Rainbow Medical Transportation, LLC *and* Henleigh Koyawena. Case 28–CA–166617

May 18, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On December 15, 2016, Administrative Law Judge Gerald M. Etchingham issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel filed an answering brief.

The National Labor Relations Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order as modified[2] and set forth in full below.

ORDER

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

In his decision, the judge inadvertently stated that employee Veronica John was a dispatcher rather than a driver. This inadvertent error has not affected our disposition of this case.

The judge also stated that wage discussions are inherently concerted. The judge's conclusion is in accordance with well-established Board precedent. See, e.g., *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 4 fn. 10 (2014); *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992).

Contrary to his colleagues, Chairman Miscimarra rejects the theory of "inherently" concerted activity for the reasons set forth in his separate opinions in *Hoodview Vending Co.*, 362 NLRB No. 81, slip op. at 5–7 (2015) (Member Miscimarra, dissenting), and *Alternative Energy Applications, Inc.*, 361 NLRB No. 139, slip op. at 7–8 (2014); see also *Component Bar Products*, 364 NLRB No. 140, slip op. at 3 & fn. 3 (2016) (Member Miscimarra, concurring in part and dissenting in part). He agrees, however, with the judge's finding that Charging Party Koyawena engaged in concerted activity under the standard set forth in *Meyers Industries*, 281 NLRB 882 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Additionally, applying the standard set forth in his separate opinion in *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12, slip op. at 17 (2014) (Member Miscimarra, concurring in part and dissenting in part), Chairman Miscimarra also agrees that Koyawena engaged in concerted activity for the purpose of mutual aid or protection.

The judge correctly found that under *Wright Line*, 251 NLRB 1083 (1980) (subsequent history omitted), the General Counsel satisfies his initial burden to prove that protected conduct was a motivating factor in an employer's adverse employment action by showing protected activity, the employer's knowledge of protected activity, and the employer's animus against protected activity. The General Counsel is not required "to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014), enfd. 801 F.3d 767 (7th Cir. 2015).

Chairman Miscimarra disagrees. He notes that in *Wright Line* itself, the Board stated that the General Counsel must make "a prima facie showing sufficient to support the inference that protected conduct was a 'motivating factor' in the employer's decision." 251 NLRB at 1089. Accordingly, Chairman Miscimarra believes the General Counsel must establish a link or nexus between the employee's protected activity and the employer's decision to take the challenged adverse employment action. See, e.g., *Tschiggfrie Properties, Ltd*, 365 NLRB No. 34, slip op. at 1 fn. 1 (2017). Applying this standard here, Chairman Miscimarra finds the General Counsel made the requisite showing.

[2] We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decisions in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), and *Guardsmark, LLC*, 344 NLRB 809, 812 (2005), enfd. in relevant part 475 F.3d 369 (D.C. Cir. 2007). We shall also substitute a new notice to conform to the language in the Order as modified.

In the remedy section of his decision, the judge provided that the Respondent must compensate Koyawena for any search-for-work and interim employment expenses regardless of whether those expenses exceed his interim earnings. Chairman Miscimarra recognizes that the judge's decision accords with the majority decision in *King Soopers, Inc.*, 364 NLRB No. 93 (2016). However, for the reasons stated in his separate opinion in *King Soopers*, id., slip op. at 12–16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

In adopting the judge's finding that the Respondent promulgated an overly broad and discriminatory rule prohibiting employees from openly discussing terms and conditions of employment, we note that the Respondent excepts to the violation solely on credibility grounds. In these circumstances, we find that the judge's recommended rescission remedy is appropriate, and we shall modify the Order and notice accordingly. See *T-Mobile USA, Inc.*, 365 NLRB No. 15, slip op. at 1 fn. 2 (2017) (rescission remedy warranted where respondent did not except to judge's finding that prohibition was a "rule."); *Guardsmark, LLC*, supra.

Unlike his colleagues, Chairman Miscimarra would not modify the Order to add a paragraph requiring the Respondent to rescind what has been erroneously characterized by the Regional Director in this and similar complaints as a "rule," here one that ostensibly prohibited employees from discussing issues relating to their trip sheets at bimonthly staff meetings. Chairman Miscimarra agrees that the Respondent, by its General Manager Philana Betoney, violated Sec. 8(a)(1) when Betoney responded affirmatively to employee Veronica John's suggestion that the Charging Party and other employees voice their concerns over trip sheets privately with the Respondent rather than publicly at staff meetings. Chairman Miscimarra further acknowledges that the Respondent did not file an exception to the judge's finding that this violation constituted the unlawful promulgation and maintenance of a "rule," instead excepting only to the finding that Betoney made the statement at issue. However, this one-off affirmation by one of the Respondent's agents to an employee's proposal—even though it violated the Act—did not constitute the promulgation and maintenance of a "rule." See *T-Mobile USA, Inc.*, 365 NLRB No. 15, slip op. at 1–2 fn. 2 (2017), and cases cited therein. For that reason, Chairman Miscimarra believes the Board should not modify the judge's Order to require that the Respondent rescind a nonexistent rule. Id.

The National Labor Relations Board orders that the Respondent, Rainbow Medical Transportation, LLC, Holbrook, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Promulgating and maintaining an overly broad and discriminatory work rule prohibiting employees from openly discussing their terms and conditions of employment, including issues related to their trip sheets.

(b) Discharging or otherwise discriminating against employees for engaging in protected concerted activities.

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

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

(a) Rescind its overly broad and discriminatory work rule prohibiting employees from openly discussing their terms and conditions of employment, including issues related to their trip sheets.

(b) Within 14 days from the date of this Order, offer Henleigh Koyawena full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(c) Make Henleigh Koyawena whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of the judge's decision, as modified in this decision.

(d) Compensate Henleigh Koyawena for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

(e) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Henleigh Koyawena, and within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(f) 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.

(g) Within 14 days after service by the Region, post at its Holbrook, Arizona facility copies of the attached notice marked "Appendix."[3] Copies of the notice, on forms provided by the Regional Director for Region 28, 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, 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. If 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 September 29, 2015.

(h) Within 21 days after service by the Region, file with the Regional Director for Region 28 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.

Dated, Washington, D.C. May 18, 2017

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Philip A. Miscimarra, Chairman

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Mark Gaston Pearce, Member

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Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD

[3] 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."

An Agency of the United States Government

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 promulgate and maintain an overly broad and discriminatory rule prohibiting open discussions of your terms and conditions of employment, including issues related to your trip sheets.

WE WILL NOT discharge or otherwise discriminate against you for engaging in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL rescind the overly broad and discriminatory work rule prohibiting you from openly discussing the terms and conditions of your employment, including issues related to your trip sheets.

WE WILL, within 14 days from the date of the Board's Order, offer Henleigh Koyawena full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he previously enjoyed.

WE WILL make Henleigh Koyawena whole for any loss of earnings and other benefits resulting from his discharge, less any net interim earnings, plus interest, and WE WILL also make Koyawena whole for reasonable search-for-work and interim employment expenses, plus interest.

WE WILL compensate Henleigh Koyawena for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Henleigh Koyawena, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

RAINBOW MEDICAL TRANSPORTATION, LLC

The Board's decision can be found at https://www.nlrb.gov/case/28–CA–166617or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273-1940.

Stefanie J. Parker, for the General Counsel.
Ernest Collins, Jr., Esq. (The Collins Law Firm, PLLC), for the Respondent.

DECISION

STATEMENT OF THE CASE

GERALD M. ETCHINGHAM, Administrative Law Judge. Henleigh Koyawena, an individual (the Charging Party or Henleigh),[1] filed the original charge in this case on December 23, 2015.[2] The General Counsel issued the complaint on February 29, 2016 (complaint), and the Respondent Rainbow Medical Transportation LLC (Respondent or Employer) answered the complaint on March 11, 2016, generally denying the critical allegations of the complaint.

This case involves the Respondent's sudden discharge of the Charging Party on September 29 after discussions were had at a business meeting of Respondent's employees between the Charging Party and his coworkers concerning Respondent's processing of daily trip reports which are required for payment of earned wages and Respondent's recommendation that such discussions should be held in private and not in a group meeting setting. The Respondent denies that these employee discussions had anything to do with its discharge of the Charging Party and that the Charging Party voluntarily resigned from his position and was not terminated on September 29. Respondent also denies that Henleigh was engaged in concerted, protected activity of any kind in September 2015 or that even if he was engaged in protected, concerted activity; his termination from employment was not related in any way to any protected, concerted activity. This case was tried in Winslow, Arizona, on April 26, 2016. Closing briefs were submitted by the General

[1] CP Henleigh is also referred to as "Henley" and "Mr. Queen" in the transcript.

[2] All dates in 2015 unless otherwise indicated.

Counsel and the Respondent on May 31, 2016. On the entire record,[3] including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a limited liability company with an office and place of business in Holbrook, Arizona, has been engaged in providing intrastate nonemergency medical transportation services. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. (Tr. at 9; GC Exhs. 1(c) 1–2, 1(e) 1, and 1(p).)[4]

II. ALLEGED UNFAIR LABOR PRACTICES

A. The Respondent's Operations

Respondent provides intrastate nonemergency medical transportation services and provided services to those Native Americans that were under the Indian Healthcare Plan through an Arizona Medicaid agency known as the Arizona Health Care Cost Containment Systems (AHCCCS). (Tr. 23.) Respondent serves and its drivers transport clients located in most of the Navajo Reservation which is Tube City, Pinon, Chinle, Wind Rock, Winslow, Holbrook, Dilkon, White Cone, Ganado, Sanders, Jeddito, Keams Canyon, and also the Hopi Reservation in Coal Mine, Tuba City, Page, and Kayenta—all in Arizona. (Tr. 27.)

Respondent functions in 2 offices—one in Holbrook, Arizona, to assist with medical transportation services to the Navajo and Hopi Indian reservations, where biweekly employee and management staff meetings occur on Sundays and individual trip paperwork is submitted to dispatchers for processing, and a second office in Tempe, Arizona, where the owners would bring the Respondent's billing employee/accountant, Shanelle Jackson (Shanelle) trip sheets every other week after receiving them on Sundays at the staff meetings. (Tr. 182–183.) Shanelle bills AHCCCS using the same trip sheets brought to her by the two owners. (Tr. 183.)

Respondent is owned and managed by Hane Sayed (Hane or Sayed) and Eltayeb Abdalla (Abdalla or Abe) and at all relevant times was managed by General Manager Philana Betoney (Betoney) who reported to Respondent's owners. (Tr. 22, 182.) Sayed and Abe supervise the Respondent in general including issues that arise, procedures, payroll, and gener al management. (Tr. 182.) Betoney directly managed and supervised Respondent's dispatchers and drivers in 2015 and she was responsible for hiring, firing, and issuing discipline to Respondent's employees during 2015 until she left Respondent on January 8, 2016. (Tr. 22 and 25, 208.)

Drivers were provided Respondent's vehicles to perform this work. Respondent has mechanics who work usually Tuesdays–Thursdays to change vehicles' oil every 3000 miles and to do repairs to vehicles on an "as needed" basis. (Tr. 29.) Betoney or dispatchers would notify Respondent's owners and the driver of a vehicle needing repair as to when the vehicle was fixed and ready for company use again. (Tr. 29–30.)

Drivers set up their own routes for transportation of their own clients which required that the client be on AHCCCS' eligibility list. Alternatively, drivers would occasionally receive calls from Respondent's dispatchers who would communicate to the driver the route to pick up a client using Google Maps which gives the destination, the mileage, and the hours and minutes estimated for travel, and drivers are required to take the shortest route. (Tr. 26.)

Respondent's drivers live in various remote locations and were scattered on the Navajo and Hopi reservations and drove their Respondent vehicles home after work. (Tr. 29.) Respondent monitored the vehicles all the time using the vehicle's GPS system and a Fleetmatics software program. (Tr. 29.)

The Respondent's owners each had this software updated to their cellphones and were alerted any time one of Respondent's vehicles started and any time a vehicle would travel over 5 miles over the speed limit. Betoney was also alerted at these same times with the same software on her cellphone and computer. (Tr. 29.)

In order for a client to be transported by a Respondent driver, each separate trip would require that the client be preauthorized and confirmed to be on AHCCCS' eligibility list by Respondent's drivers in discussion with the dispatchers who would check using AHCCCS' website. (Tr. 27–29.)

AHCCS has an office in Phoenix, Arizona that maintains a website system that Respondent's dispatchers would log on to for such confirmation that AHCCCS maintains its eligible clients' first and last names, dates of birth, AHCCCS number, and which insurance coverage they were enrolled under. (Tr. 27–28.) Anyone who did not have anything to do with the Indian Healthcare Plan or whose enrollment with AHCCCS under the Indian Healthcare Plan had expired were ineligible to be trans-

[3] The transcript in this case is somewhat accurate, but I correct the transcript (Tr). as follows: Tr. 8, line (l.)19: "sails" should be "sales;" Tr 41, l. 6: "500" should be "800" and "501" should be "801;" Tr. 42, l. 7: "through May" should be "from May;" Tr. 51, l. 23: "Nora Bacoti" should be "Nora Betoney;" Tr. 54, l. 4: "September 21" should be "September 29;" Tr. 56, l. 22: "Nora Bacoti" should be "Nora Betoney;" Tr. 57, l. 13: "Janelle" should be "Shanelle;" Tr. 58, l. 4: "Sheila Johns" should be "Spring John's;" Tr. 58, l. 15: "plea" should be "employee;" Tr. 59, 15: "Mr. Queen" should be "Mr. Henleigh Koyawena;" Tr. 61, 1. 1 and several other places: "Mr. Queen" should be "Mr. Henleigh Koyawena;" Tr. 63, l. 14: "I know Allen did make a few of the complaints. She would" should be "I know Alan did make a few of the complaints. He would;" Tr. 66, 2–3,etc.: "Access" should be "AHCCCS;" and throughout the transcript; "Mr. Queen" should be "Mr. Henleigh Koyawena," the Charging Party here; Tr. 94, l. 15: "Sheila Chi" should be "Sheila Chee;" Tr. 161 l. 8: "murder" should be "murderer;" Tr. 170, l. 14: "how to I print" should be "how do I point;" Tr. 175 and 176: "Chanel" should be "Shanelle:" Tr. 180, l. 23: "formally" should be "formerly;" Tr. 187, l. 4: "Hobi" should be "Hopi;" Tr. 193, l. 12: "are included" should be "are not included;" and Tr. 194, l. 11: "Mr. Collins:" should be "Ms. Parker:;".

[4] Abbreviations used in this decision are as follows: "Tr." for transcript; "R. Exh." for Respondent's exhibit; "GC Exh." for General Counsel's exhibit; "GC Br." for the General Counsel's brief and "R. Br." for the Respondent's brief. Although I have included several citations to the record to highlight particular testimony or exhibits, my findings and conclusions are based not solely on the evidence specifically cited, but rather on my review and consideration of the entire record.

ported. (Tr. 28.)

Any time that Respondent would receive a phone call for a transportation ride from a client, Respondent's dispatchers would ask the driver who lived closest to the client's location if they were available and if they could transport a client. (Tr. 26.) Otherwise, it was really the driver's responsibility to recruit in their community AHCCCS members that they would be transporting to medical appointments, counseling services, and addiction recovery meetings. (Tr. 26–27.) Thus, a driver's normal workload at Respondent was comprised of a mix of customers that the Respondent would either dispatch to them or clients that they would recruit on their own for non-emergency medical transportation. (Tr. 27.)

If a dispatcher was involved in any incident where one of Respondent's clients voiced a complaint about a driver, the dispatcher was asked by Betoney to record the client's message and forward this to Betoney along with the driver or client's phone number and Betoney would follow up by calling the driver or client that was being transported and get information from them about exactly what happened. (Tr. 25.)

In addition, each driver's vehicle was equipped with a GPS system that generated a Fleetmatic report that showed every second of where drivers are, how fast they are going, and when their vehicle turns off. (Tr. 25–26.) This Fleetmatic report was used to decide discrepancies between the number of miles a driver believed they were owed for transporting a client and the actual distance shown driven using GPS. Discrepancies arose due to the fact that many clients lived at isolated locations on an Indian reservation that GPS could not specifically identify using a street address.

Betoney would regularly keep in contact with all of Respondent's drivers by using her cellphone text messages to contact them and remind them to drive safely, buckle up, make sure their passengers are buckled up, obey the traffic laws, and of anything and everything that came about. (Tr. 38.)

In September 2015, the Respondent's dispatchers were Spring John (Spring John), Sheila Chee (Chee), possibly Pilar Duran (Duran), and possibly one other but not Lucindia Baloo (Baloo) who was being trained to become a dispatcher in September 2015. (Tr. 23–24.) On average in 2015, Respondent's dispatchers had 10–12 drivers each assigned to them because there were usually 36 drivers when all the vehicles were out. (Tr. 41–42.)

B. Henleigh's General Employment with Respondent and Respondent's Daily Trip Sheets

Henleigh was hired by Respondent as a driver on May 29 and worked continuously until he was terminated on September 29. (Tr. 24, 30, 144 149–150, 155.) Like all of Respondent's drivers, Henleigh was paid based on the weekly mileage he drove at rates of $0.25 per mile for the first 800 miles, $0.30 per mile for miles 801 to 1500, $0.35 per mile for miles 1501 to 2000, and $0.35 per mile for the total amount of weekly mileage if he reached 2001 miles and up in a weekly period. (Tr. 41, 76–77; GC Exh. 3 at 10.) Respondent would make an effort to assist its drivers to reach a minimum weekly mileage of 800 miles by occasionally providing a driving trip for a driver. (Tr. 41.) Another driver, Rhonda Qotswisiwaiwma (Rhonda Q.) worked with Henleigh at Respondent for more than 9 months from March 27 through December 31, 2015. (Tr. 131–132.)

Henleigh recruited some new clients and brought some clients over from his former position as a transport driver with a competing transport company. (Tr. 145.) In the summer of 2015, Henleigh had approximately 10 clients including 6–7 he recruited and some from his earlier job. Id.

Henleigh and other drivers were required to submit weekly mileage using AHCCS' daily trip sheet. (Tr. 64–67; R. Exh. 1.) Drivers would hand in their daily trip sheets to Respondent dispatchers who would process these trip sheets for review and finalization before they were sent to the AHCCCS for reimbursement to Respondent and its drivers. (Tr. 33–34.) Dispatchers would receive the completed trip sheets from drivers and they would enter them into a computer system and review them for completeness and accuracy and either return them to drivers for corrections or forward them on to Shanelle in accounting who would prepare bills to AHCCCS using approved trip sheets. (Tr. 175, 183–184.)

Respondent's drivers received their paychecks usually on Sundays at weekly staff meetings attended by drivers, dispatchers, and Respondent management and supervisors. (Tr. 34.) Employees were also paid through direct bank deposit on preceding Fridays if they chose that method for biweekly paychecks. Id.

These driver daily trip sheets were handed in by drivers every other Sunday at a staff meeting and they were a common subject matter discussed at the biweekly Sunday staff meetings due to their importance to Respondent and its employees and because there was a high turnover rate for drivers at Respondent at this time. (Tr. 30, 32, 67; R. Exh. 1.) One of the purposes of the bi-weekly mandatory meetings was for drivers to turn in their trip sheets. (Tr. 68.) Betoney added that trip sheets were a common discussion point as AHCCS was frequently changing the required information on the form that had to be accurate or else the trip sheet would not be accepted for reimbursement to the Respondent and its drivers by AHCCS. (Tr. 30–32, 69–70; R. Exh. 1.) Drivers were frequently reminded how to accurately fill out a trip sheet because of high driver turnover and because many of the drivers committed errors in completing their trip sheets. Accurate trip sheets were necessary so that AHCCCS would accept them and reimburse Respondent. (Tr. 38–39.)

As a driver, Henleigh's duties included driving a Respondent vehicle and using Respondent's credit card for gas for a variety of trips where he would pick up a customer and transport the customer to nonemergency medical appointments or to attend a meeting for recovering addicts such as an Alcoholics Anonymous (AA) meetings off reservation and nearer to a local city. Most of Henleigh's clients were people attending AA meetings and with these clients Henleigh did not have any problems completing trip sheets requiring HIPAA confidential information. (Tr. 170.)

One issue Henleigh and other drivers raised with the Respondent's owners was that many of the exact addresses of Henleigh and other drivers' Navajo and Hopi clients were not actually on Google Maps used by Respondent and AHCCS to reimburse drivers for their transportation. (Tr. 186–187.) Respondent's and AHCCCS' rules were that a driver was only

allowed 10 more miles for a trip for a Navajo or Hopi reservation client location that was not specifically on Google Maps yet. (Id.) As a result, many trips for Henleigh and other drivers involving clients on Navajo and Hopi Indian reservations were underpaid just because Google Maps did not have the exact location and a driver could only be paid 10 miles over a Google Map location—usually a gas station or something else with an exact address. (Tr. 187.) Henleigh and other drivers complained about this with Respondent's owners and Betoney. (Id).

Some other Henleigh clients were medical transport clients who did not want to disclose information as to why they needed medical transportation. (Tr. 170.) Henleigh called AHCCS about these clients and he asked what to do if they did not want to disclose information that they thought was confidential. Id. AHCCCS told Henleigh that if his client says the requested information is confidential "that is as far as it goes" and just put that in the trip sheet. Id. Henleigh understood that not providing full information on trip sheets was likely going to get those trip sheets rejected or declined by AHCCCS. Id. He also understood that when he made a mistake on a trip sheet, the trip sheet would be returned to him to correct the mistake and that he was responsible to turn in corrected trip sheets to his dispatcher. (Tr. 173, 183.)

At the Sunday staff meetings, the drivers would turn in their biweekly trip sheets to dispatchers who would be at their desk at their computers. (Tr. 35.) The dispatchers would then go to a log on their computer with each driver's submitted trip sheets and the dispatchers would compare the trip sheet information with each driver's schedule for the same time period to make sure that the information from the trip sheets matched the driver's weekly schedules so that all trips were accounted for. Id. As the trips were being matched up by the dispatchers, they would highlight the trip sheets on their computer software and not the original trip sheets in either a yellow color or a blue color to let the drivers and Respondent's management know which trip sheets had been received and which trip sheets were completed and which ones needed more information.[5] (Tr. 35–36.)

Betoney would instruct the drivers and dispatchers that the trip sheets needed to be accurately filled out with no white-outs, no highlighters as only black pen was allowed to be used and any mistakes required a redo of the trip sheet because they were submitted to AHCCCS and AHCCCS had to be able to read clearly what the information was on each submitted trip sheet. (Tr. 33). Betoney attempted to resolve trip sheet problems as quickly as possible, working directly with a driver to meet with them and trying to correct trip sheets with errors over a few days to a few weeks. (Tr. 40–41.)

Respondent's processing manager was Shanelle who worked in Tempe, Arizona and she was responsible for processing Respondent's employee payroll and she dealt with processing and submitting the daily trip sheets to AHCCCS in 2015 for reimbursement to Respondent and its employees. (Tr. 33–34, 57.) If AHCCCS denied a submitted trip sheet, AHCCCS would fax Respondent back the rejected trip sheets and let Respondent know which trip sheets needed to be corrected and management would inform the dispatchers of trip sheets needing correction and they notified the drivers to let them know that they needed to come into Respondent and redo or fix the incorrect trip sheets. Id.

These trip sheets were constantly revised by Respondent due to changes coming from AHCCS and included information for a driver's trip such as the first and last name of the driver, the date, the abbreviation of the day of the week as well as the Arizona license plate of the vehicle, the type of vehicle, the first and last name of the client or patient, their AHCCCS number, their date of birth, the reason for their trip, the time of pick up and drop off, the odometer readings at these points, the physical location of where the client was picked up and the location of the medical facility they were dropped off at, and a signature block for the client/patient and the driver to sign upon exit of the vehicle. (Tr. 31–32; R. Exh. 1.)

After turning in their biweekly trip sheets at the Sunday staff meeting, drivers were provided approximately 10–15 trip sheets for the following pay period. (Tr. 36.) Some drivers would exceed the 10–15 trips per pay period and they would receive more trip sheets or they would meet dispatchers in a designated area or they would drive to the nearest Respondent office to pick up additional trip sheets and then head back to their destination. (Tr. 37.)

C. Respondent's Personnel Policies in 2015

In 2015, Respondent followed a progressive discipline policy with its employees where there is first a verbal warning followed by three write-ups before termination, according to Betoney. (Tr. 48–49, 81.) Betoney explained that Respondent "usually will give them [employees] three write-ups before they're terminated if they don't correct the issue that is actually the disciplinary [problem]." (Tr. 49, 81.) Betoney also explained that usually before any decision is made to terminate an employee, she sits down with Respondent's owners to discuss the problem employee and she brings in the problem employee for a group discussion with the owners. (Tr. 81.) Occasionally, an employee is immediately terminated for serious violations of Respondent's policies and procedures such as driving a company vehicle while intoxicated, or transporting alcohol or any kind of substances, or allowing someone else to drive a company vehicle. (Tr. 80–81, 91, 189–190.)

In addition, Respondent had written policies formalized in a 10-page handbook that each employee was required to sign when they started work. (Tr.80; GC Exh. 3.) Employees were required to sign and date that they received Respondent's policy handbook including policies involving Schedules, Vehicle inspection and maintenance, Picking-Up and Dropping Off Passengers, Incident and Accidents, Confidentiality and Boundaries and Appropriateness, Communication, Vehicle Use, Dress Code, Drug free and Alcohol free Workplace, and a Three Month Probation Period Agreement. (GC Exh. 3.)

While company cars were to be driven only by Respondent's employees and not to be used for private use or other business use, or to carry passengers for hire or reward, whether financial or otherwise, a driver could use the car for some personal errands without violating Respondent's policies.

[5] Only the dispatchers highlighted trip sheets. No drivers highlighted their trip sheets. Tr. 35.

D. Drivers Complained About Respondent's Delayed Processing of Daily Trip Reports and Related Delayed Wage Payments

The discussion of daily trip report processing was a common occurrence at Respondent's mandatory biweekly Sunday staff meetings where Respondent distributed paychecks and conducted employee group meetings approximately every other Sunday. (Tr. 24.) The Respondent's owners and General Manager Betoney attended these Sunday meetings twice a month and drivers and dispatchers were required to sign in and out of the meetings to verify their attendance at these mandatory meetings. (Tr. 24–25, 184–185.) During two mandatory staff meetings in June 2015, employees raised concerns about Respondent's daily trip sheet. (Tr. 30.) Betoney later opined that usually a majority of drivers complain about delayed payment on submitted trip sheets at mandatory staff meetings at this time and that trip sheets were the usual subject of discussion at the June staff meetings because there were new drivers attending these meetings. (Tr. 30–31.) In addition, a common driver complaint involved the ever-changing requirements from AHCCCS for trip submittals and the lack of response from the dispatchers about AHCCCS' approving, denying or a requesting more information about a trip concerning transportation or pre-approved or prior authorizations (P.A.) trips when AHCCCS would sometimes delay a decision of trip approval or denial or request more information for 2 weeks to a month rather than the 72-hour limit the drivers were told by Respondent that AHCCCS was required to respond. (Tr. 81–83, 87.)

The drivers would work to get AHCCCS' response to their trips by going through dispatchers who acted as go-between drivers and AHCCCS. Id. Many times the drivers, frustrated or upset by the delay from AHCCCS, would also have to deal with non-communicative dispatchers like Spring John who would exacerbate the delay. (Tr. 43–44, 63, 81–83.) Drivers relied on dispatchers to check on AHCCCS' responses to submitted trip sheets. (Tr. 82.) P.A.s for less than 100 miles did not take long to be approved. (Tr. 176.)

Henleigh developed frustration because the majority of his trips were transporting clients to addiction counseling meetings and a lot of those were pending with AHCCCS on average of four at a time. (Tr. 83–84.) Respondent tried to assist Henleigh and get these trips approved at AHCCCS but AHCCCS would commonly ask for more information on what times the meetings were held, what time the client was being picked up, and the trip sheets had to match all of the required information from AHCCCS. Id. Henleigh admits that some of his trip sheet problems were due to his own mistakes in filling out the forms or having a filled-out form missing a client's signature. (Tr. 146–147, 167–168.) In addition, Henleigh understood all along that neither Henleigh nor Respondent would receive reimbursement from AHCCCS without a properly completed trip sheet. (Tr. 169.)

Some of Henleigh's trip sheets contained inaccurate mileage information and this caused a delay in processing his trip sheet. (Tr. 84.) Some of the drivers disputed the amount of trip mileage that Respondent calculated using Google Maps versus what the drivers believed was accurate for driving in many remote locations in Arizona. Id. Sometimes Henleigh would use a longer route and try to process this longer trip route to avoid using dirt roads during certain times of the year. (Tr. 85.)

Betoney, a former driver, admits that driving for Respondent gets frustrating trying to make money and providing for yourself and these trips do not get processed, they are delayed for whatever reason, and all you are doing is trying to get paid for the miles you are driving. (Tr. 86.)

During the two Sunday staff meetings each in July and August, trip sheets were again discussed as a common agenda topic at each of the staff meetings. (Tr. 38.) Henleigh spoke up at Sunday meetings after he began to transport two clients from Kings Canyon and his trip sheets' completion and reimbursement became an issue he raised at Sunday meetings in July or August 2015. (Tr. 69.)

Henleigh worked with four different dispatchers while working at Respondent as a driver. (Tr. 87.) Betoney opined that the first 2 dispatchers that Henleigh worked alongside left Respondent leaving Henleigh to find a new dispatcher. (Tr. 92.) Specifically, Henleigh explained that he worked first with dispatcher Letonia for about a month until the end of June before Respondent terminated her. (Tr. 150–151, 154–155.)

After Letonia, Henleigh worked a week with Spring John where he had verbal disagreements with her as his dispatcher and he occasionally raised his voice in frustration working with her but never received any verbal warning or write-up. (Tr. 151.)

After a week with Spring John, Henleigh was transferred to work with dispatcher Rufina Begay[6] (Begay) in early July, who he worked with for almost 2 months before she too was terminated by Respondent. (Tr. 152–155.) After Begay was discharged, Respondent reassigned Spring John to Henleigh again where they worked together for another week until late August. (Tr. 98, 152–154.)

Respondent also switched Spring John away from Henleigh just as it did for Alan because Henleigh also complained that Spring John would not communicate with him or Spring John was giving him a hard time. (Tr. 98, 151.) After a second brief assignment with Spring John, Henleigh was next assigned to work with dispatcher Chee sometime in September. (Tr. 154–155.) Betoney also explained that it was Respondent's policy to allow drivers to work with other dispatchers if they called in and their assigned dispatcher was on the phone with someone else or not in the office that day. (Tr. 93.)

E. The September 2015 Staff Meeting Drivers' Continued Complaints

1. Complaints regarding dispatcher Spring John and her processing trip sheets

By September 2015, Henleigh and three other drivers, Alan Wallace (Alan), Janelle Laylow (Janelle) and Rhonda Q., voiced their complaints about dispatcher Spring John (Spring John) at a staff meeting attended by Respondent's owners, Betoney, other drivers and dispatchers. (Tr. 44, 63, 90, 146, 210.) Alan was the first to speak up and he was later joined by Henleigh and Rhonda Q. as they complained about missing trip

[6] Begay and Henleigh were in a dating relationship at the time of hearing. Tr. 153.

sheets and that Spring John did not communicate well and she delayed the processing of their daily trip reports and how this delay resulted in delayed payment of the drivers' paychecks. (Tr. 42–43, 63, 90, 146–147.)

In particular, the four drivers all chimed in at this September 2015 staff meeting and complained that dispatcher Spring John lacked professionalism, had difficulty communicating, was argumentative, and was especially difficult to work with as she did not return the drivers' texts to her for ride assignments, she would misplace her drivers' trip sheets, and that Spring John was slow to process their daily trip reports or that she did not process them correctly, resulting in delayed and disputed pay to the three drivers. (Tr. 43–44, 63, 146–148.) Spring John admits that in addition to Henleigh, she also had trouble working with other drivers at Respondent. (Tr. 128). Respondent switched Spring John away from another driver other than Henleigh after he complained about her at a Sunday mandatory staff meeting to dispatcher Chee and she was also switched away from Henleigh due to complaints. Id.

In contrast, Spring John described working with Henleigh in August 2015, as Henleigh being very difficult and angry at times, verbally abusive and profane, and not seeming to understand or learn how to properly complete trip sheets. (Tr. 124–125.) Spring John also said that she felt threatened by Henleigh and that she was afraid for her life before he was transferred over to Chee. (Tr. 125, 199.) I reject this testimony as untrue and inconsistent with more reliable evidence as Henleigh was never disciplined or issued any written warning or write-up by Respondent despite this alleged and questionable testimony about Henleigh from Spring John. (Tr. 106–107.)

Spring John also admitted, however, that she commonly used profanities with Betoney at Respondent in 2015 and that, depending on the situation, curse words were commonly used throughout Respondent's facility. (Tr. 129–130.)

Henleigh described another problem he encountered with Spring John in early September 2015 involving his missing trip sheets. (Tr. 170–171.) Henleigh raised the issue with Abe, Respondent's owner, who was standing next to Betoney at a September staff meeting and Henleigh asked Abe: "What are you going to do about the trip sheets that were found in Spring [John's] desk? What's going to happen with that?" Id. Henleigh further explained that thes e were his missing trip sheets that Spring John had told him to hand over to a Respondent mechanic who was traveling into the Holbrook office for work on vehicles and the mechanic was directed by Spring John to deliver Henleigh's trip sheets to her. (Tr. 171). These trip sheets contained multiple clients who Henleigh picked up during the week. Id.

Henleigh's lost trip sheets only occurred after he turned them in and did not involve trips sheets he did not turn in. (Tr. 173.) All that remained with Henleigh after he turned in his completed trip sheets were either blank trip sheets or ones previously returned to him with mistakes and these may have been located in his company vehicle once it was turned in after he was terminated on September 29. (Tr. 173–174.)

2. Drivers' complaints about delayed processing of Trip Sheets and related delayed payment of wages

Also in September 2015, Henleigh and other drivers at Respondent complained about problems communicating with dispatchers and problems with lost or misplaced daily trip sheets and delayed processing with daily trip sheets. (Tr. 132, 146–148.) These complaints were voiced by Henleigh to other drivers, dispatchers, Betoney as the general manager, and to Henleigh's coworkers, including fellow driver Rhonda Q. (Tr. 132–133, 146–148.)

Henleigh also mentioned at this meeting that he had not been paid for some of his trips for quite some time and he was wondering where his trips were in Respondent's processing procedures. (Tr. 133.) Rhonda Q. also followed up on this topic and raised the issue of where the drivers' trip sheets go after they are turned in at a Sunday meeting and how the drivers know they will be properly paid for their submitted trip sheets. (Tr. 133–134, 140, 148.)

Alan also spoke up at this same Sunday meeting and repeated the complaints of Henleigh and Rhonda Q. about Respondent's very disorganized process for its drivers receiving timely and accurate pay for their turn-in trip sheets. (Tr. 134, 147.) Rhonda Q. also noticed that other drivers attending this same meeting also raised concerns about trip sheet processing but did not speak out in the group because they did not want to be identified at Respondent. Id.

During this staff meeting, dispatcher Veronica John suggested to the three complaining drivers that they should discuss their complaints about daily trip sheet processing in private with Respondent's general manager Betoney and not at a Sunday staff meeting and Betoney responded to this comment by saying that she agreed that it would be more appropriate for the three drivers to discuss the drivers' complaints in private and not at a Sunday staff meeting. (Tr. 44, 63–64.) Henleigh did not want to confine his complaints on behalf of all drivers to a private conversation with Betoney as he opined that daily trip sheet processing affected everyone at Respondent including drivers and dispatchers.

Also at this time in late September, according to Respondent's General Manager Betoney, Henleigh and Rhonda Q. were trying to persuade another driver, Janelle, also from the Hopi reservation like Henleigh, to go along with them "to complain to other governmental agencies" and "file certain things" about Respondent's mistreatment of its drivers connected to their misprocessed trip sheets and communication problems with Respondent's dispatchers and the delayed payment of drivers' wages. (Tr. 77–78, 90–91.)

After this meeting, Henleigh and Rhonda Q. took their complaints about delayed or missing trip sheets and Respondent's business ethics to the local Hopi Office of the Revenue Commission and Henleigh also reported it to the Hopi Terros Office. (Tr. 148, 174–175.) The revenue commission is the agency that issues licenses to companies doing business with the Hopi Tribe and Henleigh explained that if the revenue commission receives a certain number of complaints about a business licensed to work with Hopi Tribe members, the commission has a right to revoke that business entity's license to transport Hopi Tribe members. (Tr. 149.) Henleigh also explained that the

Hopi Terros Office is the tribal employment office that helps Hopi Tribe members with complaints they may have against various employers. Id.

F. Respondent's September 29 Termination of Henleigh and Respondent's Changing Explanations for Henleigh Leaving His Employment

On September 29, 2015, Henleigh called or texted dispatcher Chee to complain that some of his trip sheets were missing and had not been processed and Henleigh believed that Respondent's dispatchers had lost or misprocessed his trip sheets causing him a delay in pay. (Tr. 95–96, 150; GC Exh. 2 at 4–5.) Henleigh did not use any profanities in his talk to Chee that day but he did have increased aggravation and yelled about his missing trip sheets from August. (Tr. 101–102, 150.) Chee was not bothered by Henleigh's frequent complaining about his trip sheets as she never had a problem with helping him with his trip sheets as that was part of her job as dispatcher. (Tr. 96). In addition, Chee never felt threatened by Henleigh's behavior when they worked together at Respondent. (Tr. 103.)

Later on September 29, using the information he received from Chee about his missing trip sheets, Henleigh next went directly to Respondent's in-house manager and accountant Shanelle Jackson (Jackson) to see if she could determine why some of Henleigh's daily trip sheets were not being paid in a timely manner. (Tr. 155–158, 175). Shanelle told Henleigh that the dates Henleigh gave her for missing trip sheets were accounted for and that he had been paid for those dates. (Tr. 158.)

Later on September 29, 2015, Betoney telephoned Henleigh and asked him why he was calling Shanelle for information. (Tr. 158.) Next, Betoney told Henleigh to come into the office and sit down with her about his missing trip sheets but Henleigh responded by telling Betoney that he cannot come into the office at that moment as he was busy working and waiting for a client's information so he could transport his client to an appointment. (Tr. 158, 176–177.) Henleigh had been instructed by Respondent that the client always comes first so Henleigh was unable to meet with Betoney on September 29. Id.

Next, Betoney repeated to Henleigh that she needed him to come in and talk to her about trip sheets and he again told her that he could not come in because he was busy working. (Tr. 159, 176.)

By late September 2015, Henleigh had complained to Respondent's owners and General Manager Betoney about Spring John's unprofessional conduct and Henleigh believed that Spring John was responsible for some of his lost trip sheets that had not been processed. (Tr. 50.) At this time, Betoney tried to set up a meeting with Henleigh at the Holbrook office with one of Respondent's owners, Sayed, so they could try to determine what happened to Henleigh's missing trip sheets. Id.

Normally, Henleigh had been cooperative with Betoney and re-submitted trip sheets when they had been returned to him to point out errors. (Tr. 73–74.) However, in late September, Henleigh refused to come into the office and meet with Betoney to go over the calendar to figure out which trip sheets he believed were misprocessed or missing. (Tr. 50, 74.) Betoney communicated to both Respondent's owners that Henleigh was constantly complaining about his missing trip sheets and blaming Spring John yet refusing to come into the office and Betoney believed that "things were getting out of hand with Henleigh." (Tr. 50–51, 56–57.) Betoney further explained that Henleigh did not want to come in and sit down and go over his calendar with the trips that he did make. Betoney described that she then thought Henleigh reached a point of frustration where "his attitude got really ugly" and unprofessional and he became argumentative about things, about not really wanting to hear things out or get things corrected or to come in and sit down with Betoney and Respondent's owners to see what trip sheets were missing, which ones were accounted for, his mileage, and discussing what was going on between the dispatcher and himself. (Tr. 51 and 56, 86, 88.)

Betoney also sympathized with Henleigh and understood that by late September, he was frustrated with trip processing delays and had become argumentative about things. (Tr. 86, 88.) Betoney further explained that for Henleigh, he got frustrated "about probably feeling that he wasn't being heard or his needs weren't being met." (Id). Also, some of the elderly clients were not able to understand English and had to use thumbprints to sign trip sheets or if they were under Altex, their care provider signed trip sheets for them but drivers were never allowed to sign for the patients and these all can cause a delay in trip sheet processing. (Tr. 89.) Nonetheless, Henleigh remained a profitable good driver for Respondent who continued to bring in good miles for the company and Respondent's owner, Hane, did not want Henleigh to leave Respondent in 2015. (Tr. 114, 197–198.)

Finally on September 29, 2015, Betoney told Henleigh that he was being let go, that his employment with Respondent was terminated, and to just leave it, turn in his keys, his phone, and his gas card, and his company vehicle because of his complaints of improper trip sheet processing and because he was starting to talk to Betoney in an unprofessional manner similar to the way that Spring John had spoken to Betoney in late September or early October 2015 as discussed in section II.G. below. (Tr. 51, 77, 144, 149–150, 155,158–159,176–177.)

After terminating Henleigh, Betoney gave him the opportunity to bring his vehicle into the Holbrook office later that day or on September 30. Also on September 29, Henleigh left Abe a voicemail message on his cell phone telling Abe that Henleigh wanted to be paid in full before he turned in the company vehicle in his possession.[7] (Tr. 165–166, 217–219.)

Henleigh later responded to Betoney's request and told her that he was going to leave the vehicle at his residence until he received his final paycheck and for her to come and pick it up at his residence on the Hopi reservation later on September 29. (Tr. 159–160, 163–165.)

On September 30, the next day after Betoney terminated Henleigh, Respondent completed an Employee Discipline Warning Notice which provides that Henleigh was apparently

[7] Abe also testified that on the telephone message left by Henleigh on September 29, Henleigh tells Abe "Hey, Abe, I'm not—, I'm quitting." Tr. 217–218. I reject this testimony as Abe's misunderstanding of Henleigh's message as it is inconsistent with more believable testimony from Betoney, Chee and Henleigh that he did not quit his job with Respondent. (Tr. 77, 103, 157, 174.)

terminated a second time for the manner that he turned in his vehicle when Betoney and her mother unexpectedly arrived early at Henleigh's parent's house where Henleigh lives to collect his Respondent vehicle and gas card.[8] (Tr. 49–53, 59, 166; GC Exh. 2 at 1 and 3.) Betoney admits that Henleigh was already terminated by Respondent on September 29, the day before, when she and her mother traveled to his house the next day to collect the vehicle and gas card. (Tr. 51–54, 59; GC Exh. 2 at 1–3.)

Henleigh thought Betoney would come collect the company vehicle and gas card at his parents' residence on September 29 when Betoney terminated him but, instead, Betoney and her mother arrived at 7 a.m. on September 30 unannounced and uninvited. (Tr.161–165.) Henleigh felt threatened by Betoney's presence at his parents' house as he had heard a rumor that Betoney had murdered her prior husband and might be capable of hurting Henleigh or his parents. (Tr. 161.) Henleigh called the Hopi police to alert them to be on the alert for Betoney trespassing on Henleigh's parents' property. (Tr. 51–54, 59, 122–123, 127–128, 159–165; GC Exh. 2 at 1–3.)

On September 30, after Betoney and her mother arrived at Henleigh's parents' residence on the Hopi reservation at 7 a.m., Henleigh swore at Betoney when she arrived and accused her of being a murderer.[9] (Tr. 160–165.) The Hopi police were also present at this time and asked Henleigh to simply turn over the company vehicle and gas card to Betoney and her mother so they could be on their way. (Tr. 164–165.)

Henleigh received his last paycheck 2 days later on October 2, 2015, and he was paid in full for his work through September 29, 2015, the day he was terminated. (Tr. 164–165.)

Spring John and Baloo were promoted to supervisors who can hire and fire employees at Respondent as of January 8, 2016 when Betoney and three dispatchers left Respondent. (Tr. 208.)

On January 20, 2016, Respondent created a "To Whom it may Concern" letter (the "January 20 statement") signed both by former dispatcher and later supervisor Baloo and former dispatcher and then supervisor Spring John which provides that Henleigh called into dispatcher Chee on September 29 and simply quit his job as a driver for Respondent on September 29, 2015. (Tr. 106–113, 120–121; GC Exh. 2 at 6–7.) Spring John admits that she did not hear Henleigh call Chee on September 29 to quit but that she purportedly heard this account from Baloo and Chee. (Tr. 122, 124.) Spring John further admitted that she created the January 20 statement "just in case" she needed to testify at the April 2016 NLRB hearing in this case. Id. Hane also testified that he heard from an unknown staff person that Henleigh had quit. (Tr. 196–197.) In addition, dispatcher Baloo was never a dispatcher for Henleigh.

At hearing, Henleigh, Betoney and Henleigh's last dispatcher Chee all credibly denied that Henleigh quit work with Respondent and Betoney repeated the fact that she terminated Henleigh on September 29, 2015, because he was unwilling to cooperate and work out the trip sheets disputes between Henleigh and the dispatchers. (Tr. 77, 103, 157, 174.) In fact, Chee was asked directly whether Henleigh ever contacted her and told her that he was quitting and, contrary to the January 20, 2016 statement, Chee said that this never occurred. (Tr. 103.) Finally, Henleigh confidently explained that he did not quit and he had clients lined up for the first week of October and that he had already turned in P.A.s for trips after September 29. (Tr. 174.)

Respondent also argues that Henleigh was terminated for being a disorganized employee who was combative with dispatchers throughout his employment and had to be shifted away from as many as six dispatchers due to his aggressive manner and abusive language.

Henleigh was not on probation when he was terminated and he had never been disciplined or warned for any incident or received any form of Respondent's progressive discipline policy before he was terminated on September 29. There was one incident late in Henleigh's employment where Betoney claims she spoke to Respondent's owners about Henleigh's behavior but Betoney admits that she never confronted Henleigh with any form of discipline before she terminated him on September 29, 2015. (Tr. 75.) Betoney was unaware of any customer complaints concerning Henleigh's behavior or attitude prior to his termination other than that Respondent's own trip sheets asked its clients for information they believed raised privacy issues or were problematic to clients. (Tr. 55.) Respondent's statement of position in this case, General Counsel Exhibit 2, does not contain any prior discipline issued to Henleigh before September 30, 2015, after he had already been terminated by Respondent.

Finally, after Henleigh was terminated on September 29, 2015, Respondent discovered some blank trip sheets or incomplete trips sheets stuffed in Henleigh's company vehicle that were dated back to June 2015 or contained some client signatures. (Tr. 56–57, 96, 102–103.) Rhonda Q. also credibly testified that she and Henleigh also found some of Henleigh's missing trip sheets in Spring John's dispatcher drawer and that Rhonda Q. had not been paid for three of her trips in 2015. (Tr. 135, 140.)

G. Respondent's Progressive Discipline with Spring John Following Drivers' September 2015 Complaints of Her as a Dispatcher and Other Employee Incidents

Betoney described how after receiving the multiple complaints about Spring John from Alan, Henleigh, and Rhonda Q. in late September 2015, Betoney disciplined Spring John after pulling her aside in the office after Spring John had met with Respondent's owners. At the follow-up meeting, Betoney verbally warned Spring John that her professionalism needed to be improved; she needed to work on her communication skills with the drivers as well as the other staff. (Tr. 44–45.) Betoney also instructed Spring John that any time that Spring John received a text message from one of her drivers, she was to im-

[8] Betoney's mother, Nora Betoney or Bacoti, was next in line to become a driver for Respondent and Respondent was assigning Henleigh's vehicle to Betoney's mother for her personal and business use. Nora Betoney went with her daughter Betoney to retrieve Henleigh's vehicle. (Tr. 51, 56, and 88.)

[9] While Henleigh admits he used profane language directed at Betoney on September 30, he convincingly denied using the "f***" word as part of his seasoned word repertoire. (Tr. 167–168.)

mediately acknowledge receipt of the text so the drivers were not left wondering if their texts had gone through and Betoney told Spring John that she was going to write her up for this poor work performance including poor text responses, bad attitude, and unprofessional conduct. (Tr. 45.) Spring John then took the verbal write-up and avoided coming into the office to sit down and talk to Betoney about the write-up and Betoney "just let it be." Id.

Instead, Betoney prepared written write-up and gave the write-up paperwork to dispatcher Baloo and asked Baloo that if Spring John came into the office, Baloo would give the write-up to Spring John to have her read it over and if Spring John did not agree with the write-up, Baloo was to inform Spring John that Spring John would not have to sign the writeup. (Tr. 45.)

Spring John apparently waited for Betoney to leave the office when the write-up was created and then Spring John picked up the paperwork and Betoney did not confront Spring John about the write-up until Spring John returned from her vacation sometime in October. (Tr. 46, 60.) When Betoney finally confronted Spring John about the writeup, Spring John told Betoney that she did not want to sign the write-up because she did not feel that she was in the wrong for the way she spoke in text to Betoney or the drivers. (Tr. 46.) Spring John never brought the first write-up paperwork back to Betoney. Id.

The following Sunday, Betoney wrote up Spring John a second time and Betoney repeated the reasons for the first write-up and added a new reason for an improper text that Spring John had sent to Betoney's work phone. (Tr. 46. etoney and the three of them called Spring John into a meeting at the office and Spring John apologized to both of the owners for her inappropriate language but Spring John did not apologize to General Manager Betoney and Spring John never sat down and talked to Betoney about the write-ups. Id. At the end of the meeting with the owners, it was agreed that Respondent would ignore the two writeups of Spring John and move forward without any further discipline to Spring John. Id.

Next, Betoney explains that these two write-ups and meetings with Spring John did not work to correct her poor performance at Respondent but, instead, by November 2015, Spring John's poor work performance "seemed to kind of increase on where she [Spring John] just wanted to kind of do whatever she wanted to do and leave the office when she wanted to leave the office" and Spring John acted like she did not have to listen to Betoney or Respondent's owners about her poor work performance. (Tr. 46–47.) None of the alleged write-ups for Spring John were produced by Respondent at hearing although they were the subject of a valid subpoena request from the General Counsel. (Tr. 58.) In addition, Respondent's owner Hane explained that driver Alan, like Henleigh, had a lot of complaints while driving for Respondent and that numerous drivers, other than Henleigh, were issued many written disciplinary write-ups by Respondent but, unlike Henleigh, remained at Respondent as drivers. (Tr. 210).

Betoney admits that at no time was Respondent considering terminating Spring John for her continued poor work performance. (Tr. 47–48.) Instead, Abe and not Spring John signed off on the second writeup of Spring John and it went into her personnel file at Respondent. Id.

Spring John later applied and interviewed for another job and finally resigned from work at Respondent to work for another transport company at the end of November 2015. (Tr. 47–48, 120.) At this time, Respondent offered Spring John a position as a driver at Respondent. (Tr. 48.)

Betoney also described a verbal counseling session she had with dispatcher Veronica John (no relation to Spring John) just before October 31, 2015, for her frustrated and unprofessional behavior to the more than 10 drivers she worked with at Respondent. (Tr. 61–62.) Betoney also opined that Veronica John's behavior improved after she was given a verbal counseling session by Betoney. (Tr. 62–63.)

Rhonda Q. left employment with Respondent in late December 2015, not from the culmination of written or verbal warnings from Respondent's progressive discipline program, although Betoney claimed, without written evidence, that Rhonda Q. had misused her company vehicle several times including to attend bingo or go to Walmart. (Tr. 131–132, 138.)

Rhonda Q. explains that she had a client who needed to go to Walmart. (Tr. 139.) Rhonda Q. also confirmed that Betoney never confronted her about any alleged personal use of her company vehicle in 2015 and Rhonda Q. says that Betoney is not being truthful if she says that she confronted Rhonda Q. about personal use of the company vehicle. (Tr. 139.) There were no write-ups produced at trial by Respondent involving Rhonda Q.

Instead, Rhonda Q. describes an incident leading to her resignation from Respondent in December 2015 due to harassment from Betoney's cousin, Marie. (Tr. 135–137, 141–142.) Rhonda Q. explained that Marie tailgated her and demanded that Rhonda Q. turn in her vehicle and key while she was transporting a client. (Tr. 135–137, 141–142.) Rhonda Q. left a message with Respondent's owner Abe, but testified that Abe never returned her call about this incident. (Tr. 137.) Later Rhonda Q. heard from dispatcher Baloo that "Marie is Philana's [Betoney's] cousin." (Tr. 136–137.) Rhonda Q. was not given an exit interview when she left Respondent's employment in late 2015. (Tr. 141–142.)

Betoney left her position as general manager of Respondent on January 8, 2016, to work somewhere else. (Tr. 28.) Spring John was rehired by Respondent on January 8, 2016 as a dispatcher and promoted to supervisor at this time. (Tr. 208.)

On January 21, 2016, Respondent filed its position statement in this case comprised of Respondent's Discipline Warning Notice to Henleigh dated September 30, a handwritten statement from dispatcher Chee dated September 29, and the January 20, 2016 "To Whom It May Concern" letter referenced above and signed by Baloo and Spring John. (Tr. 106–113; GC Exh. 2.) Baloo and Spring John were promoted to supervisors on January 8, 2016, with authority to hire and fire drivers in 2016 before they testified at hearing on April 26, 2016. (Tr. 106–113, 115, 118.)

Analysis

I. CREDIBILITY

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness'

demeanor, and the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001) (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed.Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi,* 335 NLRB at 622. My credibility findings are generally incorporated into the findings of fact set forth above.

Henleigh and Chee testified in direct and forthright manners and their testimony did not waiver on cross-examination. For example, Henleigh admitted that he made mistakes as a driver and did not always submit trip sheets on time. Despite this, Henleigh was always viewed by both Respondent's owners as a good driver who drove good miles and was profitable for Respondent. While everyone used profanities at Respondent, including Henleigh, only Spring John complained about his behavior though it was the same as her behavior and she was not terminated. Henleigh worked with two other dispatchers who were terminated by Respondent; his fourth and final dispatcher, Chee, credibly testified that Henleigh did not quit his job at Respondent and he did not use any profanities in his talk to Chee on September 29 before he was terminated by Betoney but he did seem frustrated and yelled about his missing trip sheets from August. (Tr. 101–102, 150.) Chee also was not bothered by Henleigh's frequent complaining about his trip sheets as she never had a problem with helping him with his trip sheets as that was part of her job as dispatcher. (Tr. 96). In addition, Chee never felt threatened by Henleigh's behavior when they worked together at Respondent. (Tr. 103.)

Respondent's position that Henleigh quit on his own before he was terminated is not believable, as Henleigh continued to submit patient authorizations for the week he supposedly quit and continued to call dispatch to confirm pickup times for his customers when he was told that he was terminated by Respondent on September 29 and again on September 30. In addition, as referenced above, Henleigh, dispatcher Chee, and Betoney all denied that Henleigh quit Respondent at any time before Betoney fired him on September 29, 2015.

While I agree with Respondent's characterization that Henleigh was a disorganized driver who had problems in the time he worked at Respondent with his submittal of daily trip sheets, Respondent admits that Henleigh was a good driver and Respondent made a profit off of his work. (Tr. 114, 197–198, 214.) Therefore I reject Respondent's argument as unsubstantiated by credible evidence that Henleigh was a difficult employee who acted so belligerent, angry, abusive, threatening, and profane, that he was terminated by Respondent for this conduct rather than Henleigh's protected concerted activity raising the common issue of delayed trip sheet problems amongst drivers at September staff meetings. Once again as reported by Respondent's owner Hane, Henleigh remained a profitable good driver for Respondent who continued to bring in good miles for the company and Respondent's owner, Hane, did not want Henleigh to leave Respondent in 2015. (Tr. 114, 197–198.)

I also reject Respondent's argument that Henleigh was terminated for his *behavior* prior to September 30 or on September 30 when he had already been terminated and Respondent traveled to collect his work vehicle. Respondent failed to produce any written discipline notices to Henleigh despite its progressive discipline policy and despite the several warnings and discipline for similar behavior by Spring John in late 2015. I reject Betoney's testimony that before September 30, she issued and left behind a folder of more than one written discipline against Henleigh as it was not credible when she mentioned it at hearing and this is unsubstantiated as no such documents were produced at hearing. (Tr. 50–51.)

What was particularly telling to me at hearing as it relates to Respondent's own management and supervisory witness credibility were the frequent leading questions asked by counsel to Respondent to all of his witnesses, including significant testimony from General Manager Betoney, Supervisor Baloo, Supervisor Spring John, and Respondent's owners and chief executives Sayed and Abe, despite numerous objections by the General Counsel and admonishments from me to avoid improperly having testimony from Respondent's lawyer rather than believable testimony from Respondent's witnesses' own personal knowledge. (Tr. 68–73, 80–81, 99, 101, 113, 126–127, 183–186, 188–189, 191–192,198–200, 213.) An occasional leading question is expected but the wide scope of testimony elicited from leading questions fashioned as script from Respondent's legal counsel adds credence to my finding that Respondent's multiple different explanations as to why Henleigh no longer works at Respondent is pure pretext and that Respondent's counsel's proffered facts through his witnesses' multiple "yes" or "no" responses are inadmissible as evidence. See, e.g., *H.C. Thomson*, 230 NLRB 808, 809 fn. 2 (1977) (answers to leading questions on direct examination not entitled to credence).

I also reject Respondent's "To: Whom it may Concern" letter dated January 20, 2016, prepared not near the time of the alleged September 29, 2015 event, but immediately after the General Counsel started investigating the charge in this case and Respondent first received notice of the investigation. The letter was signed by former dispatcher and 2016 supervisor Baloo and former dispatcher and also 2016 supervisor Spring John, which provides that Henleigh simply quit his job as a driver for Respondent at the end of September 2015 (Tr. 106–118; GC Exh. 2 at 6–7). Both Spring John and Baloo were promoted to supervisors by Respondent on January 8, 2015 and created the letter only after a charge had been filed and investigation began in this case and also when Respondent's fabricated position that Henleigh quit came into this case. (Tr. 197, 208.) At hearing, former Respondent General Manager Betoney denied that Henleigh quit work with Respondent and once again admitted that she terminated Henleigh on September 29, 2015, because he was unwilling to cooperate and work out the trip sheets disputes between Henleigh and the dispatchers with her. (Tr. 77, 103.) Also, Henleigh's dispatcher Chee was more credible than Baloo and Spring John that Henleigh did not quit but was terminated by Betoney on September 29, 2015. (Tr. 103.)

I reject Sayed's testimony that only Henleigh spoke up and

complained at a September staff meeting and that another driver spoke up to say that because Henleigh was taking a lot of time at the meeting, he should do this privately on his own time. (Tr. 185, 191–192.) The credible testimony here is that Henleigh and other drivers complained at a staff meeting in September that trip sheets were not being processed properly and during this staff meeting, dispatcher Veronica John suggested to the three complaining drivers that they should discuss their complaints about daily trip sheet processing in private with Respondent's General Manager Betoney and not at a Sunday staff meeting, and Betoney responded to this comment by saying that she agreed that it would be more appropriate for the three drivers to discuss the drivers' complaints in private and not at a Sunday staff meeting. (Tr. 44, 63–64.) I also reject Sayed's testimony as unsubstantiated, vague, and self-serving that on some unknown date, Respondent paid Henleigh for all miles that he claimed dispatchers lost even without any submitted trip sheets. (Tr. 188–189). Sayed was believable, however, when he explained that Henleigh remained a profitable good driver for Respondent who continued to bring in good miles for the company and Sayed did not want Henleigh to leave Respondent in 2015. (Tr. 114, 197–198.)

I also reject Sayed's statements that he instructed Betoney numerous times to discipline Henleigh with write-ups for swearing or anything related to alleged bad behavior as no written discipline documents were produced in response to the General Counsel's subpoena other than the fabricated General Counsel's Exhibit 2 at 1–3, which attempts to document Betoney's day on September 30 *after* Henleigh had been terminated and she and her mother showed up unannounced at 7 a.m. at Henleigh's parents' Hopi Reservation property to collect his vehicle and gas card.

II. THE UNLAWFUL DISCHARGE OF HENLEIGH

A. Henleigh's Protected Concerted Actions and Respondent's Knowledge of Them

Complaint paragraph 4(a) alleges that since about the first week of September 2015 through about September 30, 2015, Henleigh engaged in concerted activities with other employees for the purposes of mutual aid and protection and concertedly complained to Respondent regarding wages, hours, and working conditions, by talking to other employees about, and raising concerns to Respondent about, wages, hours, and working conditions, including Respondent's processing of employees' or drivers' trip sheets. (GC Exh. 1(c) 2; R. Exh. 1.) Respondent denies that Henleigh was involved in protected concerted activity related to his termination. (R. Br. at 1).

To be protected under Section 7 of the Act, employee conduct must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB No. 12 slip op. at 3 (2014). Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that "[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee's activity and that of his fellow employees combine with one another in any particular way." *NLRB v. City Disposal Systems,* 465 U.S. at 835. The concept of "mutual aid or protection" focuses on the *goal* of concerted activity; chiefly, whether the employee or employees involved are seeking to "improve terms and conditions of employment or otherwise improve their lot as employees." *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978).

In *Meyers I*, the Board defined concerted activity as that which is "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 *Meyers II*, the Board clarified that the *Meyers I* definition of concerted activity includes cases "where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management." *Meyers II*, 281 NLRB at 887. The requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. In this regard, "inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition." *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683, 685 (3d Cir. 1964). In addition, it is well established that "the activity of a single employee in enlisting the support of his fellow employees for their mutual aid and protection is as much 'concerted activity' as is ordinary group activity." *Whittaker Corp.*, 289 NLRB 933, 933 (1988), quoting *Owens-Corning Fiberglas Corp. v. NLRB*, 407 F.2d 1357, 1365 (4th Cir. 1969).

It is well established that wage discussions are "inherently concerted." *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992). Here, Henleigh and other drivers raised the issue of Respondent's continued delayed processing of drivers' trip sheets with a resulting delay in the payment of drivers' wages tied to these trip sheets and possibly seeking outside assistance with the Hopi Office of the Revenue Commission or Terros Office to get paid in a timely manner. These issues were raised in the presence of other drivers, dispatchers, General Manager Betoney and Respondent's owners Sayed and Abe two times in September. Even under *Myers II*, and its progeny, Henleigh's conduct with fellow drivers, Alan and Rhonda Q., at these September staff meetings would constitute concerted activity. See Transcripts. 44, 63–64, 77–78, 90–91, 132–134, 140, 146–149, 174–175. It is irrelevant that Henleigh's coworkers did not expressly join in his efforts to hasten payment of their delayed wages by going with Henleigh to the Hopi Revenue Commission or Terros Office although Janelle informed Betoney of this activity. Solicited employees do not have to agree with the soliciting employee or join that employee's cause in order for the activity to

be concerted. See *Mushroom Transportation*, 330 F.2d at 685; *Circle K Corp*., 305 NLRB at 933; *Whitaker Corp*., 289 NLRB at 934; and *El Gran Combo*, 284 NLRB at 1117. Further, the protected, concerted nature of an employee's complaint to management is not dependent on the merit of such a complaint. See *Spinoza, Inc*., 199 NLRB 525, 525 (1972), enfd. 478 F.2d 1401 (5th Cir. 1973).

Having found that Henleigh's discussions with his coworkers at two September staff meetings with Respondent's management were concerted activities based on the totality of the record evidence, I now turn to the issue of whether Henleigh's concerted activities were engaged in for the purpose of "mutual aid or protection" under Section 7 of the Act. The Board has expanded the scope of this provision as follows:

> We hold that an employee seeking the assistance or support of his or her coworkers in raising a sexual harassment complaint is acting for the purpose of mutual aid or protection. This decision applies equally to cases where, as here, an employee seeks to raise that complaint directly to the employer, or, as in *Holling Press*, to an outside entity.

Fresh & Easy Neighborhood Market, Inc., supra at 7.

In this case, I find that Alan's, Rhonda Q.'s, and Henleigh's staff meeting complaints were for the purpose of mutual aid or protection under Section 7 of the Act when Henleigh and other drivers tried to improve conditions at work and complained about delayed trip sheet processing more than once at September staff meetings in the presence of Respondent management. In addition, since more than one driver had delayed trip sheets and paychecks, Respondent through Betoney and its two owners had reason to know that more than a single employee was involved when Betoney announced in late September a new Respondent rule prohibiting these open complaints at bimonthly staff meetings and directed drivers to complain in private only and not at any future Sunday staff meeting. (Tr. 44, 63–64.) Again soon thereafter, General Manager Betoney heard from driver Janelle in late September that Henleigh sought to continue these staff meeting complaints by bringing these same drivers' issues to the attention of the Hopi Revenue Commission and Terros Office as outside entities for assistance. See *Salisbury Hotel*, 283 NLRB 685, 687 (1987) (employee who called Department of Labor regarding her employer's lunch-hour policy was engaged in concerted activity because call was a continuation of efforts initiated by group of employees, even though no evidence employees agreed to act together, they did agree they had a grievance they should take up with management).

In sum, I find that both Henleigh's and other drivers' complaints about delayed trip sheet processing at a September staff meeting and Henleigh's subsequent reporting of this delayed trip sheet processing to local agencies to improve work conditions for Respondent's drivers are protected concerted activities in late September. I further find that Betoney and other Respondent managers had knowledge of these protected concerted activities before Henleigh was terminated on September 29.

B. Respondent's Animus

Complaint paragraphs 4, 5, and 6 allege that on about September 29, 2015, Respondent, by Betoney, discharged Henleigh because Henleigh engaged in protected, concerted activities regarding wages, working conditions, and terms of employment to discourage employees from engaging in these or other concerted activities in violation of Section 8(a)(1) of the Act.

Inasmuch as this case turns on Respondent's motive, a *Wright Line* analysis is appropriate and I find that the Respondent violated Section 8(a)(1) of the Act when it terminated Henleigh on September 29, 2015. In determining whether an employee's discharge is unlawful, the Board applies the mixed motive analysis set forth in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds, 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 (1983); *Hawaiian Dredging Construction Co.*, 362 NLRB No. 10, slip op. at 3 (2015).

Under *Wright Line*, the General Counsel must demonstrate by a preponderance of the evidence that the employee's protected conduct was a motivating factor in an employer's adverse action. The General Counsel satisfies her initial burden by showing (1) the employee's protected activity; (2) the employer's knowledge of that activity; and (3) the employer's animus. If the General Counsel meets her initial burden, the burden shifts to the employer to prove that it would have taken the adverse action even absent the employee's protected activity. See, e.g., *Mesker Door*, 357 NLRB 591, 592 (2011); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004).

The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *Roure Bertrand Dupont, Inc.*, 271 NLRB 443, 443 (1984). If the employer's proffered reasons are pretextual—i.e., either false or not actually relied on—the employer fails by definition to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003); *Limestone Apparel Corp.*, 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

As set forth in section II.A. above, I find that Henleigh engaged in protected concerted activity and Respondent was well aware of it. The third element, animus, is readily established by Respondent's failure to conduct a reasonable investigation, its summary discharge of Henleigh, and its shifting explanations for this discriminatory adverse action.

The timing of events here is also suspect and supports finding animus. The Board has long held that the timing of adverse action shortly after an employee engaged in protected activity will support a finding of unlawful motivation. *Alternative Entertainment*, 363 NLRB No. 131, slip op. at 10 (2016); *Trader Horn of New Jersey, Inc*., 316 NLRB 194, 198 (1995). Respondent tolerated Henleigh's alleged bad work behavior without issuing any discipline for almost four months before being terminated on September 29. Here, Henleigh was terminated almost immediately after Alan and Henleigh complained to management about their delayed trip sheet processing and Betoney discovered that Henleigh was continuing their com-

plaints by repeating them to the Hopi Reservation Revenue Commission and the Terros Office. Once again, there was no discipline against Henleigh prior to September 29 and no customers had ever complained about his driving and Henleigh remained a profitable good driver for Respondent who continued to bring in good miles for the company and owner Sayed admitted at hearing that he did not want Henleigh to leave Respondent in 2015. (Tr. 114, 197–198.)

Respondent is unable to prove it had a reasonable belief that Henleigh engaged in such egregious conduct by September 29 to warrant a discharge. This is untrue as Henleigh had not been disciplined before September 29, Respondent has a progressive discipline policy, and Henleigh did not commit any act subject to immediate termination by September 29. When compared to Spring John's similar conduct where she received disciplinary warnings as did other Respondent drivers, Respondent did not treat Henleigh equally or conduct a thorough investigation of his alleged bad behavior. Betoney acted unreasonably when she attempted to conduct an impromptu meeting with Henleigh on September 29 while he was working and had other customers to service.

An employer's failure to conduct a meaningful investigation and to give the alleged discriminatee an opportunity to explain demonstrates discriminatory intent. *Andronaco*, 364 NLRB No. 142 (2016), slip op. at 14, citing *inter alia*, *Ozburn-Hessey Logistics, LLC v. NLRB*, 609 Fed.Appx. 656, 658 (D.C. Cir. 2015), enfg. 357 NLRB 1632 (2011). Also see *Sociedad Esponanola de Auxilio Mutuo Y Benefencencia de P.R.*, 342 NLRB 458, 459–460 (2004), enfd. 414 F.3d 158 (1st Cir. 2005). Therefore, Respondent presented no conclusive evidence that Henleigh was treated similarly to other employees disciplined for bad behavior. *Ozburn-Hessey Logistics, LLC v. NLRB*, 833 F.3d 210, 219 (D.C. Cir. 2016), enfg. 361 NLRB No. 100 (2014) and 362 NLRB No. 118 (2015) (disparate treatment discussion).

Shifting defenses or reasons for an employer's adverse employment action are persuasive evidence of discriminatory motive; it also serves as evidence of animus and pretext. *Lucky Cab Co*., 360 NLRB No. 43, slip op at 4 (2014); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999), citing *Mastercraft Casket Co*., 289 NLRB 1414, 1420 (1988), enfd. 881 F.2d 542 (8th Cir. 1989). The most believable explanation for termination at trial was that Betoney fired Henleigh over the telephone on September 29 which differs from the only form of discipline that Respondent produced from its records, General Counsel's Exhibit 2 at 1–3, which provides that Henleigh was terminated for his behavior on September 30 when Betoney arrived unannounced and surprised Henleigh and his parents at their residence on the Hopi Reservation. These reasons also differ from yet another—Respondent's supervisors' January 20, 2016 statement that Henleigh was not terminated by Respondent but he instead quit on September 29. *City Stationery, Inc*., 340 NLRB 523, 524 (2003). These shifts in explanation are evidence of an unlawful motivation.

The General Counsel has met her burden, and the burden shifts to Respondent. The employer cannot meet its burden merely by showing that it had a legitimate reason for its action; rather, it must demonstrate that it would have taken the same action in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086–1087 (2011); *JCR Hotel, Inc. v. NLRB*, 342 F.3d 837, 841 (8th Cir. 2003). If the employer's proffered reasons are pretextual (i.e., either false or not actually relied on), the employer fails to show that it would have taken the same action for those reasons regardless of the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007). An employer fails to meet its rebuttal burden when the evidence shows that it tolerated an employee's shortcomings until the employee engaged in protected activity. *Global Recruiters of Winfield*, 363 NLRB No. 68 (2015) (Hirozawa, concurrence), citing *Diversified Bank Installations*, 324 NLRB 457, 476 (1997). The trier of fact may not only reject a witness story, but also determine that the truth is the complete opposite. *Boothwyn Fire Co. No. 1*, 363 NLRB No. 191, slip op. at 7 (2016).

As previously noted, I reject Respondent's only written discipline of Henleigh produced at hearing as being illogical – the September 30 discharge of Henleigh for using profane language when Betoney and her mother unexpectedly showed up at Henleigh's parents' house on Hopi Reservation land to collect Henleigh's company car and gas card. This alleged discipline occurred *after* Henleigh had been purportedly terminated by Betoney on September 29 so it is ineffective and pretext.[10] Respondent also falsely contends that Henleigh quit and was not discharged when it created the untrue and unsubstantiated January 20, 2016 statement alleging that Henleigh quit on September 29 and had promoted the two alleged authors of the statement to supervisor status. This too is pretext.

As referenced above, Henleigh had not been disciplined at all before September 29, though he was always disorganized as a driver yet profitable to Respondent. Henleigh's behavior at Respondent may have warranted progressive discipline like other employees including Spring John who received warnings in October and November 2015 and allowed to improve but Respondent rushed to discharge Henleigh soon after his protected concerted activities without affording him the same progressive discipline and fabricating the reasons he no longer worked at Respondent. When compared to how Respondent treated Spring John and other drivers who made mistakes, the evidence strongly supports an inference of discriminatory motivation. *Embassy Vacation Resorts*, 340 NLRB 846, 848 (2003), rev. denied 2004 WL 210675 (D.C. Cir. 2004) (inference of unlawful motive drawn from inconsistencies between the proffered reasons for disciplining employer's other actions, disparate treatment of employees with similar work records or offenses, deviations from past practice, or proximity of discipline to

[10] Respondent did not argue that Henleigh engaged in conduct on September 30 that was so egregious as to lose protection under the Act, and thus waived any defenses on that basis. I find that under the circumstances here where Henleigh had been terminated the day before and Betoney arrived unannounced at 7 a.m. to pick up his company car and gas card, his behavior was reasonable for an unlawfully discharged employee. See *Fund for the Public Interest*, 360 NLRB No. 110, slip op. at 1 (2014); *Hawaii Tribune-Herald*, 356 NLRB No. 63, slip op. at 2 (2011), enfd. 677 F.3d 1241 (2012) (Unlawfully discharged employees may act with some vehemence to an unlawful discharge and often say unkind things about their former employers).

union activity).

Moreover, even were these reasons not pretext, they would not satisfy Respondent's *Wright Line* burden. Substantively, the main proffered reason for Henleigh's discharge is his being disorganized and making frequent complaints about delayed trip sheet processing despite his sloppy trip sheet preparation. Respondent owner Sayed or Hane credibly testified that Henleigh remained a profitable good driver for Respondent who continued to bring in good miles for the company and Respondent's owner Hane did not want Henleigh to leave Respondent in 2015. (Tr. 114, 197–198.) It was not Henleigh's undisciplined disorganized behavior, use of profanities, or anything approaching a legitimate reason but, instead, Henleigh raising issues of improper delayed trip sheet processing at September staff meetings with other drivers and especially Henleigh's communicated intention to complain to the Hopi Reservation Revenue Commission and Terros Office that resulted in his quit termination by Betoney for Respondent on September 29. In view of the evidence here, the record does not support a finding that Respondent satisfied its defense burden. See, e.g., *Bally's Atlantic City*, 355 NLRB 1319, 1321 (2010) (when there is a strong showing of unlawful motivation, the respondent's defense burden is substantial).

Accordingly, the evidence does not establish that the Respondent would have discharged Henleigh based solely on his undisciplined behavior as a driver even in the absence of Henleigh's protected concerted activities. Stated differently, because of the pretexts referenced above, Respondent does not prove that it would have terminated Henleigh regardless of his protected concerted activities. Therefore, I find that Henleigh's discharge was motivated by his protected concerted activities in violation of his rights under Section 8(a)(1) of the Act.

III. RESPONDENT'S OVERBROAD RULE PROHIBITING OPEN DISCUSSIONS AMONGST EMPLOYEES AT STAFF MEETING OF PROTECTED CONCERTED ACTIVITIES

In addition, complaint paragraphs 4(b) and 5 and 6 further allege that about the first week of September 2015, Respondent, by Betoney, by oral announcement in a staff meeting at Respondent's facility, promulgated and since then has maintained an overly broad and discriminatory rule prohibiting employees from discussing their terms and conditions of employment and engaging in protected concerted activities in violation of Section 8(a)(1) of the Act. Specifically, during a September Sunday staff meeting, dispatcher Veronica John suggested to three complaining drivers, Henleigh, Alan, and Rhonda Q., that they should discuss their complaints about daily trip sheet processing in private with Respondent's General Manager Betoney and not at a Sunday staff meeting and Betoney responded to this comment by saying that she agreed that it would be more appropriate for the three drivers to discuss the drivers' complaints in private and not at a Sunday staff meeting. (Tr. 44, 63–64.)

The General Counsel has the burden to prove that a rule or policy violates the Act. In determining whether a work rule violates Section 8(a)(1), the appropriate inquiry is whether the questioned rule would reasonably tend to chill employees in the exercise of their Section 7 rights. *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999); *Hills & Dales General Hospital*, 360 NLRB No. 70, slip op. at 5 (2014).

As the Board stated in its *T-Mobile USA, Inc*. decision, 363 NLRB No. 171, slip op. at 1–2 (2016), applicable here when analyzing an employer's work rule:

The consolidated complaint alleges that numerous provisions in written work rules and policies applicable to the Respondent's employees are unlawful. An employer violates Section 8(a)(1) of the Act if it maintains workplace rules that would reasonably tend to chill employees in the exercise of their Section 7 rights. See *Lafayette Park Hotel*, 326 NLRB 824, 825 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999). The analytical framework for assessing whether maintenance of rules violates the Act is set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). Under *Lutheran Heritage*, a work rule is unlawful if "the rule *explicitly* restricts activities protected by Section 7."Id. at 646 (emphasis in original). Id. at 647.

As stated above, under *Lutheran Heritage Village-Livonia*, 343 NLRB supra at 647, an employer violates Section 8(a)(1) when it maintains a work rule that explicitly restricts activities protected by Section 7. Here, the disputed rule explicitly prohibits employees from having open discussions at staff meetings of the terms and conditions of employment, thereby preventing the open discussion of complaints about Respondent's delayed processing of drivers' daily trip sheets caused by testy or uncooperative dispatchers and further causing a delay in payment of wages. I further find that this rule is a violation of Section 8(a)(1) of the Act because it explicitly restricts protected activities. See *Automatic Screw Products Co*., 306 NLRB 1072 (1992) (Respondent violated Section 8(a)(1) by promulgating and maintaining rule prohibiting employees from discussing their salaries and also disciplining an employee for violating that rule); see also *Lockheed Martin Astronautics*, 330 NLRB 422 (2000) (Discussion of working conditions prohibited).

CONCLUSIONS OF LAW

1. The Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. By promulgating and maintaining an overly broad and discriminatory rule prohibiting employees from open discussion of the terms and conditions of employment and engaging in protected concerted activities, Respondent, through Betoney, violated Section 8(a)(1) of the Act.

3. By discharging employee Henleigh Koyawena because of his protected concerted activities for his complaining about delayed trip sheet processing at Sunday staff meetings with other drivers combined with his communication these same drivers' complaints to the Hopi Revenue Commission and Terros Office to report Respondent's delayed processing of drivers' trip sheets and other terms and conditions of employment, the Respondent violated Section 8(a)(1) of the Act and interfered with, restrained, and coerced Henleigh Koyawena in the exercise of the rights guaranteed in Section 7 of the Act.

4. The above unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

REMEDY

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

Specifically, having concluded that the Respondent is responsible for the unlawful discharge of employee Henleigh Koyawena, the Respondent must offer him immediate reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and privileges previously enjoyed. I also order that Respondent make Koyawena whole, with interest, for any loss of earnings and other benefits he may have suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F.W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). Also, Respondent must compensate Koyawena for his search-for-work and interim employment expenses regardless of whether those expenses exceed her interim earnings. *King Soopers, Inc.*, 364 No. 93, slip op. at 9 (2016). Search-for-work and interim employment expenses shall be calculated separately from taxable net backpay, with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, the Respondent shall compensate Koyawena for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). The Respondent shall also be required to expunge from its files any and all references to the discharge, and to notify Koyawena in writing that this has been done and that the discharge will not be used against him in any way. The Respondent shall also post the notice in accord with *J. Picini Flooring*, 356 NLRB 11 (2010).

Respondent shall also rescind or revise its unlawful rules as set forth above. I will also order that Respondent post a notice in the usual manner, including electronically to the extent mandated in *J. Picini Flooring*, 356 NLRB 11, 15–16 (2010). In accordance with *J. Picini Flooring*, the question as to whether an electronic notice is appropriate should be resolved at the compliance phase. Id. at 13.

On these findings of fact, conclusions of law, and upon the entire record, pursuant to Section 10(c) of the Act, I hereby issue the following recommended[11]

ORDER

The Respondent, Rainbow Medical Transportation, LLC, in Holbrook and Tempe, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unlawfully promulgating and maintaining an overly broad and discriminatory rule prohibiting employees from open discussion of their terms and conditions of employment and engaging in protected concerted activities;

(b) Unlawfully discharging or otherwise discriminating against Respondent's employees because they openly discuss Respondent's delayed processing of drivers' trip sheets and any other terms and conditions of employment; and

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

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

(a) Within 14 days from the date of this Order, offer employee Henleigh Koyawena immediate and full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make employee Henleigh Koyawena whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, as set forth in the remedy section of this decision.

(c) Compensate employee Henleigh Koyawena for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and submit the appropriate report to the Social Security Administration so that when backpay is paid to Koyawena, it will be allocated to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter, notify employee Koyawena in writing that this has been done and that the loss of employment will not be used against him in any way.

(e) 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.

(f) Within 14 days from the date of this order, post at its facilities in and around Holbrook or Tempe, Arizona, copies of the attached notice marked "Appendix."[12] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall also be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, notices

[11] 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.

[12] 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."

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. 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 September 29, 2015.

(g) 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.

Dated: Washington, D.C., December 15, 2016.

APPENDIX

Notice to Employees
Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated 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 do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to freely bring issues and complaints to us on behalf of yourself and other employees regarding your working conditions, including concerns about our processing of employees' trip sheets, and

WE WILL NOT do anything to interfere with the exercise of that right.

WE WILL NOT tell you that you should only raise issues about your working conditions in private.

WE WILL NOT fire employees because they exercise their right to bring issues and complaints to us on behalf of themselves and other employees regarding their work conditions.

WE WILL NOT discharge you because you engage in activities or make statements to other employees to the effect that you will go to the Hopi Reservation Revenue Commission or the Terros Office for assistance for any delayed processing of a trip sheet or delayed payment of a paycheck.

WE WILL NOT in any like or related manner interfere with your rights under Section 7 of the Act.

WE WILL offer Henleigh Koyawena immediate and full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights and/or privileges he previously enjoyed.

WE WILL pay and make Henleigh Koyawena whole for the wages and other benefits he lost as a result of his discharge.

WE WILL compensate Henleigh Koyawena for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods of longer than a year.

WE WILL file a report with the Social Security Administration allocating backpay for Henleigh Koyawena to the appropriate quarters.

WE WILL expunge and physically remove from our files all references to the September 30, 2015 discharge of Henleigh Koyawena, notify him, in writing, that such action has been accomplished, and that the expunged material will not be used as a basis for any future personnel action against him or made reference to in any response to any inquiry from any employer, prospective employer, employment agency, unemployment insurance office, or reference-seeker.

RAINBOW MEDICAL TRANSPORTATION, LLC

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28–CA–166617 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.