recall that any such “threat” was merely that the employees would seek other employment. There was nothing in the nature of a personal threat to Bardwell.

Significantly, Bardwell did not dispute any of the details of Ledman’s description of this conversation. On cross-examination, counsel for the General Counsel inquired as to whether he had “asked Gina Ledman if she had seen the letter,” to which his terse reply was, “[y]es.” (Tr. 266.) I credit Ledman’s detailed and uncontroverted account of the contents of the conversation between them.

It is also undisputed that Bardwell met with Grossman to discuss the letter. On examination by his own counsel, he was asked if he “ever had a conversation with [Grossman] specifically asking her if she wrote the letter?” (Tr. 252.) He responded affirmatively.

While there is no doubt that Bardwell interrogated Grossman about the letter, the testimony and documentary evidence was in conflict about the precise circumstances. For example, the record contains a corrective action form dated January 14 which purports to be issued by Bardwell to Grossman. It is characterized as a verbal warning for two disciplinary issues which are described as, “1) Letter received unsigned, presumably from Jennie re: payroll deduction 2) ‘toxic talk’ + negativity.” (GC Exh. 5, p. 1.) Grossman is directed to “reduce ‘negativity + toxic talk. (Remove herself from negative discussions) Do not participate!’” (GC Exh. 5, p.1) [All punctuation in the original.] Although the corrective action form has signature lines for both the employee and the owner, the only signature on it was Bardwell’s.

In addition to this corrective action form, Grossman’s personnel file contained a typed description entitled, “Discussion with Jennifer Grossman, PA-C.” (GC Exh. 5, p. 3.) This document is also dated January 14, and it states:

I asked Jennie if she had written the letter, and she said, “I’m not saying I did and I’m not saying I did not write the letter.”

....

I polled other employees who were present at the meeting wherein the salary cut was announced, and each person denied writing a letter. Ms. Grossman was the only employee who did not deny writing the letter.

(GC Exh. 5, p. 3.)

Turning to the testimony regarding the events surrounding these documents, Bardwell reported that he met with Grossman on January 14. Surprisingly, when asked if he issued the verbal warning to her on that date, he limited his response to a statement that, “I believe so.” (Tr. 255–256.) Given his authorship of the corrective action document, this seems a peculiarly vague formulation.

As to Grossman, she vehemently denied meeting with Bardwell or being issued any discipline on January 14. When asked about the written documentation of such an event, she stated that the first time she had seen the corrective action form was subsequent to her termination from employment when she demanded a copy of her personnel file. It was contained among those papers.

In contrast with the rather puzzling evidence regarding events on January 14, there is no dispute in the evidence concerning another meeting between Bardwell and Grossman on January 18. Grossman testified that she was on duty in the office and Bardwell came in to ask her, “if I wrote the letter, and I said that I wasn’t going to say whether I wrote it or not, just that I agreed with what was in the letter.” (Tr. 32.) Regarding the contents of the letter, Bardwell opined that making suggestions about the Employer’s plans to address a financial shortfall, “isn’t our place; it’s his place since he’s the owner.” (Tr. 32.)

Grossman’s account of this meeting indicates that Bardwell raised a second topic, explaining to her that Parker had informed him that, “we were talking about the pay cut.”⁶ (Tr. 32.) He went on to warn her that:

[I]t’s toxic and it’s negative and that we can’t talk about it, we can no longer whisper—we, meaning Gina, Mike and myself, can no longer whisper or go into offices and close the door—that it was creating a negative environment and that it’s not going to be tolerated.

(Tr. 32.)

Grossman further recounted that she was unaware that she was being given any form of discipline arising from this discussion. It was only after she obtained her personnel file that she discovered that Bardwell had given her a second writeup which was placed in her file.

In fact, the corrective action form that Grossman found in her file for that date serves to entirely corroborate her testimony regarding this meeting. In the first place, like the similar form dated January 14, this one has signature lines for both the employee and the owner but is only signed by Bardwell. It is characterized as a “verbal warning” for the offenses of, “toxic talk—negativity.” (GC Exh. 4, p. 1.) The form lists five corrective steps that Grossman must take:

“1. No more negativity or ‘toxic talk’ 2. No closed door meetings 3 No whispering 4. Come to Dr. Bardwell to discuss issues or concerns rather than the staff 5. Walk away from toxic discussions.” (GC Exh. 4, p. 1.)

What is clear about these interactions between Bardwell and Grossman is that the overwhelming testimonial and documentary evidence establishes that Bardwell did interrogate Grossman regarding the authorship of the anonymous letter and did direct her to refrain from discussions with her coworkers regarding the terms and conditions of their employment.

There can be no doubt that the Employer’s pay cut and the staff’s unhappiness with this action caused what Landon described as a change in “tone” at the clinic. (Tr. 148.) For example, Kim Bardwell, the owner’s wife and clinic receptionist, testified that she was assigned to work with Grossman, Borucki, and Ledman on January 17. It was the first time she had

⁶ Bardwell testified that, sometime between January 14 and 18, both Parker and Landon had told him that Grossman was whispering and speaking behind closed doors for prolonged periods with Borucki and Ledman. He conceded that he believed that a topic of their discussions was the pay cut and that he also had concluded that they were the only three employees engaged in such discussions.

shared a shift with these three employees. She reported that the staff interactions made it a “difficult day” for her. (Tr. 205.) Afterward, she told her husband, “about the whispering and how it made me feel paranoid.” (Tr. 206.) In evaluating her testimony, I found Kim Bardwell to be a fairminded witness. This was illustrated by her caution in explaining that, “[n]othing that I saw involved patients. But it felt . . . like I was being left out.”⁷ (Tr. 206.)

On January 19, the day after Bardwell’s meeting with Grossman, he conducted similar conferences with both Borucki and Ledman. Turning first to Borucki, there is no dispute about this event. As Borucki described it, Bardwell called him into the office and informed him, “that there was a lot of toxic talk around the office and negativity and stated that he was going to write me up for these closed-door meetings and toxic talk.”⁸ (Tr. 82–83.) Bardwell instructed him, “not to discuss, have any of these whispering conversations or discussions during work time.” (Tr. 83.) Ominously, Bardwell added that, “this was going to stop or else.” (Tr. 84.)

In his own testimony, Bardwell confirmed the essential details of his conversation with Borucki. He agreed that he instructed Borucki to refrain from toxic talk. On cross-examination, he acknowledged that he had asked Borucki if he had been engaged in discussions about the pay cut. On hearing this, counsel for the General Counsel posed the following question: “And after Mr. Borucki admitted he had [been talking about the pay cut], isn’t it true that you then told him he needed to be above the negativity?” Bardwell replied, “[y]es.” (Tr. 274.)

If any additional corroboration of this event were required, it would be found in the corrective action form issued by Bardwell to Borucki during the meeting. The reported disciplinary problem was “toxic talk/negativity.” (GC Exh. 9, p. 1.) The expected improvement in conduct was, “[n]o more closed door meetings, whispering, or negativity.” (GC Exh. 9, p. 1.) Most importantly, the form listed specific consequences if there was no improvement. Those consequences were, “1 Reduction in salary or 2 Change to straight commission for sales rather than salary.” (GC Exh. 9, p. 1.) [Punctuation in the original.]

Ledman described a very similar meeting with Bardwell on the same day as Borucki’s session. She testified that Bardwell called her into the office and told her:

that Wanita [Parker] and Kim, his wife, were telling him that we were whispering and how many times we were whispering each day and that we weren’t allowed to have whispering conversations because nobody would know exactly what we were talking about. So he wasn’t saying that we were talking about the pay cut, but he was saying that if we were talking

about the pay cut nobody would know and so they felt like they were either being left out of the conversation or they were—or that we were talking about something that we weren’t supposed to be talking about.

(Tr. 179.)

The intensity of Bardwell’s concern regarding what he viewed as toxic talk was illustrated on the next day when he was on duty at the clinic along with Borucki and Ledman. In the course of the day, he observed Borucki and Ledman conversing at the nurses’ station. Both employees testified without contradiction that Bardwell chided them, “Come on guys. No toxic talk.” (Tr. 88.) Ledman told him that they were whispering about a patient’s X-ray results. On hearing this, Bardwell told them, “Oh well, then you can whisper.” (Tr. 180.)

Borucki also testified regarding another exchange with Bardwell later that day or on the following day. He reported that Bardwell again warned that, “he didn’t want me to get caught up in the toxic talk or the negativity that was going around the clinic.” (Tr. 88.) Borucki attempted to explain that, “the letter was not meant to be negativity, it was supposed to just give alternatives to the pay cut.” (Tr. 88.) He added that the size of the pay cut was “very drastic.” (Tr. 88.) In response, Bardwell rolled his eyes and said, “Come on, Mike.” (Tr. 88.) He also reiterated that he did not want Borucki to become involved in “this toxic talk stuff.” (Tr. 88.) It should be noted that Bardwell did not dispute the veracity of this testimony.

On approximately the same day as this warning to Borucki, Bardwell had a discussion with Ledman that offered insight into his evolving response to employees’ disaffection with the pay cut decision. The conversation began when Bardwell called Ledman into the office. He asked her to evaluate Borucki’s job performance. He continued with this theme by making inquiries about Ledman’s own ability to assume some of Borucki’s existing job duties. Next, he warned her that other employees were reporting continuing “whispering.” (Tr. 181.) He then made a prediction that he was shortly to effectuate, observing that, “there’s going to be a lot of changes around here, and, you know, things are going to change pretty soon.” (Tr. 181.) As with many other key conversations, Bardwell did not dispute Ledman’s account of this conversation.

On January 26, Bardwell took his first concrete step regarding Borucki’s status with the Employer. This consisted of the preparation and communication to Borucki of his first-ever performance review. Thus, although Borucki had been employed by the clinic for 21 months and had been promoted during the course of those months, he had never before received a written evaluation.⁹ Nor was there any evidence that any other employee received such an evaluation during the same time period. For that reason, I do not credit Bardwell’s rather lame explanation that January, “happened to be also the month that we started doing the reviews.” (Tr. 223.) Instead, I credit Borucki’s testimony that, during the course of presenting him with

⁷ One can only sympathize with Bardwell’s awkward position in this situation given the obvious unhappiness of her coworkers caused by her husband’s decision to impose a substantial and immediate reduction in their compensation.

⁸ Counsel for the Employer asked Borucki if he knew what Bardwell meant by toxic talk and Borucki explained that he “assumed it had to do with, you know, the pay cut, because [Bardwell] didn’t start really using that term until after the letter, he was given the letter. So I just assumed that was what he was talking about.” (Tr. 165.)

⁹ It should be noted that Borucki was hired in April 2009 and was promoted to his current position in March 2010. Thus, a performance evaluation in January 2011 did not coincide with any sort of anniversary date.

his evaluation results, Bardwell told him that, “he was tired of the toxic talk and the negative atmosphere in the clinic and that it needed to stop.” (Tr. 91.) I conclude that this statement reveals that actual motivation for the performance evaluation.

My conclusion regarding the motivation for the performance evaluation is underscored when one examines its contents. Generally speaking, the scores assigned by Bardwell to Borucki’s job performance are consistent with a satisfactory report. The only major criticism was an admonition that Borucki, “needs to work on appropriate staff interaction (i.e., losing temper) + not getting involved in ‘toxic talk’ or negativity.” (GC Exh. 10, p. 4.) In my view, this reflects the actual focus of Bardwell’s concern and the true reason for the issuance of the evaluation at this particular stage in Borucki’s career.

Although I have concluded that the essential motivation for the issuance of this evaluation was in response to Borucki’s activities related to the pay cut, it is necessary to review the remainder of the evaluation as it will serve to shed important light on the motivation for other actions taken against Borucki. In particular, it is important to examine Bardwell’s recorded perceptions regarding all areas of Borucki’s performance, keeping in mind that Bardwell chose to terminate Borucki’s employment just 11 days later. It will be seen that there is nothing in his rating of Borucki that hints at such an outcome less than a fortnight in the future.¹⁰

Borucki’s evaluation form notes that he has two separate job duties, “Marketing Support Specialist” and “Radiation Supervisor.” (GC Exh. 10, p. 1.) In proceeding to provide ratings for specific job functions within these two broad categories, Bardwell offered penetrating insight into his opinion regarding certain of Borucki’s duties that will figure in his later efforts to justify Borucki’s discharge. For example, Borucki was assessed as having met his job requirements in the area of recruiting new businesses for the clinic and met requirements, “with commendations” for making telephone contacts with corporate clients. (GC Exh. 10, p. 3.) His compliance with company policies was found to consistently exceed requirements, and his attendance was determined to be in compliance with company rules. His was also found to be consistently in compliance with such broad evaluation categories as, “[u]se of work time and availability; organization of work, follow through, productive use of time; attendance, timeliness, use of breaks.” (GC Exh. 10, p. 5.) As to his work in the radiation department, the evaluation concludes that, “Mike does a great job supervising the Radiology Dept.” (GC Exh. 10, p. 4.) Finally, Borucki’s overall score is expressed as, “Consistently Meets Requirements.” (GC Exh. 10, p. 9.)

Numerous witnesses testified at length regarding events that took place during the work shift on January 31. The comple-

ment of employees that day consisted of Grossman as medical provider, Ledman as nurse, Borucki as radiation technician, and Kim Bardwell as receptionist. Significantly, this was Ledman’s last day at work as she had tendered her resignation approximately a week earlier. Grossman planned to commemorate Ledman’s departure by bringing three slices of cheesecake to work.

The testimony of all concerned, indicates that the behavior of Grossman, Ledman, and Borucki proved to be frustrating and hurtful to Kim Bardwell. As indicated by the lack of a fourth piece of cake, she was clearly excluded from the social aspect of the work environment on that date. As she put it, “the whole day was difficult.” (Tr. 202.) I have already observed that Bardwell was a careful witness, even when reporting events that had aroused her ire. Her concern with accuracy was illustrated in her description of what she felt that day:

[W]henver they didn’t have a patient that they were working with, [they] were either congregating in the nurses’ station or congregating in the break room with the door shut. . . . [T]he whole day, I just felt left out. I felt like I was being ignored, unless it had—you know, unless it was work-related.

(Tr. 202.) She confirmed that, among her attempted responses to this exclusionary behavior, she “tried to get as close to them as you could to listen.” (Tr. 207.) [Counsel for the General Counsel’s phrasing.]

Borucki, Grossman, and Ledman’s cliquish behavior and Kim Bardwell’s angry and distressed reaction to it, culminated in a controversy regarding the treatment of a patient who arrived at the clinic later that day. Matters began when this patient called the clinic, stating that he had smashed his hand in a car door. He was concerned both about the injury and about the cost of treatment. Bardwell went to find the medical staff in order to get an estimate from them as to the costs of care. She encountered them in the break room and described the patient’s inquiry. She testified that Grossman told her that the patient would need an X-ray. In testimony that includes a further insight into her sense of hurt, Bardwell reported that, “she didn’t give me any more information; they were busy.” (Tr. 197.) Bardwell computed the fees for a clinic visit and X-ray and gave the patient the resulting total as the cost estimate for the treatment.

Ten minutes later, the patient arrived at the clinic in the company of his girlfriend. There appears to be no doubt that the patient’s presentation was highly unusual. As Bardwell explained, he was “very upset” and “talking loudly.” (Tr. 198.) Although the waiting room had been empty prior to the patient’s arrival, other patients came in shortly thereafter. Bardwell decided to place the finger injury patient in the trauma room. She conceded in her testimony that she did not do this out of concern for his medical condition, but rather due to his loud conduct and unusual demeanor. Indeed, she agreed that she could not observe his injury at all since he was holding his injured finger in his other hand. She asked him if it was bleeding and he reported that it was not. After placing the patient in the trauma room, she gave his girlfriend the paperwork to complete since his hand was incapacitated.

¹⁰ I recognize that there could certainly be circumstances where an employer would give a good rating to an employee and then discharge that employee immediately thereafter. For instance, an otherwise competent employee could be caught engaging in embezzlement shortly after receiving a satisfactory job evaluation. Thus, it is important to note that there is no claim that Borucki engaged in some substantial, hitherto unknown, form of misconduct that superseded the overall satisfactory performance rating that Bardwell awarded him mere days prior to his abrupt termination.

At this point, Bardwell returned to the break room where she found the other three staff members eating the cheesecake.¹¹ Nursing hurt feelings and having just dealt with a difficult patient, Bardwell entered the break room appearing, in Grossman's words, "irate."¹² (Tr. 53.) She told the staff, "There's a patient in the trauma room. You guys need to get up and get back to work." (Tr. 53.) Grossman interjected, "Wait. Stop . . . Why is he in the trauma room?" (Tr. 53.) She explained that she posed this question to Bardwell, "because I needed to know what I was going to be walking into. Is this a chest pain? Is that a DVT [deep venous thrombosis]? What is this?" (Tr. 53.) Bardwell responded that she placed him in the trauma room because he was in pain. Grossman asked what kind of pain and Bardwell said, "[h]e has finger pain. Get back to work."¹³ (Tr. 54.)

Both Ledman and Grossman testified that, immediately upon Bardwell's departure from the break room, they got up to attend to the patient. They went into the trauma room where Grossman conducted a preliminary assessment.¹⁴ She testified that, "[h]is finger was normal . . . It looked completely normal. He was calm, sitting on the gurney table. He wasn't writhing in pain."¹⁵ (Tr. 54.) He told her that he had jammed his finger in a door and had already taken ibuprophen. Grossman explained that the next step would be an X-ray. Given her evaluation of his condition, she determined that this could be performed once he had been registered and his medical chart had been prepared. As she put it, "he's not acute, he can wait to be registered." (Tr. 55.)

Grossman reported that the normal office procedures were then accomplished. Bardwell completed the registration process and Ledman took the patient's vital signs, medical history, and allergy information. At that point, Grossman conducted "a more thorough exam than what I did initially." (Tr. 55.) She ordered the X-ray, which revealed that the finger was not broken. Grossman placed a splint on the finger and sent the patient

home. She testified that the patient did not voice any complaints to her.

Bardwell reported that the patient did voice dissatisfaction to her. As she put it, he was "furious, and still in pain when he left." (GC Exh. 8.) While I do not doubt that the patient may have been unhappy with the pain caused by his injury, it also clearly appears that a significant source of his anger was the size of his medical bill. This amount was well in excess of the estimate that he had been given over the telephone by Bardwell. The discrepancy was the failure to include the cost of the "finger splint application" in addition to the treatment charge and the X-ray. (GC Exh. 8.) Bardwell and Grossman each attempted to deflect blame from themselves for this underestimate. I would only note that it would have been very difficult to provide an accurate estimate over the phone. It is unclear to me how anyone would have been able to predict the need for the application of a splint prior to observing the condition of the finger. In fact, the evidence established that the clinic subsequently changed its procedures to decline to provide detailed cost estimates to future patients over the telephone.

On returning home after her shift, Ms. Bardwell wrote an account of the events that had caused her concern during the day. She reported that Borucki, Ledman, and Grossman took eight breaks, including lunch and dinner. Three of those breaks involved "whispering," while another three involved "door [being] shut." (GC Exh. 8.) She then described the events involving the finger patient. When asked why she took the trouble to create this document, she explained that it was, "because the whole day was difficult." (Tr. 202.)

After drafting her account of the day's events, she showed it to her husband. She told him that she felt the report should be included in Ledman's personnel file in the event she reapplied for work at the clinic as she had done after quitting once before. Dr. Bardwell asked her to expand her original report to "be more specific," because, "what he was seeing, not only about Gina Ledman, but about all three of them, was very discouraging."¹⁶ (Tr. 203.) Bardwell's revised report is the document placed into evidence as General Counsel's Exhibit 8.

One may readily infer that the impact of his wife's distress over what she perceived as misconduct by Borucki, Ledman, and Grossman had a direct effect on the employment decisions made by Dr. Bardwell over the course of the following days. In fact, the first such decision was announced to Borucki on February 3. Borucki testified that, on that date, he was feeling ill and had arranged to switch shifts with another radiology technician. During the course of the day, he received a telephone call from Bardwell, "who was upset and said that he needed me to come in and work that shift because he wanted to discuss sales and marketing stuff." (Tr. 95.)

Borucki reported to the clinic at 2:30 p.m. On his arrival, Bardwell called him into the office to inform him that, "he no longer wanted me to do sales and marketing, that he couldn't trust me, and that the clinic wasn't doing very well and he had to make cuts and so he was going to take over that position." (Tr. 96.)

¹⁶ Dr. Bardwell confirmed that he asked his wife to add additional details to her written account.

¹¹ There was nothing improper about this since it will be recalled that Bardwell confirmed that, prior to the arrival of the finger patient, the waiting room was empty.

¹² Bardwell conceded that, on entering the breakroom, she was "upset." (Tr. 201.)

¹³ Ledman testified that Bardwell provided a more sarcastic response to Grossman's questions about the patient's condition, asserting, "Well, I didn't know it was my job to be a triage nurse." (Tr. 183.) As will shortly be described, Bardwell, herself, wrote an account of these events later that evening. She noted that, "Jenni began questioning my judgement in rooming the patient in 'Trauma.' At that point, I told each one of them to get to WORK." (GC Exh. 8.) [Capitalization in the original.]

¹⁴ Bardwell appeared to believe that there was some additional period of delay before the patient was examined by Grossman or Ledman. I conclude that Ledman and Grossman's testimony that they made an immediate preliminary examination is credible and Bardwell's contrary assumption was a product of her overall distress regarding the events of this workday.

¹⁵ Ledman confirmed Grossman's account of the patient's condition reporting, "his finger wasn't bleeding or it wasn't split, wasn't red. It was nothing, just a stubbed finger. And so he wasn't in any distress. I had taken his vital signs and they were fine." (Tr. 184.)

In his own testimony, Bardwell confirmed that he had decided to demote Borucki because, "I felt that he was over time not being completely honest with me." (Tr. 233.) As to particulars, he cited his unhappiness about Borucki's handling of the marketing of influenza vaccines. He reported that, in November 2010, the clinic found itself with a large inventory of unused flu shots. He instructed Borucki to contact the clinic's "established" corporate customers to invite them to offer flu shot programs for their employees. (Tr. 232.) None of the customers availed themselves of the opportunity.¹⁷

Bardwell testified that he became "suspicious" of Borucki's efforts to market the flu shots. (Tr. 234.) As a result, he asked Borucki to provide him with a list of customers. Borucki furnished him with a list of "20 to 30 companies." (Tr. 234.) Bardwell chose to contact four of the listed firms to verify Borucki's sales efforts. He testified that the individuals he spoke with at three of the companies could not recollect whether Borucki had contacted them about the flu shots. The fourth company was an organization named Tru Vue. Bardwell testified that the person he spoke with at Tru Vue told him that Borucki "did not contact us in any way, shape, or form." (Tr. 235.) Bardwell did not provide any testimony regarding when he had this conversation.

On the day after the demotion meeting, Bardwell sent Borucki a formal notification that his "sales, marketing, and radiology technician position . . . is being reduced to radiology technician alone." (GC Exh. 11.) The letter advised that this would represent a "switch from salary to an hourly rate." (GC Exh. 11.) No rationale for this demotion was cited in the document.

Very shortly after his decision to demote Borucki, Bardwell altered course and decided on a more drastic approach. Just 2 days after writing the letter of demotion, Bardwell called Borucki into his office and discharged him from employment. Borucki reported that Bardwell informed him of his termination on February 6, immediately after he had reported to the clinic to begin his shift. He testified that Bardwell explained that,

he was letting me go because he did not, he could not trust me and he needed somebody that he could trust . . . and he also said, you know, he was sick of the toxic talk and closed-door meetings.

(Tr. 98.) Borucki asked why Bardwell did not trust him and was given, "a couple of examples." (Tr. 99.)

The first example provided by Bardwell related to an incident in August 2009. At that time, Borucki and several other clinic employees were attending an off-site training session. Bardwell gave Borucki permission to purchase dinner for the attendees. Afterwards, Borucki told Bardwell that the cost of

¹⁷ Borucki provided a logical explanation for the complete lack of success in this endeavor. He explained that the decision to offer such flu clinic programs was taken too late in the season. By November, employers had typically completed whatever arrangements they intended to make to cope with the influenza season. This testimony was uncontroverted.

the meal was \$65. However, he submitted a reimbursement request in the amount of \$75.¹⁸

The second example cited by Bardwell concerned an incident that had occurred 6 months ago. At that time, Borucki had used the company credit card to purchase a case of bottled water for the clinic without Bardwell's prior consent.¹⁹

After this discussion about the rationales for Borucki's discharge, Bardwell asked him for his password to his office email account. After providing this information, Borucki asked Bardwell to give him a written termination letter. In response, Bardwell sent him an email that afternoon advising that, "as of 10:00 am today 2/6/11, your employment for Northfield Urgent Care has been terminated." (GC Exh. 12.) As with the demotion letter, no reason for the termination is cited in the email.

It should be noted that Bardwell did not testify in any detail regarding this meeting. He did, however, prepare a written account of it. In that account, he reported that he fired Borucki for "repeated dishonesty." (R. Exh. 2, p. 8.) He also listed the instances of dishonesty involved. These consisted of calling in sick when he was not ill, the training meal reimbursement, the purchase of water, and the failure to contact Tru Vue regarding flu shots.

Having obtained the password, Bardwell now proceeded to examine Borucki's work email account. In so doing, he reported that he was dismayed to find Grossman's January 8 email to Ledman and Borucki and Ledman's reply. When asked why these emails caused such dismay, he explained that it was because of the discussion about quitting and receiving unemployment and also because, "I had confirmation that Jennie had written the letter." (Tr. 282.) After reading the emails, Bardwell forwarded them from Borucki's email account to Grossman's own work and personal email accounts.

Early the next morning, February 8, Borucki sent a text message to Grossman, telling her to check her email. When she did so, she found the forwarded material from Bardwell. She reported to the clinic at 8 a.m. to begin her workday. As she sought to obtain her timecard from her file folder, she found that it contained another copy of the same email exchange.

Grossman proceeded into the office and found Bardwell seated there with yet another copy of the email exchange on his desk. He asked her, "[w]hat do you have to say about this?" (Tr. 48.) She replied that she believed they had already discussed the matter. He responded that, "[f]rom what it looks

¹⁸ Borucki went on to explain that he had forgotten to tell Bardwell about the tip for the server. This was the reason for the higher request for reimbursement. He also testified that, when asked about the different amount, he told Bardwell the reason for the discrepancy and Bardwell said that everything was "okay." (Tr. 100.) Borucki's account is corroborated by the fact that it is undisputed that no disciplinary action was taken regarding this incident.

¹⁹ Once again, Borucki explained this event, reporting that Grossman had told him that the clinic needed bottled water to offer to patients and asked him to purchase a case of it. She told him that, "it'd be fine to put it on the company credit card." (Tr. 101.) A week later, Bardwell had questioned him about it. On explaining the circumstances, Bardwell indicated that it was "fine," but instructed Borucki not to buy any water in the future. (Tr. 102.) As with the dinner reimbursement, the absence of any contemporaneous disciplinary action taken against Borucki serves to corroborate his account.

like here, it looks like insubordination to me.” (Tr. 48–49.) He added that, “[m]aybe I should suspend you without pay and benefits.” (Tr. 49.)

At this juncture in their tense exchange, Grossman left the office and returned in the company of Wanita Parker. Her intent was to have Parker serve as a witness to the conversation. Grossman then asked Bardwell, “[c]an you explain to me how I’m being insubordinate?” (Tr. 49.) He declined to respond, but simply left the office.

After a 10-minute interval, Bardwell summoned Grossman and Parker back into the office. He told Grossman, “[a]t this point I’m just going to terminate you.” (Tr. 50.) When she asked for the reason, he told her that it was, “[f]or insubordination.” (Tr. 50.) She demanded more information and Bardwell declined, telling her that, “I’ll let you know in 10 days.” (Tr. 50.) Under cross-examination, Bardwell did explain that by choosing to fire Grossman for insubordination, “I meant recurrent negative talk, whispering, and closed door meetings.” (Tr. 279.)

As promised, on February 17, Bardwell sent Grossman a formal written explanation of his decision to terminate her employment. He told her that:

Your misconduct was a serious violation of the standards of behavior that Northfield Urgent Care has a right to reasonably expect and because of your substantial lack of concern [for] employment. Specifically, without limitation, prior to February 8, 2011 you received several warnings regarding conduct of yours that violates expected standards of behavior. Additionally, and without limitation, on or about January 31, 2011 you failed to provide prompt medical care to a medical patient in physical pain.

(GC Exh. 7.) The parties agree that the reference to patient care involved the patient with the injured finger whose visit to the clinic has already been described in detail.

On April 13, Grossman filed an unfair labor practice charge based on events at the clinic. (GC Exh. 1(a).) She filed an amendment on May 16. (GC Exh. 1(c).) The Regional Director issued a complaint and notice of hearing on May 31. (GC Exh. 1(e).) Grossman and Borucki have not been offered employment at the clinic at any time since their discharges.

B. Legal Analysis

The General Counsel alleges that Dr. Bardwell’s response to staff dissatisfaction over his pay cut decision consisted of a number of unfair labor practices, including adverse personnel actions involving Borucki and Grossman. Ultimately, the contention is that Bardwell unlawfully discharged those two employees in response to their protected concerted activities in protest against the reduction in their compensation. I will assess the Employer’s actions in chronological order, with particular attention to his ultimate decision to terminate the two employees.²⁰

²⁰ There is an additional allegation that the Employer promulgated, maintained, and enforced a handbook rule that unlawfully prohibited employees from discussing their compensation with each other. The Employer concedes this issue. (See R. answer to complaint, par. 4(z) and R. Br. at p. 7 which admits that the handbook provision contained

Before engaging in the evaluation of the Employer’s behavior, I must address an essential preliminary consideration. The Acting General Counsel’s theory as to most of the alleged unfair labor practices centers on his view that the Employer was responding vigorously and unlawfully to the protected concerted activities of its employees. Absent a conclusion that those employees had actually been engaged in such protected concerted activities, there would be no basis for the Board to regulate management’s conduct.

It must be recognized that, typically, the issue of protected concerted activity will arise in the context of employees’ efforts to organize or assist in the functioning of a labor union. In this case, there is no evidence that the clinic’s staff ever sought to create or affiliate with any labor organization. Despite this, it is well established that the Act’s protections extend beyond the context of labor union organizing.²¹ This is evident from the language of Section 7 of the Act which provides that employees shall possess “the right of self-organization . . . to engage in other concerted activities for the purpose of . . . mutual aid and protection.” This right is enforced through the mechanism of Section 8(a)(1) which prohibits employer interference, restraint, or coercion of employees who are exercising their Section 7 rights.

The Board’s recognition of the Act’s protection of employees’ activities that do not involve labor unions was explicitly endorsed by the Supreme Court in *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962). In that case, employees of a foundry were not represented by any union. Nevertheless, they chose to walk off the job as a group in order to protest the lack of heat in the plant during a wintertime cold spell. The employer fired them for violating a company rule that prohibited unauthorized departures from work. Management argued that the employees’ concerns were merely “gripes,” and that it was already working to have the furnace repaired at the time of the walkout. Both the Board and the Supreme Court ordered the reinstatement of the discharged employees. As the unanimous Court explained, the workers had “no bargaining representative and, in fact, no representative of any kind to present their grievances to their employer. Under these circumstances, they had to speak for themselves as best they could.” 370 U.S. at 15. In so doing, they were entitled to the protection of the Act.²² As

“prohibited language.”) Nevertheless, I will discuss the issue briefly at the conclusion of my legal analysis.

²¹ These additional protections afforded by the Act are often invoked in settings that are far removed from the typical labor union case. For example, on my own docket, I have addressed these issues in a case involving investment consultants for a large financial institution in *Citizens Investment Services Corp.*, 342 NLRB 316 (2004), affd. 430 F.3d 1195 (DC Cir. 2005), and in a recent case that I will discuss in this decision due to its presentation of similar analytical issues arising out of the discharge of hair stylists at a salon and day spa, *Salon/Spa at Boro*, 356 NLRB 444 69 (2010).

²² The Court also declined to limit such protection to situations where it found the employees’ actions to have been reasonable. Thus, it took note of the fact that the walkout occurred at the same time the employer was already acting to fix the furnace problem and that this, arguably, rendered the protest “unnecessary and unwise.” 370 U.S. at 16. Nevertheless, the Court held that “the reasonableness of workers’ decisions to engage in concerted activity is irrelevant.” 370 U.S. at 16.

the Court explained, “an employer is [not] at liberty to punish a man by discharging him for engaging in concerted activities which §7 of the Act protects.” 370 U.S. at 17.

In effectuating the Supreme Court’s mandate, the Board has been careful to draw a distinction between individual acts and protected concerted activity. That the drawing of such distinctions is sometimes complicated is illustrated by the extensive citation necessary to describe the procedural history of the Board’s leading precedents on the topic: *Meyers Industries (Meyers I)*, 268 NLRB 493 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), and *Meyers Industries (Meyers II)*, 281 NLRB 882 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). In *Meyers II*, the Board held that the Act “requires some linkage to group action in order for conduct to be deemed ‘concerted’ within the meaning of Section 7.” 281 NLRB at 884. In assessing the nature of such concerted activity, the Board has cautioned that a pragmatic approach is required in order to properly assess the “myriad of factual situations that . . . will continue to arise in this area of the law.” *Meyers I*, 268 NLRB at 497. The key concept is that concerted action must “be engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself.” *Meyers I*, 268 NLRB at 497.

In this case, it is evident that Borucki and Grossman acted together and in further concert with a number of their coworkers. Thus, it will be recalled that Borucki, Ledman, and Grossman decided on the use of an anonymous letter to present their objections to the pay cut. Grossman drafted the letter and submitted it for editing and approval to Ledman and Borucki. They did approve the letter as drafted. These three employees also engaged in discussions of the pay cut and the appropriate response to it with a variety of additional staff members. These included Parker, Rodgers, Garry, Stowe, and Collins. Indeed, there was uncontroverted testimony from Ledman that Garry, Stowe, and Collins specifically expressed their belief that, “it was a good idea to write the letter.” (Tr. 175.) All of these discussions about the terms of employment and the proper means of conveying dissatisfaction with the pay cut constituted concerted activity among a group of employees. Their conduct was indistinguishable from that of the workers involved in *Champion Home Builders Co.*, 343 NLRB 671 (2004), enf. in pertinent part sub. nom. *Carpenters Local 1109 v. NLRB*, 209 Fed. Appx. 692 (9th Cir. 2006) (discharged employee had engaged in concerted activity when he discussed his concerns about the employer’s bonus policy with coworkers who agreed with his plan to write a protest letter to the employer).

Not all concerted activity is protected under the Act. Having acknowledged this, it must also be observed that a concerted

protest about a pay cut clearly falls within the Act’s ambit of protection. As the Board has held, “there can be no doubt that there is no more vital term and condition of employment than one’s wages, and employee complaints in this regard clearly constitute protected activity.” *Rogers Environmental Contracting*, 325 NLRB 144, 145 (1997), quoting *Cal-Walts, Inc.*, 258 NLRB 974, 979 (1981).

It is also true that concerted activity may be of an egregious character to such a degree that it loses protection. As the Board explained:

The protection that our Act provides employees verbal and written expressions during the course of protected activity is not without limitation. Otherwise protected activity may become unprotected if in the course of engaging in such activity, the employee uses sufficiently opprobrious, defamatory, or malicious language. Nonetheless, the most repulsive speech enjoys immunity provided it falls short of a deliberate or reckless untruth. [Citations and internal punctuation omitted.]

Honda of America Mfg., 334 NLRB 751, 752 (2001), enf. 73 Fed. Appx. 810 (6th Cir. 2003). In this case, there is absolutely nothing that would remotely suggest that the behavior of any of the employees transgressed the standards for protection. In particular, I have already characterized the letter written by Grossman and approved by Borucki as being both civil and respectful in its language and tone.

For these reasons, I readily find that the statements and actions that the clinic’s employees made in response to the pay cut were both concerted and protected within the meaning of the Act. As a result, adverse actions taken against those employees due to their participation in these activities would be unlawful under the Act.

I will now examine the Employer’s actions as they unfolded in response to the staff’s reaction to the announcement of the pay cut on January 4. To begin, the Acting General Counsel alleges that, shortly after receiving the anonymous employees’ letter on January 12, Bardwell unlawfully interrogated employees and unlawfully prohibited them from discussing the pay cut with each other.²³

Bardwell testified that he did conduct meetings with employees regarding the anonymous letter. Borucki testified that he had such a discussion with Bardwell on January 12. I have already noted that I credit much of Borucki’s account, including his assertion that Bardwell asked, “[I]f I knew who drafted the letter.” (Tr. 81.)

The Board does not hold that all questioning of employees by their employers is unlawful. Rather, it employs a totality of circumstances test to gauge the propriety of such interrogations.

This is pertinent to the present case because there is credible evidence to suggest that Bardwell’s adverse actions against employees arose in significant measure from his belief that their use of an anonymous letter was offensive and unreasonable. His assessment is immaterial in light of the Court’s refusal to become involved in such evaluations of protected activities. The Board continues to take the same position, declining to impose “a reasonable means requirement on employees’ concerted activity.” *Accel, Inc.*, 339 NLRB 1052, 1052 (2003) [internal punctuation omitted].

²³ As explained in her brief, counsel for the Acting General Counsel specifically alleges that Bardwell’s questioning of Ledman “[o]n about January 12,” was unlawful. (GC Exh. 1(e), pars. a, b, and c.) Actually, this incident took place on January 13. In addition, Bardwell interrogated Borucki and Landon on the same topic. Borucki’s questioning took place on January 12 and Landon was questioned sometime during the same month. All of these matters were fully litigated by the parties and any imprecision regarding dates in the complaint was not prejudicial. See *Pergament United Sales*, 296 NLRB 333, 335 (1989), enf. 920 F.2d 130 (2d Cir. 1990).

See *Rossmore House*, 269 NLRB 1176 (1984), *affd.* sub nom. *Hotel Employees Local Union 11 v. NLRB*, 760 F.2d 1006 (9th Cir. 1985). In conducting the assessment, the Board considers the so-called *Bourne*²⁴ factors, which it has described as follows:

Those factors are: (1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g., did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was the interrogator in the company hierarchy? (4) The place and method of interrogation, e.g., was the employee called into the boss's office? Was there an atmosphere of unnatural formality? The truthfulness of the reply.

Holiday Inn-JFK Airport, 348 NLRB 1, 4 (2006), citing *Rossmore House*, *supra*.

Regarding Bardwell's questioning of Borucki, the first factor cuts against the Employer as both Bardwell and Borucki confirmed that Bardwell was "upset" about the anonymous letter and appeared "obviously" so during the interview. (Trs. 250, 81.) Thus, the employee was confronted by an expression of employer hostility. The second factor, the nature of the inquiry, is strong evidence of unlawful conduct. In this regard, Bardwell's conduct mirrors that of the employer in *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003), *enf.* 387 F.3d 908 (D.C. Cir. 2004), where employees were questioned with "only one objective . . . to identify who had been engaged in the flier distribution." The nature of such a pointed inquiry is strongly probative of unlawful conduct. Likewise, the next factors support the same conclusion. Bardwell was the highest official of the employer and his questioning took place in the formal setting of his office. Regarding the final criterion, I decline to find against the employer as I did not credit Borucki's evasion in recounting his response to the questioning.

With particular emphasis on the prohibited purpose of the questioning, I conclude that the hostile interrogation of Borucki regarding the identity of the employee who had engaged in protected conduct that the employer deemed unacceptable was unlawful. While the Acting General Counsel has not specifically alleged that it constituted an unfair labor practice, I will consider it as evidence of the Employer's unlawful animus involved in the adverse actions taken against Borucki and Grossman within the next month. See *American Packaging Corp.*, 311 NLRB 482 fn. 1 (1993) ("law is well-settled that conduct that exhibits animus but that is not independently alleged to violate the Act may be used to shed light on the motive for, or underlying character of, other conduct that is alleged to violate the Act"), and *Meritor Automotive*, 328 NLRB 813 (1999) (same).

In addition to his interrogation of Borucki, in the same time frame Bardwell also asked Landon about the authorship of the letter. While Landon was the clinic's nurse manager, there is no contention that she was a statutory supervisor. As with Borucki, Bardwell's inquiry into authorship of the letter had the same unlawful purpose and his questioning was conducted with

the same degree of formality. It is true that Landon responded truthfully and without hesitation. This factor cannot be decisive as Landon was clearly sympathetic to Bardwell's position regarding the letter. The fact that the employee under interrogation is friendly to management's position cannot excuse an otherwise unlawful attempt to uncover protected activities in order to impose sanctions against those employees engaged in the activities. Bardwell's questioning of Landon is also evidence of his animus against the protected activities of his employees who were involved in drafting and presenting the anonymous letter regarding the pay cut.

Turning next to the specific conversation alleged to involve the commission of several unfair labor practices, the evidence demonstrates that, on January 13, Bardwell summoned Ledman into his office. He interrogated her regarding two topics. She testified that he began by asking her if she had participated in employee discussions about the pay cut on January 7. Ledman added that, "he told me that these conversations are toxic and we're not supposed to be talking about the pay cut." (Tr. 176.) Next, Bardwell showed Ledman the anonymous letter and asked her, "if I knew who wrote the letter."²⁵ (Tr. 176.) Ledman told him that she did not know who wrote it. Bardwell then informed her that he was "upset" about the letter and that he knew that Grossman was the author, "because it seemed like it was her vocabulary or her style of writing." (Tr. 177.)

The Acting General Counsel contends that Bardwell's statements constituted three separate unfair labor practices consisting of two improper interrogations²⁶ and an unlawful directive to Ledman that she refrain from discussing the pay cut with coworkers. (See complaint, GC Exh. 1(e), at pars. 4(a, b, and c).) Ledman's testimony about the meeting was uncontroverted and corroborated to a substantial degree by Bardwell's admission and by a pattern of similar conduct on his part. Finding her account to be reliable, I conclude that Bardwell did violate the Act by impermissibly questioning Ledman for the purpose of learning about the specific involvement of employees in protected activities with the objective of taking adverse actions against such employees. All of the *Bourne* factors support this conclusion.

In addition to the unlawful interrogation, Bardwell instructed Ledman to refrain from discussing the pay cut with her coworkers, characterizing such conversations as "toxic." (Tr. 176.) Discussing such topics with coworkers is protected activity within the meaning of the Act. See *Mesker Door*, 357 NLRB 591, 592 (2011) (employee engaged in "protected activity" when he discussed the union with a coworker). There was no contention that the Employer prohibited clinic employees from conversing with each other about topics unrelated to work. In such circumstances, the Board's policy is clear. As it

²⁵ In his own testimony, Bardwell confirmed that he asked Ledman about the letter. See Tr. 266.

²⁶ It is far from clear to me that an employer commits multiple unfair labor practices if its officials ask improper questions on more than one topic during the same interrogation. I will not engage in any detailed assessment of this manner of pleading since the remedial response to such employer misconduct is identical whether one characterizes the conduct as one offense or multiple offenses.

²⁴ *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964).

explained in the related context of a union organizing campaign:

[A]n employer may forbid employees from talking about a union during periods when the employees are supposed to be actively working, if that prohibition also extends to other subjects not associated or connected with their work tasks. However, an employer violates the Act when employees are forbidden to discuss unionization, but are free to discuss other subjects unrelated to work, particularly when the prohibition is announced or enforced only in response to specific union activity in an organizational campaign.

Jensen Enterprises, 339 NLRB 877, 878 (2003). Of course, the same rule would apply to employer regulation of discussions about other protected concerted activity such as the response to the pay cut involved in this case.²⁷ Bardwell's instruction to Ledman to refrain from discussions with fellow employees regarding the pay cut constituted a violation of Section 8(a)(1).

The complaint next alleges that, on January 14, Bardwell imposed unlawful discipline on Grossman in response to her protected activities. (See complaint, GC Exh. 1(e), at par. 4(e).) As to this contention, the documentary evidence is crystal clear. It consists of a corrective action form written and signed by Bardwell on January 14. It is characterized as a verbal warning issued in response to Grossman's "presum[ed]" authorship of the pay cut letter and involvement in "toxic talk + negativity." (GC Exh. 5, p. 1.) Grossman testified that, after her discharge from employment, she requested a copy of her personnel file. Once this was provided to her, she discovered this corrective action form among the paperwork. She reported that she had never seen it before. Whether disclosed to her at the time of its creation or simply inserted into her personnel file, the corrective action form constitutes disciplinary action as alleged by the Acting General Counsel. See *Altercare of Wadsworth Center*, 355 NLRB 565 (2010) (counselings and warnings constitute adverse actions if they are intended to form part of employer's disciplinary process).

It remains to be determined whether the discipline was unlawfully imposed in response to Grossman's protected activities. To the extent that it responds to her presumed involvement in preparing the anonymous pay cut letter, the answer is obvious. As a result, it is unnecessary at this point to interpret Bardwell's meaning regarding his concepts of toxic talk and negativity. I will address those topics later in this decision. It is clear that Bardwell did impose discipline on Grossman for her participation in producing the anonymous letter, a protected activity. The disciplinary action was unlawful.

The complaint next alleges that Bardwell engaged in three unfair labor practices on January 18, all directed at Grossman. Grossman testified that, on that day, Bardwell spoke to her in his office. He directed her attention to the anonymous letter and asked, "[I]f I wrote the letter, and I said that I wasn't going

to say whether I wrote it or not." (Tr. 32.) Bardwell confirmed this account in his own testimony. Grossman also reported that Bardwell informed her that Parker had reported that she had been "talking about the pay cut" with other employees. (Tr. 32.) He instructed her that:

it's toxic and it's negative and that we can't talk about it, we can no longer whisper—we, meaning Gina, Mike, and myself, can no longer whisper or go into offices and close the door—that it was creating a negative environment and that it's not going to be tolerated.

(Tr. 32.) In addition, Grossman testified that, while she was not given a copy during their meeting, she later discovered in reviewing her personnel file that Bardwell had written another corrective action form on this date. The form again characterized the discipline as a verbal warning for "toxic talk—negativity." (GC Exh. 4, p. 1.) It directed her to refrain from discussing conditions of employment with fellow workers.

I readily conclude that Bardwell's conduct on this date included the three violations as alleged. By asking Grossman if she had authored the anonymous letter, Bardwell engaged in a pointed and hostile effort to learn about her participation in protected activity in order to impose sanctions against her. All of the *Bourne* factors support such a conclusion, including Grossman's evasive response which was based on her entirely reasonable perception that a truthful answer would subject her to punishment. Similarly, for reasons previously outlined, Bardwell's order to Grossman to refrain from discussing the terms and conditions of her employment with her coworkers constituted an unfair labor practice within the meaning of Section 8(a)(1).

This leaves the assessment of the corrective action form which imposed a verbal warning for the offenses of "toxic talk—negativity." (GC Exh. 4, p. 1.) In assessing Bardwell's meaning, it is vital to consider the context. That context consists of Bardwell's contemporaneous discussion with Grossman during which he expressed his hostility toward her participation in the protected activities of writing and presenting the letter protesting the pay cut and discussing the pay cut with other employees.²⁸ From this, it is apparent that the verbal warning was an unlawful response to Grossman's protected activities in violation of Section 8(a)(1).

Next in chronological order, the complaint alleges that, on January 19, Bardwell committed seven unfair labor practices involving his interactions with Borucki and Ledman. Turning first to Ledman, she provided uncontroverted and credible testimony that Bardwell summoned her into the office and told her that Parker and Kim Bardwell, "were telling him that we were whispering and how many times we were whispering each day." (Tr. 179.) He informed her that, "we weren't allowed to have whispering conversations" because such conversations would cause other employees to feel excluded and would lead

²⁷ For another example in a healthcare context, see *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006) (employer violated the Act when supervisor overheard two nurses discussing upcoming union meeting at the nurses' station and told them, "that does not belong here").

²⁸ Later in this decision, I will explain my further conclusion that Bardwell's use of the concepts of toxic talk and negativity as workplace offenses represents an attitude of unlawful animus toward employees' protected concerted activities.

them to surmise that “we were talking about something that we weren’t supposed to talk about.” (Tr. 179.)

The Acting General Counsel asserts that, when Bardwell told Ledman that two other employees had reported that she was whispering, he engaged in the offense of creating an impression of surveillance of employees’ protected activities. The Board has explained that the rationale for prohibiting such conduct is that employees should be shielded from fear that “members of management are peering over their shoulders, taking note of who is involved in [protected] activities, and in what particular ways.” *Fred’k Wallace & Son*, 331 NLRB 914 (2000). The Board has further held that, “[i]n order to establish an impression of surveillance violation, the General Counsel bears the burden of proving that the employees would reasonably assume from the statement in question that their [protected] activities had been placed under surveillance.” *Heartshare Human Services of New York*, 339 NLRB 842, 844 (2003).

While there are certainly cases where application of this standard is straightforward, the Board’s precedents reveal that other situations present close questions. In my view, this is one such example. Counsel for the Acting General Counsel bases her view of the illegality of Bardwell’s statement on her conclusion that, “Ledman could have reasonably believed that Dr. Bardwell was engaged in surveillance by his reliance on other employees’ reports of her behavior.” (GC Br. at p. 36.) The difficulty with this approach is that it does not grapple with the Acting General Counsel’s burden of proof. While Ledman could have come to such a conclusion, it is at least equally likely that she would have instead concluded that Kim Bardwell and Parker had taken it upon themselves to report on her behavior. This would certainly have been consistent with the well-known understanding that these two employees were favorably disposed to management.

The Board has indicated that, where two equally plausible interpretations exist, the burden of establishing the unlawful creation of an impression of surveillance has not been met. *SKD Jonesville Division, LP*, 340 NLRB 101, 102 (2003) (where two likely interpretations of employer’s statement exist, no reason to infer one over the other). Such is the case here. Beyond this, I have relied on two quite specific precedents that appear to be on point. In *Bridgestone Firestone South Carolina*, 350 NLRB 526, 527 (2007), the Board held that, “merely informing employees that their coworkers have volunteered information about ongoing [protected] activities does not create an impression of surveillance, particularly in the absence of evidence that management solicited that information.” Similarly, in *Stevens Creek Chrysler Jeep Dodge*, 353 NLRB 1294, 1296 (2009), the Board held that, “when an employer tells employees that it learned of their [protected] activities from another employee . . . the Board has found no violation.” [Citations omitted.]

Considering these authorities, I conclude that an employee in Ledman’s position could have reached two equally reasonable conclusions based on Bardwell’s statement that Parker and his wife had reported on her activities. The first such conclusion would be that Bardwell had improperly solicited them to obtain and provide such information. The second would be that the two coworkers had taken it upon themselves to report the in-

formation to their boss. Because the evidence is in true equipoise, the Acting General Counsel has not met his burden of proving this violation. *American, Inc.*, 342 NLRB 768 (2004).

Bardwell’s alleged second offense in his meeting with Ledman was an instruction to her to cease whispering with her coworkers. Taking this instruction in its full and proper context, I conclude that it was unlawful. In this regard, two factors are dispositive. First, there was no prohibition against whispering at this workplace. Indeed, the testimony was clear in establishing that whispering formed a normal practice which arose from the confidential nature of the work and from the legal requirement that the clinic protect patients’ privacy. Indeed, it is noteworthy that, far from prohibiting whispering, the employer’s handbook encouraged it, admonishing employees that, “[l]oud talking . . . where patients can hear is never acceptable.” (Jt. Exh. 1, p. 2.) The second factor that I find compelling of a finding of unlawful conduct is Bardwell’s contemporaneous explanation that whispering would prompt coworkers to conclude that the offenders were discussing a prohibited topic. Again, taken in context, it is clear that the prohibited topics would have consisted of the sort of toxic talk or negative talk about terms and conditions of employment that Bardwell found to be both unacceptable and punishable. I find that Bardwell’s prohibition of whispering, issued during his campaign against protected protests of his pay cut decision, was unlawful.

The remaining alleged violations on January 19²⁹ were all directed toward Borucki. They consist of the utterance of two threats, the promulgation of two instructions to refrain from discussing terms and conditions of employment, the creation of an impression of surveillance, and the issuance of unlawful discipline. (See complaint, GC Exh. 1(e), pars. 4(d), (k), (l), (p), and (q).)³⁰

With one exception, the evidence, consisting of testimony and documentation, is both largely uncontroverted and quite overwhelming in establishing the commission of these alleged infractions. Borucki testified that Bardwell called him into his office on this occasion and told him “that there was a lot of toxic talk around the office and negativity and stated that he was going to write me up for these closed-door meetings and toxic talk.” (Tr. 82–83.) He went on to instruct Borucki that, “we were not to discuss, have any of these whispering conversations or discussions during work time.” (Tr. 83.)

²⁹ In her brief, counsel for the Acting General Counsel explains that, while the complaint alleged that one of these violations took place “[o]n about January 12” and that another took place “[o]n about January 26,” the evidence established that they both occurred on January 19. (GC Exh. 1(e), pars. 4(d) and (p).) See GC Br. at fns. 16 and 17. Once again, the issues were fully litigated and the minor discrepancies were not prejudicial under the standard of *Pergament United Sales*, supra.

³⁰ Par. 4(d) of the complaint states that this alleged offense occurred on January 12. Par. 4(p) alleges an offense occurring on January 26, while par. 4(q) contends that another offense was committed during the same meeting referred to in 4(p). In her brief, counsel for the Acting General Counsel asserts that all three of these alleged unfair labor practices actually took place on January 19. See GC Br. at fns. 16 and 17. Each alleged offense was fully explored by both sides at trial and I cannot find any prejudice regarding the discrepancy in the dates.

Bardwell's own testimony largely corroborated Borucki's account. He agreed that he asked Borucki if he had been talking about the pay cut and Borucki admitted that he had done so. At that point, counsel for the General Counsel asked him, "And after Mr. Borucki admitted he had, isn't it true that you then told him he needed to be above the negativity?" (Tr. 274.) Bardwell responded affirmatively.

Lest there be even the slightest doubt about what was said at this meeting, it is dispelled by the content of the corrective action form that Bardwell issued to Borucki during the meeting. The subject of the corrective action is described as "bad behavior" consisting of "'toxic talk'/negativity Closed doors Whispering." (GC Exh. 9, p. 1.) [Punctuation in the original.] The instruction to Borucki was, "[n]o more closed door meetings, whispering, or negativity." (GC Exh. 9, p. 1.) The threatened sanction for failure to follow these instructions was plainly described as either, "[r]eduction in salary" or "[c]hange to straight commission for sales rather than salary." (GC Exh. 9, p. 1.)

As asserted by the Acting General Counsel, the evidence clearly establishes that Bardwell threatened Borucki with reprisals, including loss of pay, in the event he persisted in criticizing his terms and conditions of employment in discussions with coworkers. The evidence similarly establishes that Bardwell instructed Borucki to cease and desist from discussions of his terms and conditions of employment with his coworkers. Finally, it conclusively shows that Bardwell issued an adverse disciplinary action to Borucki due to his participation in the protected activity of discussing the Employer's pay cut decision with his coworkers. All of these actions violate Section 8(a)(1).³¹

Lastly, I must again grapple with the Acting General Counsel's assertion that Bardwell's statements also created an impression that he was engaged in surveillance of his employees' protected activities. Examining Bardwell's statements on this occasion, it is noteworthy that he did not attribute his knowledge of Borucki's "whispering conversations" to any surveillance. (Tr. 83.) Indeed, he did not provide any explanation as to how he became aware of this activity by employees. In such circumstances, the Board has rejected a finding of an impression of surveillance violation, observing:

A statement as to what someone has heard could be based on (1) what he had heard from the grapevine or (2) what he had picked up from spying. There is no reason to infer the latter as the source over the former.

SKD Jonesville Division, LP, 340 NLRB 101, 102 (2003). The Board's reasoning in this regard is particularly apt as to this workplace. It is a small office and each employee could readily observe his or her coworkers. Grossman testified that when she and Borucki talked about the pay cut, other employees "could hear if they wanted to." (Tr. 45.) Furthermore, the staff understood that there were employees who supported management's

³¹ To the extent that it is not already apparent, I will shortly discuss the inextricably close relationship in Bardwell's meaning between the concepts of toxic talk and negativity and the discussion of his pay cut decision by employees.

views as to the necessity for the pay cut. For instance, Borucki reported that Parker, "seemed to kind of stick up for Dr. Bardwell." (Tr. 82.) Considering the totality of circumstances, I find that a reasonable person did not have an adequate basis to infer from Bardwell's remarks to Borucki during their meeting on January 19 that the Employer was either engaged in surveillance of protected activity or was seeking to convey an impression that it was engaged in such an endeavor. As a result, the Acting General Counsel has not carried his burden of proof in this respect.

It is next alleged that the Employer twice violated the Act during a conversation between Bardwell and Ledman on January 21 in Bardwell's office. Ledman was the sole witness who testified regarding the content of the conversation. While I found most of her trial testimony to be clear and precise, her recollection of this conversation and her subjective view as to its meaning and purpose were vague and uncertain. She reported that much of the discussion focused on Bardwell's desire to learn whether Ledman felt that she would be able to perform some of Borucki's current job duties. He also commiserated with her regarding what he termed her "crappy" work schedule. (Tr. 181.) The discussion did turn to the pay cut issue, but Bardwell did not attempt to justify the cut. Instead, using his calculator, he figured out the amount of Ledman's reduction in income and conceded that it was, "a lot of money." (Tr. 181.) At this juncture, Bardwell told Ledman that, "there's going to be a lot of changes around here." (Tr. 181.) Ledman explained that, before Bardwell could elaborate, "we kind of got interrupted at that point." (Tr. 181.)

I recognize that the Board employs an "objective standard of whether [an employer's] remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas*, 347 NLRB 52 (2006) [Citation and internal quotation marks omitted.] Nevertheless, I find Ledman's description of the effect of Bardwell's discussion with her to be probative because she struck me as a rather sophisticated observer of work-related interactions. Her opinion represents a useful insight into the objective nature of Bardwell's unfinished commentary. She described the impact of the conversation as follows:

I kind of left the meeting like I wasn't sure if he meant that there was going to be a lot of changes with my schedule or with my position or if he was saying—if he was then referring to Mike, because Mike—we were talking about Mike first. I just left with a funny taste, a funny taste in my mouth and a sort of funny stomach, like I wasn't sure where that conversation was going. It just was kind of weird.

(Tr. 181.)

Ledman's candid expressions of uncertainty regarding the motivation behind Bardwell's scattered remarks on a number of topics mirrors my own conclusion. While he mentioned his concern about ongoing whispering, he did not link that concern to the pay cut issue or any other term or condition of employment.

Much of the content of their conversation consisted of Bardwell's expressions of commiseration with Ledman regarding

her own working conditions, including the size of her pay cut. As a result, both Ledman and I found it difficult to conclude whether his contention that changes were about to occur was a threat or a promise of amelioration of her situation.³² In resolving this close question, I am mindful that the Acting General Counsel bears the burden of proof and that, “mere suspicion cannot substitute for proof of an unfair labor practice.” *Lasell Junior College*, 230 NLRB 1076 (1977) [Citation omitted]. Because Bardwell’s remarks were equivocal and incomplete, the evidence does not permit me to find that the Acting General Counsel has carried his burden regarding these alleged violations.

On January 26, Bardwell subjected Borucki to a thorough job performance evaluation, including the detailed assessment of both his roles as radiology supervisor and marketing specialist. The Acting General Counsel contends that, as part of this process, the Employer gave Borucki an unfavorable evaluation due to his participation in protected activities with his coworkers. (See complaint at GC Exh. 1(e), par. 4(r).) Based on both the content of the evaluation and Bardwell’s contemporaneous remarks during the meeting, I find that this allegation has been proven. In making such a finding, I must first acknowledge that much of the evaluation is actually favorable and even complimentary to Borucki. Nevertheless, it is impossible to ignore the fact that Bardwell assessed Borucki’s work performance in one key area as failing to meet even minimum requirements.

The area of assessed deficiency involved “harmony, teamwork and leadership” and the maintenance of “good supervisor and employee relationships.” (GC Exh. 10, p. 4.) It is evident that a failing grade as to these aspects of the employment relationship is a grave matter which could overshadow the other aspects of his evaluation. The question remains as to whether the employer gave this low assessment to Borucki because of his protected activities. Both the evaluation document and Bardwell’s remarks to Borucki concerning his evaluation reveal this to be the case. The comment written beneath the failing score warned that he needed to improve his staff interactions and to avoid toxic talk and negativity. This was reinforced by Bardwell’s verbal comment that was “was tired of the toxic talk and the negative atmosphere in the clinic and that it needed to stop.” (Tr. 91.) The evidence establishes that Borucki’s performance evaluation was significantly downgraded in direct response to his Employer’s disapproval of his involvement in protected concerted activity. This constituted a violation of the Act.

The Acting General Counsel next contends that the Employer, through its agent, Kim Bardwell, engaged in actual surveillance of employees’ protected activities in violation of the Act.³³ (See complaint, GC Exh. 1(e), par. 4(s).) There can be

³² Granted, with perfect hindsight, it appears likely that Bardwell was actually considering replacing Borucki with Ledman in the marketing role. However, Ledman remained uncertain that this was his meaning and I share that uncertainty. Even if one were to conclude that he was exploring this planned personnel action, it hardly represented a threat against Ledman. Rather, such a change in her duties would have constituted a promotion.

³³ While the creation of an impression of surveillance is a more common allegation in labor law cases, actual surveillance is, of course,

no dispute that Kim Bardwell did engage in surveillance of her coworkers on January 31. Under cross-examination by counsel for the Acting General Counsel, she conceded that she “tried to get as close to them as [she] could to listen.” (Tr. 207.) [Counsel’s words.] She also agreed that she took the trouble to reduce her observations to written form and present them to her husband that evening.

The real issue here is not whether Kim Bardwell engaged in surveillance. It is undisputed that she did so. Standing alone, this does not prove that the Employer committed an unfair labor practice. There is no contention that Kim Bardwell was a supervisor at the clinic. Indeed, it is fair to say that her position as receptionist was at the lowest rung of the corporate ladder. The Employer does concede that she was an agent of the clinic. Nevertheless, in order to find the Employer liable for her conduct, it must be shown that she was authorized to perform the particular acts at issue as part of her agency status or that the Employer’s conduct and statements created a reasonable belief among the employees that she was so authorized. See *Pan-Osten Co.*, 336 NLRB 305, 306 (2001) (“party who has the burden to prove agency must establish an agency relationship with regard to the specific conduct that is alleged to be unlawful”).

There was simply no evidence whatsoever that Dr. Bardwell ordered his wife or any other employee to engage in surveillance. In this connection, Parker, Landon, and Kim Bardwell all clearly testified that he never made such a request. Bardwell, himself, also denied ordering any surveillance of employees. No contrary evidence was presented. Furthermore, while Bardwell was clearly well informed regarding the protected activities of employees who were angered by the pay cut, the evidence demonstrates that he acquired this knowledge without any need to order surveillance. His supporters among the workforce were entirely willing to volunteer this information to him.

Frankly, the only evidence that Kim Bardwell was authorized to spy on her coworkers is the inference to be drawn from her actual surveillance coupled with her marital relationship to Dr. Bardwell. This is insufficient. See *Leather Center, Inc.*, 308 NLRB 16, 26 (1992) (“familial relationship, without more,” is insufficient to establish agency). I conclude that the Acting General Counsel has failed to carry his burden of establishing that Kim Bardwell was authorized to spy on her coworkers or that the Employer created a reasonable apprehension on the part of those coworkers that she was so authorized. I know of no legal authority for the proposition that an employer would violate the Act by receiving unsolicited reports from employees regarding the activities of their coworkers.

The remaining alleged unfair labor practices all arise from events surrounding the demotion and termination of Borucki on February 3 and 6 and the termination of Grossman 2 days later. Due to their importance, I will discuss these events separately as follows.

also an unfair labor practice. See *Ivy Steel & Wire, Inc.*, 346 NLRB 404 (2006).

1. The demotion and termination of Borucki

It is undisputed that Bardwell demoted Borucki on February 3 and fired him just 3 days later. The Acting General Counsel contends that these personnel actions were unlawful because they were made as a direct response to Borucki's protected concerted activities involving the pay cut at the clinic.³⁴ (See complaint, GC Exh. 1(e), pars. 4(t), (v), and (aa).) The Employer disputes the issue of motivation, claiming that the reasons for these adverse actions related to a variety of forms of misconduct by Borucki. Given the nature of this dispute, I must analyze the issues by employing the methodology devised by the Board for assessment of multiple alleged motivations. See *Wright Line*, 251 NLRB 1083 (1980), enf. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 399–403 (1983).

In the context of an alleged violation of Section 8(a)(1), the Board has described the steps required by *Wright Line* as follows:

To prove a violation under *Wright Line*, the General Counsel must first show that protected activity was a motivating factor in the Respondent's decision to take adverse action against the alleged discriminatees. The General Counsel can satisfy this initial burden by proving that the alleged discriminatees engaged in protected activity, that the Respondent was aware of it, and that the Respondent demonstrated some animus toward that protected activity. The burden then shifts to the employer to demonstrate that the same adverse action would have occurred even absent the protected activity.

American Red Cross Missouri-Illinois Blood Services Region, 347 NLRB 347, 349 (2006).

I have already discussed at length my conclusion that Borucki engaged in protected concerted activity with Ledman, Grossman, and a number of other employees when they chose to criticize the Employer's pay cut decision, attempted to formulate alternatives to that decision, and decided to present the Employer with an anonymous letter setting forth their views. There is also abundant evidence to establish that Bardwell knew of Borucki's involvement in these activities. He received reports to this effect from his wife, Parker, and Landon. He documented his concern about these concerted activities in a variety of written disciplinary records.

Most compellingly, Bardwell testified that, on January 19, he discussed Borucki's "negativity" regarding the pay cut decision with him directly, instructing him that he needed to cease such behavior. (Tr. 274.) They had another such discussion a day or two later, during which Borucki explained that the anonymous letter was not meant to be negative. In reply, Bardwell "rolled

³⁴ The Acting General Counsel also alleges that Bardwell threatened Borucki during the course of the February 6 meeting at which he also terminated Borucki. (See complaint, GC Exh. 1(e), par. 4(u).) In my view, such a statement made in the course of firing an employee is simply part of the res gestae of the termination. Even if the statement is properly construed as a threat, it would not constitute a separate offense. In any event, regardless of the correctness of my view as to the propriety of this style of pleading, a finding of an additional violation here would not affect the remedy.

his eyes" and told Borucki to avoid involvement in "toxic talk stuff." (Tr. 88.)

It is undisputed that, on February 3, Bardwell took adverse action against Borucki consisting of his demotion from a salaried position to an hourly rate that resulted in a large cut in his compensation and the loss of his marketing responsibilities. Shortly thereafter, Bardwell imposed what the Board has termed "the most draconian punishment in an employer's arsenal," the discharge of Borucki. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). I must next determine whether a substantial motivating factor in the demotion and termination decisions was Borucki's participation in the protected concerted activities. In making this analysis, I am mindful of the Board's observation that:

Unlawful motive may be demonstrated not only by direct evidence, but by circumstantial evidence, such as timing, disparate or inconsistent treatment, expressed hostility toward the protected activity, departure from past practice, and shifting or pretextual reasons being offered for the action. [Citations omitted.]

Real Foods Co., 350 NLRB 309, 312 fn. 17 (2007). I conclude that virtually all of these types of probative evidence of unlawful animus exist in this case.

As a starting point for the analysis, I must take into account the Employer's other unfair labor practices committed in response to the same protected activity by the employees, including Borucki. Thus, I have found that Bardwell unlawfully interrogated employees, including Borucki, regarding their involvement in the protest of the pay cut. Bardwell instructed employees, including Borucki, to cease their involvement in the same protected activities. He also threatened Borucki with precisely the sort of demotion that he later imposed if Borucki continued his participation in the protected activity. Finally, he issued a performance evaluation to Borucki that gave him an unsatisfactory rating in the category involving teamwork and relationships with coworkers due to his continuing involvement in the protected conduct.

The Board considers "the employer's contemporaneous commission of other unfair labor practices" as probative evidence of unlawful motivation. *Waste Management of Arizona*, 345 NLRB 1339, 1341 (2005). This is particularly true when the other violations are directed at the same employee who is later subjected to the adverse action under evaluation. See *St. Margaret Mercy Healthcare Centers*, 350 NLRB 203, 204 (2007), enf. 519 F.3d 373 (7th Cir. 2008). The fact that Bardwell engaged in a pattern of unfair labor practices directed toward those employees, including Borucki, who were involved in the concerted protest of the pay cut decision is powerful evidence of animus against the same employees leading to the adverse actions taken against them.

Next, I have considered persuasive direct evidence of Bardwell's unlawful motivation in demoting and discharging Borucki. That direct evidence consists of Bardwell's own statements and writings showing that he disciplined Borucki due to his involvement in negativity and so-called toxic talk. In parsing the meaning of these concepts as understood by the Employer, it is useful to consider the broader implications of an

employer's reliance on attitudinal factors in imposing discipline. In other words, discipline due to involvement in toxic talk or negativity is different from discipline imposed in response to deficient work performance (e.g., low productivity or quality of work) or specific forms of misconduct in the workplace (e.g., embezzlement, violence, drug abuse).

For very understandable reasons, the Board has a long history of skepticism regarding employers' imposition of discipline premised on negative assessments of employees' attitudes, particularly when those adverse actions occur in the context of protected concerted activities by the same employees. As the Board has noted, "[i]t is well settled that an employer's reference to an employee's 'attitude' can be a disguised reference to the employee's protected concerted activity." *Rock Valley Trucking Co.*, 350 NLRB 69 (2007). For this reason, the Board has ordered reinstatement of employees who were discharged for such subjective descriptions of attitudinal deficiencies as being a "disruptive force" (*Edward's Restaurant*, 305 NLRB 1097 fn. 1 (1992)); or an "instigator" (*Boddy Construction Co.*, 338 NLRB 1083 (2003); or "troublemaker" (*United Parcel Service*, 340 NLRB 776 (2003); or for possessing a "bad attitude" (*Dayton Typographic Service, Inc. v. NLRB*, 778 F.2d 1188, 1193 (6th Cir. 1985).

In several recent cases, the Board has expressed the same concerns regarding the concept of "negativity" as a workplace offense. In *Claremont Resort & Spa*, 344 NLRB 832 (2005), the Board held that a work rule prohibiting "negative conversations" about coworkers and managers was unlawful. Its rationale was expressed as follows:

We find that the rule's prohibition of "negative conversations" about managers would reasonably be construed by employees to bar them from discussing with their coworkers complaints about their managers that affect working conditions, thereby causing employees to refrain from engaging in protected activities. Accordingly, the rule is unlawful. [Citation and footnote omitted.]

344 NLRB at 832. Of course, it is easy to see that Bardwell's use of a similar, albeit unwritten, policy to threaten and discipline his employees represents the same sort of unlawful conduct and motivation.

The Board's conclusion that employer sanctions imposed for "negativity" directed toward complaints about terms and conditions of employment are violative of Section 8(a)(1) was implicitly reinforced in a very recent case, *Worldmark by Wyndham*, 356 NLRB 765 (2011). In that case, a sales employee voiced criticisms of a new dress policy imposed by the employer. He received discipline for expressing "negativity." 356 NLRB at 766. While the Board's focus in its opinion was on the issue of the concertedness of the activity by the employees, it accepted without need for additional discussion that it is inherently unlawful to impose sanctions for protected concerted activity that an employer believes to constitute "negativity."

In my opinion, the case that speaks most directly to the issue of sanctions for negativity happens to have arisen on my own docket. In *Salon/Spa at Boro*, 356 NLRB 444 (2010), the Board adopted my decision finding the discharge of two employees for violation of the employer's negativity policy to be

unlawful. The case presented many of the same issues and concerns as the present litigation. The owner of the hair salon in question presented credible testimony that, before opening her business, she had conducted a careful study of the industry and had concluded that the key to a financially successful operation was to create an atmosphere where customers felt a "culture of love and happiness." 356 NLRB at 461. As a result, she formulated a policy prohibiting any form of negativity by the staff. The policy was directed, in part, towards gossip and expressions of personal animosity. In reality, it was so broad that on one occasion during a snowstorm, an employee entered the salon and uttered a complaint about the weather. She was admonished for violating the policy against negativity. Unfortunately, the salon owner also applied the negativity policy toward employees' expressions of complaints about management actions and workplace procedures. This culminated in the owner's decision to fire two hair stylists for violating the negativity policy by complaining about certain actions and behaviors of management.³⁵

In defending his client, counsel for the salon contended that, "this [e]mployer should not be punished simply because they have a unique take on how they want their workplace to be." 356 NLRB at 461. I sympathized with this argument then and I continued to do so now. It appears to me that the Board has an obligation to make a concerted effort to accommodate an employer's business model to the extent this is possible consistent with its obligation to enforce the Act. In *Boro*, I noted that the Board has striven to do so, citing the example of *W San Diego*, 348 NLRB 372 (2006). In that case, management of a hotel had an operating philosophy intended to make guests feel as though they were staying in a "Wonderland" where every desire could be fulfilled. 348 NLRB at 372. In order to effectuate this vision, employees were required to wear a uniform that included a small pin. The hotel imposed a work rule that prohibited any other forms of adornment to the uniform. The rule was enforced against an employee who chose to wear a union pin in public areas of the hotel. In declining to find a violation of the Act, the Board held that the hotel had demonstrated "a special circumstance . . . justifying its prohibition on wearing the pin in public areas of the hotel." 348 NLRB at 373. [Footnote omitted.]

In *Boro*, I attempted to discern the possibility of a reaching a similar accommodation with the employer's business plan. Ultimately, I was forced to conclude that the breadth of the negativity policy and its subsequent enforcement rendered such an accommodation impossible. Thus, I found that the employer's demand that the staff refrain from all forms of criticism of management's actions and decisions was in fundamental and irreconcilable conflict with the Act's expressed purpose of, "protecting the exercise by workers of full freedom of association . . . for the purpose of . . . mutual aid and protection."

³⁵ Bardwell also articulated a very similar conception of the breadth of his policies against negativity and toxic talk, explaining that, "My definition of 'toxic talk' would be any talk that is negative and can spread and create a hostile work environment. I mean, it'd be like a toxic cloud spreading. I think that's where the term comes from. *But in my mind it can be any talk; doesn't matter what it's about.*" (Tr. 230-231.) [Italics added.]

(Sec. 1 of the Act.) In reaching this outcome, I noted that a negativity policy that prohibited adverse comment on management decisions would render it impossible for employees to engage in even the most preliminary forms of concerted activity that the Act was designed to protect. See 356 NLRB at 460–461.

In the present case, from a legal standpoint, the situation is identical. While the Board and its judges must make a good-faith effort to accommodate the legitimate business plans and decisions of the nation’s entrepreneurs, the policies against negativity and toxic talk invoked to justify the disciplinary actions against Borucki (and, of course, Grossman) cannot be reconciled with the Board’s duty to enforce the mandate of Congress. Indeed, to the extent that the facts of this case differ from those of *Boro*, the need for Board action is underscored. Unlike *Boro*, this Employer did not attempt to present a particularized business rationale for the policies against negativity and toxic talk. More importantly, in *Boro*, there was no doubt that the negativity policy was a genuine part of the business plan created at the outset and applied throughout the entire existence of the salon. In sharp contrast, Borucki provided uncontroverted and credible testimony that Bardwell never articulated a policy against toxic talk, “until after the letter, he was given the letter.” (Tr. 165.)

For all of these reasons, I conclude that to the extent the Employer relied on violations of its policies against negativity and toxic talk, it was acting in violation of the Act’s protections. In consequence, each such statement of its rationale constitutes clear and unmistakable direct evidence of unlawful animus as a key motivating factor in the demotion and discharge of Borucki (and, again, of the discharge of Grossman).

Having found that Borucki engaged in protected concerted activities that were known to his employer, and that the employer took adverse actions against him that were motivated in substantial part by unlawful animus against those activities, the burden now shifts to the Employer to establish that it would have taken the same adverse actions regardless of Borucki’s participation in protected activities. The Employer advances a number of reasons that it contends will serve to meet its burden in this regard. In evaluating those reasons, I am mindful of the Third Circuit’s observation, later cited with approval by the Board, that:

[T]he policy and protection provided by the National Labor Relations Act does not allow the employer to substitute “good” reasons for “real” reasons when the purpose of the discharge is to retaliate for an employee’s concerted activities.

Hugh H. Wilson Corp. v. NLRB, 414 F.2d 1345, 1352 (3d Cir. 1969), cited with approval in *North Carolina Prisoner Legal Services*, 351 NLRB 464, 469 fn. 17 (2007). I will now assess the Employer’s asserted justifications for Borucki’s demotion and almost immediately subsequent termination.

In my view, one of the most compelling factors in the assessment of Bardwell’s motivations underlying his treatment of Borucki is the inconsistency of the asserted explanations, including the shifting and disparate nature of the rationales being offered for his ultimate discharge. Thus, in his brief, counsel for the Respondent attempts to assert a relatively narrow ra-

tionale consisting of Borucki’s “dishonesty.” (R. Br. at p. 10.) He argues that Borucki had provided prior “minor” examples of dishonesty, but it was his “dishonesty in regard to the flu vaccine marketing [that] was sufficient to tip the scale for termination.” (R. Br. at pp. 10–11.)

In contrast, Bardwell, himself, emphasized these so-called “minor” episodes of what he viewed as dishonesty and added other rationales. The authoritative expression of his own asserted reasoning in reaching the decision to discharge Borucki is contained in a written report that he prepared after his termination meeting with Borucki. It is clear that this report represents a considered attempt to explain and justify his decision. I readily infer that it was written for the purpose of memorializing his justifications in the event the discharge provoked controversy or litigation.

The first justification raised by Bardwell was not the flu shot episode relied on by counsel in his brief. Rather, it was the bald and unsupported accusation that, “I didn’t believe that he was sick” when he called in sick for his Saturday shift. (R. Exh. 2, p. 8.) Neither in this report nor in his testimony did Bardwell present any evidence or reasoning to support this assumption. Furthermore, this unexplained accusation is gravely undermined by Bardwell’s own assessment of Borucki’s record of compliance with attendance policies issued less than 2 weeks earlier. Thus, in his performance evaluation, written on January 26, Bardwell assessed Borucki using language in the evaluation form that provided, “Complies with the attendance policy.” (GC Exh. 10, p. 5.) He specifically chose not to use the form’s language for an employee who “Fails to follow appropriate department procedures regarding scheduled hours (i.e. . . . ill calls, etc.).” (GC Exh. 10, p. 5.) The utter failure to explain the basis for Bardwell’s conclusion that Borucki had abused the sick leave policy, coupled with the very recent expression of satisfaction with Borucki’s history of past compliance with that policy, renders this explanation unpersuasive.

Bardwell next asserted that Borucki had violated attendance rules by failing to inform him that he had switched shifts with Tom, his fellow radiology technician. As he put it, “Michael should have contacted me on Wednesday evening or Thursday because we were supposed to meet every Thursday to discuss sales and marketing for the clinic. So I believe he was dishonest.” (R. Exh. 2, p. 8.) In the first place, this rationale lacks internal logic. It has not been explained, or can I understand how the alleged failure to plan his schedule so as to meet with Bardwell represents “dishonesty.” At most, it would represent a violation of the attendance policy, a policy which the Employer had recently assessed Borucki as being in general compliance with. The attempt to twist this into an example of dishonesty represents an expression of the Employer’s animus rather than an effort to provide a genuine rationale for Borucki’s termination from employment. Furthermore, there was considerable dispute in the testimony regarding the Employer’s expectations in this regard. Borucki testified that Bardwell had told him that it was permissible for him to switch shifts with Tom without seeking advance approval so long as the change did not result in the Employer’s liability for paying overtime to Tom. Bardwell testified that he had told Borucki that “he was free to go ahead and do that [switch shifts with Tom] without

notifying me” so long as it did not interfere with the sales meetings. (Tr. 229.) He conceded that Borucki had often switched shifts without giving him advance notice. On balance, I conclude that the Employer has not shown that Borucki’s failure to provide advance notice on this one occasion served as a genuine and significant reason for the actual decision to terminate him. At most, this would have represented a minor violation of their past vague understanding of the proper procedures. Viewed against the backdrop of the Employer’s very recent formal expression of satisfaction with Borucki’s compliance with attendance policies, this rationale is also unpersuasive.

The next two rationales presented in Bardwell’s written account are so trivial as to represent evidence of animus rather than proof of legitimacy. The first was an incident dating from August 2009 in which Borucki had failed to include the tip when he told Bardwell the amount due to him as reimbursement for meals purchased at the time employees were on off-site training. Because of his omission, the submitted written reimbursement claim was approximately \$10 larger than the amount he had verbally reported to Bardwell. It was undisputed that Borucki was not disciplined at the time and Bardwell’s attempt to dredge up this petty incident more than 16 months later is evidence of animus.

The same reasoning applies with even more force to the event characterized by Bardwell’s report as involving, “charg[ing] unapproved items at Target on the clinic credit card.” (R. Exh. 2, p. 8.) On the surface, this smacks of serious misconduct, even potential theft. In reality, it is a mere will-o’-wisp. The undisputed evidence revealed that this episode took place six months before the termination meeting. At that time, the clinic needed bottled water for its patients. Grossman asked Borucki to go to Target and purchase a case using the clinic’s credit card. He did make the purchase, to the tune of \$4. While Bardwell later told him not to do so in the future, no disciplinary action was taken.

I have already noted that counsel for the Employer, perhaps cognizant of the effect of these two accusations on an impartial trier of fact, has “recognize[d] that two of the incidents involving Borucki’s honesty were minor and did not warrant discipline.” (R. Br. at p. 10.) The fact that Bardwell chose to resurrect them and offer them as rationales for firing an employee is illustrative of both animus and the desire to disguise an improper motivation. In similar circumstances, the Board has chastised one employer for asserting “makeweight reasons” that suggest that it was “simply making up its defense as it went along,” and another for weakening its defense by merely “grasping for reasons to justify an unlawful discharge.” *Desert Toyota*, 346 NLRB 118, 120 (2005), review denied sub nom. *Machinists Local Lodge 845 v. NLRB*, 265 Fed. Appx. 547 (9th Cir. 2008), and *Meaden Screw Products*, 336 NLRB 298, 302 (2001). [Internal punctuation omitted.]

The last reason offered by Bardwell in his report is the only reason relied on by his counsel in the brief. This consists of the accusation that Borucki lied to Bardwell regarding his activities in connection with the Employer’s attempt to dispose of excess flu vaccines by offering flu shot clinics to prior corporate customers. I have little doubt that Bardwell was unhappy with Borucki’s performance as to the flu shots. It is likely that an

employer would be displeased that its sales person had failed to find even a single customer for these flu shots.³⁶ Nevertheless, several key factors persuade me that the flu shot clinic issue would not have led to Borucki’s demotion absent his participation in protected concerted activities regarding the pay cut. Beyond this, it is clear that Bardwell’s unhappiness about this issue related to Borucki’s marketing duties. Even if one were to suppose that it contributed to his demotion from those duties, it had nothing whatsoever to do with his radiology work. It will be recalled that, even after the failed flu shot campaign, Bardwell had characterized this aspect of Borucki’s job performance as follows: “Mike does a great job supervising the Radiology Dept.” (GC Exh. 10, p. 4.)

My concern regarding the genuineness of the flu shot issue as a factor in Borucki’s discipline begins with the nature of the Employer’s investigation of the issue. It is undisputed that Bardwell asked Borucki for a client list. Borucki provided a list of 20 to 30 clients. For unexplained reasons, Bardwell chose to contact only four of those customers. Three of these were unable to provide any information that would aid in Bardwell’s investigation. One customer told Bardwell that Borucki had not been in touch with it regarding flu shots. Borucki testified that he had not contacted that client because Bardwell had agreed to undertake this particular sales effort himself. Bardwell denied this. Both witnesses are thoroughly interested parties and neither offered any corroborative evidence to support their opposing accounts.

Taken in full context, I conclude that Bardwell has failed to prove that he discovered evidence of Borucki’s dishonesty in the conduct of his flu shot duties. Part of this context consists of my conclusion that Bardwell grasped at other straws to bolster a claim of legitimacy for his conduct in the face of strong evidence of unlawful animus. Beyond this, Bardwell’s assessment of Borucki’s job performance, written after the flu shot campaign, undermines his case. The Employer’s counsel correctly characterizes the overall thrust of this evaluation as being “generally favorable.” (R. Br. at p. 3.) More specifically, in evaluating Borucki’s success at his marketing duties, Bardwell gave him a rating of “[m]et requirements with commendations” as to his record of ability to “[h]andle and make telephone calls to/from corporate clients while representing NUC Occupational Medicine services.”³⁷ (GC Exh. 10, p. 3.)

With regard to Bardwell’s decision to demote Borucki by removing him from his marketing position, I conclude that there is some evidence to support a view that this resulted from a mix of motives, including a very substantial degree of unlawful animus and a lesser degree of genuine dissatisfaction with

³⁶ On the other hand, Borucki’s explanation for his failure to locate any customers makes sense. He explained that he was given this assignment too late in the year. Employers had already made whatever arrangements for flu season that they wished to undertake.

³⁷ It is clear that this was written after Borucki’s lack of success in marketing the flu shots was evident to Bardwell. No evidence was presented as to the date on which Bardwell contacted the client who reported that it had not heard from Borucki about flu shots. To the extent that the record is silent on this point, it cannot assist the Employer in meeting its evidentiary burden.

Borucki's success in marketing the clinic's services.³⁸ On careful reflection, I conclude that the Employer has failed to meet its burden. As the Board has explained, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity." *Yellow Ambulance Service*, 342 NLRB 804 (2004), citing *W. F. Bolin Co.*, 311 NLRB 1118, 1119 (1993), enf. mem. 99 F.3d 1139 (6th Cir. 1996). Given the strength of the Acting General Counsel's evidence as to unlawful animus, the pretextual nature of much of the Employer's asserted defense, and the proximity in time between the protected activity and the demotion decision, I conclude that Borucki's demotion would not have taken place absent his involvement in the pay cut protests. In this connection, it is impossible to ignore the compelling documentary evidence consisting of the written warning issued by Bardwell to Borucki on January 19. In that document, Borucki was advised that continued involvement in "meetings, whispering, or negativity" would result in "[r]eduction in salary or [c]hange to straight commission for sales rather than salary." (GC Exh. 9, p. 1.)

While the decision to demote Borucki reflects some component of genuine dissatisfaction with his marketing job performance, the same cannot be claimed for the decision to terminate Borucki from his radiology position. It is clear that the demotion effectively resolved any legitimate areas of concern about Borucki's job performance. I have already noted that, less than 2 weeks earlier, Bardwell had assessed Borucki's performance as "great" in his role as supervisor of the radiology department. (GC Exh. 10, p. 4.) Thorough examination of the evidence in this case compels a conclusion that the only rationale established in this record that explains the decision to terminate a "great" department leader from employment was Bardwell's ongoing dissatisfaction with Borucki's involvement in the protected concerted activities stemming from the pay cut. Because the termination was entirely a product of unlawful animus against Borucki's protected activities, it constitutes a violation of Section 8(a)(1).

2. The termination of Grossman

The Acting General Counsel contends that, on February 8, Bardwell conducted two meetings with Grossman during which he unlawfully interrogated and threatened her and ultimately terminated her employment. By way of vital context, it must be recalled that at the time of Borucki's discharge 2 days earlier, Bardwell had requested and received his email password. He then accessed Borucki's email account and discovered Grossman's January 8 email to Ledman and Borucki providing them with her draft of the pay cut protest letter and Ledman's response. At 3:28 a.m. on February 8, Bardwell took the trouble to forward these emails to Grossman at both her work and personal email addresses. When Grossman reported to the clinic for work at 8 a.m. that morning, she found yet another copy of the emails in her timecard folder. Her first meeting with Bardwell took place immediately thereafter in his office.

³⁸ In this regard, I acknowledge that Bardwell issued two warnings to Borucki prior to the pay cut controversy. These warnings centered on his performance of sales and marketing duties.

Grossman provided credible and largely uncontroverted testimony regarding her meetings with her employer on that day. She testified that, upon entering the office, she encountered Bardwell seated there with a yet another copy of the emails laying on the desk. He began by asking her, "[w]hat do you have to say about this?" (Tr. 48.) I agree with counsel for the Acting General Counsel's contention that this constituted an unlawful interrogation because it was yet another pointed attempt to ascertain the details of her involvement in protected activity. In addition, virtually all of the *Bourne* factors support a finding of a violation. The Employer's hostility toward protected activities had just been strongly underscored by the termination of Borucki. It was clear that his current inquiry was made with the purpose of seeking information on which to base disciplinary action against Grossman. He was the highest official of the Employer and the setting was formal. I readily conclude that his question constituted an unlawful interrogation.

Bardwell followed up his interrogation with a statement that Grossman's conduct in writing the pay cut letter "looks like insubordination to me." (Tr. 48-49.) Thereupon, he observed that, "[m]aybe I should suspend you without pay and benefits." (Tr. 49.) I concur with counsel for the Acting General Counsel's view that this statement constituted an unlawful threat of reprisal for Grossman's participation in the protected activity involved in protesting the pay cut.

After these preliminary discussions that included an unlawful interrogation and threat, the meeting was interrupted. It resumed shortly thereafter with the additional presence of Parker, whom Grossman had summoned to serve as a witness. At this point, Bardwell informed Grossman that, "I'm just going to terminate you." (Tr. 50.) When she asked why, he told her that it was, "[f]or insubordination."³⁹ (Tr. 50.)

Under cross-examination about these events, Bardwell made two key statements. First, he explained that by terminating Grossman for insubordination, he was referring to her involvement in an "excessive" and "recurrent" amount of "negative talk, whispering, and closed-door meetings."⁴⁰ (Tr. 279.) Bardwell made one other key statement during this exchange with counsel for the General Counsel:

COUNSEL: And other than toxic talk and negativity, you regarded [Grossman] overall as a good and prompt employee?

BARDWELL: Yes.

³⁹ The Board has previously expressed its concern regarding employers' use of the disciplinary concept of insubordination to prohibit "concerted employee protest[s] of supervisory activity." *University Medical Center*, 335 NLRB 1318, 1321 (2001), enf. denied in pertinent part 335 F.3d 1079 (D.C. Cir. 2003). Much more recently, the Board observed that, "[i]t is well-settled that a refusal to comply with a directive to cease protected communications does not constitute insubordination." *Tenneco Automotive, Inc.*, 357 NLRB 953, 957 (2011). That is precisely the situation presented here.

⁴⁰ In his testimony, Bardwell indicated that the insubordinate behavior he was referring to concerned the same activity for which he had issued corrective action forms to Grossman on January 14 and 18. Earlier in that same testimony, he had reported that this activity included the closed-door and whispered conversations about his pay cut decision. See Tr. 271-274.

(Tr. 279.)

Turning now to the heart of the matter involving Grossman, I must evaluate the lawfulness of her termination at the conclusion of this meeting. The issue of which evaluative criteria I should properly employ in assessing this question has given me some pause. In connection with Borucki's discharge, I have already outlined the criteria the Board employs where there is a genuine issue of the existence of multiple motivations for the employer's disciplinary action. However, the Board also maintains a different evaluative standard for cases in which the evidence demonstrates only one motivation. In such circumstances, it holds that:

The discharge of an employee will violate Section 8(a)(1) of the Act if the employee was engaged in concerted activity (i.e. activity engaged in with or on the authority of other employees and not solely on her own behalf), the employer knew of the concerted nature of the employee's activity, the concerted activity was protected by the Act, and the discharge was motivated by the employee's protected concerted activity.

Triangle Electric Co., 335 NLRB 1037, 1038 (2001). In my view, this is an appropriate standard to employ in evaluating Grossman's discharge.

It is clear that Grossman engaged in the concerted activity of planning and implementing a response to the Employer's pay cut decision along with Borucki and Ledman. It is equally clear that, as of February 8, the Employer had unambiguous proof of Grossman's involvement in this conduct, consisting of copies of her own email and draft protest letter. For reasons already discussed, there can be no dispute that such a concerted protest of a pay cut conducted in a civil and respectful manner constitutes protected activity within the meaning of the Act. It is also undisputed that, by firing Grossman, the Employer imposed what has been termed, "the capital punishment of the workplace." *Reno Hilton Resorts*, 320 NLRB 197, 209 (1995). [Internal punctuation omitted.]

All that remains is to consider whether the discharge was motivated by Grossman's participation in the pay cut protests. I see no reason not to accept Bardwell's stated rationale for his decision. Thus, he told Grossman that she was being fired for "negativity" that was clearly connected to her pay cut protest. This was emphasized by his contemporaneous and repetitive presentation to her of copies of her email and draft pay cut protest letter. Furthermore, Bardwell conceded that, apart from this behavior, she was a good employee. The Board comprehends that the initial explanation offered by an employer when explaining the termination of an employee has greater probative force than subsequent rationales offered up in response to outside scrutiny of its motivation. See *Yellow Ambulance Service*, 342 NLRB 804, 805 (2004). The evidence establishes that the Acting General Counsel has met his burden of proving that Grossman was fired as a direct consequence of her employer's dissatisfaction with her concerted protected protest activity regarding the pay cut. As a result, the termination constitutes a violation of Section 8(a)(1).

I recognize that the Employer now asserts a number of additional reasons for the firing of Grossman. Although I view these reasons as afterthoughts, in the interest of decisional

completeness, I will evaluate them using the Board's *Wright Line* methodology. I have already explained that Grossman engaged in protected activity that was well known to her employer. Her employer responded by imposing an adverse action that was substantially (if not entirely) motivated by animus against her due to her protected activity. As a result, the burden shifts to the Employer to establish that it would have terminated her employment for other legitimate reasons.

In response to this burden, the Employer asserts two rationales beyond its disapproval of her negativity and toxic talk. The first such explanation, described in Bardwell's formal termination letter written nine days after her firing, is that Grossman demonstrated "substantial lack of concern [for] employment." (GC Exh. 7.) Counsel for the Respondent explains that this refers to Grossman's "email communication regarding quitting and collecting unemployment." (R. Br. at pp. 9-10.) His reference is to Grossman's discussion in her email to Borucki and Ledman indicating her belief that the pay cut constituted a lawful reason for an employee to quit and receive unemployment compensation under State law. Counsel contends that this documents Grossman's involvement in a "scheme to quit and collect unemployment." (R. Br. at p. 9.) Nowhere does counsel for the Respondent explain how this expression of an opinion about the availability of unemployment compensation would constitute unprotected conduct under the Act. It is apparent to me that employees may discuss such matters when deciding among themselves how to respond to the imposition of a pay cut.⁴¹ I can perceive no difference between such an expression of viewpoint and a similar discussion of whether to walk off the job in order to protest the Employer's pay cut. It will be recalled that such a response was specifically protected by the Supreme Court in *NLRB v. Washington Aluminum Co.*, supra. I conclude that this proffered rationale is both unavailing and supportive of the conclusion that Grossman's discharge was wholly motivated by animus against her protected activity.

Finally, the Employer alleges that Grossman was discharged, in part, due to her failure to provide "prompt medical care to a patient." (GC Exh. 7; R. Br. at p. 10.) The reference here is to the patient with the injured finger who was treated at the clinic on January 31. Using the Board's evaluate methods, I readily conclude that this explanation was not a genuine motivation for Grossman's discharge. In the first instance, I have considered the compelling evidence of timing. The timing here has significance in two respects. First, it is noteworthy that Bardwell was informed about the incident by his wife on the day it occurred. Despite this, he made no mention of it to Grossman until he wrote his termination letter to her on February 17.⁴² He never offered any reason for his prior silence. As the Board has ob-

⁴¹ While counsel is perhaps insinuating that such a discussion may have involved the consideration of improper conduct under the State unemployment compensation statutes, he does not point to anything that would support such an interpretation. I do not perceive Grossman's statement as involving any impropriety.

⁴² As Grossman explained, "At the time that I was terminated, there was never any mention of a patient, never any discussion about a patient, I was never asked about a patient. The first time I actually heard about this was when I got this [termination] letter." (Tr. 52.) In his own testimony, Bardwell confirmed this. See Tr. 278.

served in a very similar context, such an unexplained “delay in discipline” is “highly suspect.” *Moore Business Farms*, 288 NLRB 796 fn. 3 (1988).

The other aspect of timing is even more probative. While Grossman was not discharged in proximity to her alleged deficiency in treating the finger patient, she was discharged immediately following the discovery of conclusive proof of her authorship of the pay cut protest letter. Bardwell’s instantaneous response to his discovery represents timing that can only be described as “stunningly obvious.” *Allstate Power Vac*, 357 NLRB 344, 347 (2011), quoting *NLRB v. Rubin*, 424 F.2d 748, 750 (2d Cir. 1970). As the Board has explained, “where adverse action occurs shortly after an employee has engaged in protected activity, an inference of unlawful motive is raised.” *McClendon Electrical Services*, 340 NLRB 613 fn. 6 (2003). The Board has also observed that timing can sometimes be “dramatic” evidence of unlawful motivation. *Saigon Grill Restaurant*, 353 NLRB 1063, 1065 (2009). This is such a case.

Apart from timing, a variety of other factors convincingly demonstrate that the finger patient incident is a mere pretext. I have already noted in connection with Borucki’s firing that animus is demonstrated by the commission of the string of other unfair labor practices adjudicated in this case, including those specifically directed at Grossman. Furthermore, Borucki’s firing just 2 days prior to Grossman’s termination is strong circumstantial evidence of illegal motivation. See *Extreme Building Services Corp.*, 349 NLRB 914, 916 (2007) (discharge of employee shortly after discharge of another employee engaged in the same protected activities “strongly supports” a finding of unlawful motivation).

Finally, I have considered Bardwell’s own testimony that he relied exclusively on his wife’s account of the finger patient incident. He never questioned the other employees who were involved in the patient’s treatment or the patient himself. In addition, he never discussed the issue with Grossman. This stands in stark contrast to his testimony that he did not routinely discipline employees when a patient expressed dissatisfaction with treatment. He also reported that he would investigate such a complaint. The failure to follow such a procedure here, particularly when Bardwell has conceded that Grossman’s overall job performance had been good, is evidence of pretext. In *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1005 (2004), the Board noted that the failure to conduct an investigation of alleged misconduct and failure to afford the employee an opportunity to explain her behavior before firing that employee constitute “significant factors” supporting a conclusion of unlawful conduct. See also *Hospital Espanol Auxillio Mutuo de Puerto Rico*, 342 NLRB 458, 460 (2004), enf. 414 F.3d 158 (1st Cir. 2005) (“simply accept[ing] the complaints as true, without affording [employee] an opportunity to refute them” is evidence of unlawful discharge).

For all these reasons, I conclude that the copious evidence convincingly establishes that Bardwell did not actually rely on any reasons to terminate Grossman apart from those directly linked to his animus against her due to her participation in the protected pay cut protest activity. Grossman’s discharge constitutes a violation of Section 8(a)(1).

3. Employer’s rule prohibiting employees’ discussions of salaries

The Employer maintains an employee handbook that contains the following provision: “No employee may ever discuss issues of personal salaries or raises with other employees other than management.” (Jt. Exh. 2, p. 5.) The Acting General Counsel alleges that such a prohibition violates the Act. Counsel for the Employer, quite properly, does not contest this allegation and concedes in his brief that the provision contains “prohibited language.”⁴³ (R. Br. at p. 7.)

I agree with the lawyers that the Board clearly prohibits maintenance of such a rule against discussions among employees regarding their pay. As the Board has put it, “employers may not prohibit employees from discussing their own wages or attempting to determine what other employees are paid.” *Mediaone of Greater Florida*, 340 NLRB 277, 279 (2003). [Citations and footnote omitted.] See also *Longs Drug Stores California*, 347 NLRB 500 (2006) (rule stating, “[y]our pay is confidential company information and should not be discussed with fellow employees” is unlawful). Based on this, I will make the required finding and order an appropriate remedy.

CONCLUSIONS OF LAW

1. The Employer unlawfully interrogated its employees as alleged in paragraphs 4(a), (c), (g), and (w) of the complaint. This conduct violated Section 8(a)(1) of the Act.

2. The Employer unlawfully prohibited its employees from discussing the terms and conditions of their employment with each other as alleged in paragraphs 4(b), (d), (h), (j), and (p) of the complaint. This conduct violated Section 8(a)(1) of the Act.

3. The Employer unlawfully disciplined its employees because of their participation in protected concerted activities as alleged in paragraphs 4(e), (f), (m), and (aa) of the complaint. This conduct violated Section 8(a)(1) of the Act.

4. The Employer unlawfully threatened its employees due to their participation in protected concerted activities as alleged in paragraphs 4(k), (l), and (x) of the complaint. This conduct violated Section 8(a)(1) of the Act.

5. The Employer unlawfully issued an unfavorable evaluation of its employee, Michael Borucki, due to his participation in protected concerted activities as alleged in paragraphs 4(r) and (aa) of the complaint. This conduct violated Section 8(a)(1) of the Act.

6. The Employer unlawfully demoted and terminated its employee, Michael Borucki, due to his participation in protected concerted activities as alleged in paragraphs 4(t), (v), and (aa)

⁴³ Counsel for the Respondent does assert that there was never any proof that “the prohibited language in the handbook was the basis for employee discipline.” (R. Br. at p. 7.) This is not entirely accurate. In his testimony, Bardwell conceded that, during an unemployment hearing, the clinic’s attorney (not Reppe) argued that Borucki’s conduct violated this rule. See Tr. 260–262. In any event, if the rule is unlawful on its face, the Acting General Counsel does not need to prove that it was actually enforced. See *Double Eagle Hotel & Casino*, 341 NLRB 112, 115 (2004), enf. 414 F.3d 1249 (10th Cir. 2005), cert. denied 546 U.S. 1170 (2006) (rule prohibiting salary discussions is “plainly” unlawful “on its face”).

of the complaint. This conduct violated Section 8(a)(1) of the Act.

7. The Employer unlawfully terminated its employee, Jennifer Grossman due to her participation in protected concerted activities as alleged in paragraphs 4(y) and (aa) of the complaint. This conduct violated Section 8(a)(1) of the Act.

8. The Employer unlawfully maintained a provision in its employee handbook that prohibits its employees from discussing their compensation with each other as alleged in paragraph 4(z) of the complaint. This conduct violated Section 8(a)(1) of the Act.

9. The Acting General Counsel did not meet his burden of proving that the Employer engaged in unlawful surveillance of its employees and in the unlawful creation of an impression of such surveillance as alleged in paragraphs 4(i), (q), and (s) of the complaint.

10. The Acting General Counsel did not meet his burden of proving that the Employer unlawfully threatened its employees as alleged in paragraphs 4(n) and (u) of the complaint.

11. The Acting General Counsel did not meet his burden of proving that the Employer unlawfully prohibited an employee from discussing her terms and conditions of employment with other employees as alleged in paragraph 4(o) of the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. This will include a requirement that the Respondent rescind its handbook provision prohibiting its employees from discussing their compensation with each other.

With regard to Borucki, I will order the Respondent to rescind its unlawful performance evaluation (GC Exh. 10) and corrective action form (GC Exh. 9) and to remove all references to those matters in its files. I will also order that he be offered reinstatement to his sales and marketing duties and radiology supervisor duties and that he be reimbursed for his loss of pay and benefits from the dates of his demotion and discharge, respectively, computed on a quarterly basis until the date of such proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). I will order that the make whole remedy shall include the payment of interest as computed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010).

As to Grossman, I will order the Respondent to rescind its unlawful corrective action forms (GC Exhs. 4 and 5) and to remove all references to those matters in its files. I will also order the Respondent to offer her reinstatement and make her whole for any loss of earnings and other benefits, computed on a quarterly basis from date of discharge to date of proper offer of reinstatement, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950). I will order that the make whole remedy shall include the payment of interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010).

Finally, I will order that the employer post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11 (2010).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended⁴⁴

ORDER

The Respondent, Northfield Urgent Care, LLC, Northfield, Minnesota, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Coercively interrogating its employees regarding their participation in protected concerted activities and the participation of other employees in such activities.

(b) Prohibiting its employees from discussing the terms and conditions of their employment with each other.

(c) Threatening its employees with reprisals because of their participation in protected concerted activities.

(d) Disciplining its employees because of their participation in protected concerted activities.

(e) Issuing unfavorable performance evaluations to its employees because of their participation in protected concerted activities.

(f) Demoting Michael Borucki or any other of its employees because of their participation in protected concerted activities.

(g) Discharging Michael Borucki, Jennifer Grossman, or any other of its employees because of their participation in protected concerted activities.

(h) Maintaining or enforcing a handbook provision or work rule that prohibits employees from discussing their compensation with each other.

(i) In any like or related manner interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, rescind the provision in its employee handbook prohibiting its employees from discussing their compensation with each other.

(b) Within 14 days from the date of the Board's Order, remove from its files the unlawful corrective actions forms issued to Michael Borucki and Jennifer Grossman and the unfavorable performance evaluation issued to Michael Borucki and, within 3 days thereafter, notify each of them in writing that this has been done and that the corrective action forms and unfavorable performance evaluation will not be used against them in any way.

(c) Within 14 days from the date of the Board's Order, offer Michael Borucki and Jennifer Grossman full reinstatement to their former jobs or, if those jobs no longer exist, to substantially equivalent positions, without prejudice to their seniority or any other rights or privileges previously enjoyed.

(d) Make Michael Borucki whole for any loss of earnings and other benefits suffered as a result of his unlawful demotion

⁴⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

and discharge, in the manner set forth in the remedy section of this decision.

(e) Make Jennifer Grossman whole for any loss of earnings and other benefits suffered as a result of her unlawful discharge, in the manner set forth in the remedy section of this decision.

(f) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful demotion of Michael Borucki and the unlawful discharges of Michael Borucki and Jennifer Grossman, and within 3 days thereafter, notify each of them in writing that this has been done and that the demotion and discharges will not be used against them in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post at its facility in Northfield, Minnesota, copies of the attached notice marked "Appendix."⁴⁵ Copies of the notice, on forms provided by the Regional Director for Region 18, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since January 12, 2011.

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

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

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

⁴⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

- Form, join, or assist a union
- Choose representatives to bargain with us on your behalf
- Act together with other employees for your benefit and protection
- Choose not to engage in any of these protected activities.

WE WILL NOT coercively interrogate our employees regarding their participation in protected concerted activities or regarding the protected concerted activities of other employees.

WE WILL NOT prohibit our employees from discussing the terms and conditions of their employment with each other.

WE WILL NOT threaten our employees with reprisals because of their participation in protected concerted activities.

WE WILL NOT discipline our employees because of their participation in protected concerted activities.

WE WILL NOT issue unfavorable performance evaluations to our employees because of their participation in protected concerted activities.

WE WILL NOT demote our employees because of their participation in protected concerted activities.

WE WILL NOT discharge Michael Borucki, Jennifer Grossman, or any other of our employees because of their participation in protected concerted activities.

WE WILL NOT maintain a handbook provision or work rule that prohibits our employees from discussing their compensation with each other.

WE WILL NOT in any like or related manner, interfere with, restrain, or coerce our employees in the exercise of the rights guaranteed by Federal labor law.

WE WILL, within 14 days from the date of the Board's Order, rescind the provision in our employee handbook prohibiting employees from discussing their compensation with each other.

WE WILL, within 14 days from the date of the Board's Order, remove from our files the unlawful corrective action form and unfavorable performance evaluation issued to Michael Borucki and the unlawful corrective action forms issued to Jennifer Grossman and, within 3 days thereafter, WE WILL notify each of them in writing that this has been done and that these corrective action forms and performance evaluation will not be used against either of them in any way.

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

WE WILL make Michael Borucki whole for any loss of earnings and other benefits resulting from his demotion and discharge, less any net interim earnings, plus interest.

WE WILL make Jennifer Grossman whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days of the date of the Board's Order, remove from our files any reference to the demotion and discharge of Michael Borucki and the discharge of Jennifer Grossman, and WE WILL, within 3 days thereafter, notify each of

them in writing that this has been done and that the demotion and discharges will not be used against them in any way.

NORTHFIELD URGENT CARE, LLC