Cellco Partnership d/b/a Verizon Wireless *and* Communications Workers of America, AFL–CIO. Case 29–CA–158754

June 9, 2017

DECISION AND ORDER

BY CHAIRMAN MISCIMARRA AND MEMBERS PEARCE AND MCFERRAN

On August 1, 2016, Administrative Law Judge John T. Giannopoulos issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel and the Charging Party filed answering briefs, and the Respondent filed a reply brief. The Respondent also filed a motion to reseal record.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[1] and conclusions,[2] to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.[3]

ORDER

The National Labor Relations Board orders that the Respondent, Cellco Partnership d/b/a Verizon Wireless, Basking Ridge, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in activities on behalf of the Communications Workers of America, AFL–CIO, or any other labor organization.

(b) Discharging or otherwise discriminating against employees for engaging in concerted activities protected by Section 7 of the Act.

---

[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 addition, some of the Respondent's exceptions imply that the judge's rulings, findings, and conclusions demonstrate bias and prejudice. On careful examination of the judge's decision and the entire record, we are satisfied that the Respondent's contentions are without merit.

[2] In affirming the judge's finding that the Respondent violated Sec. 8(a)(1) and (3) of the Act by discharging employee Bianca Cunningham, we find it unnecessary to rely on the 8(a)(1) violations found in *Cellco Partnership d/b/a Verizon Wireless*, 365 NLRB No. 38 (2017), to find animus.

Further, because we agree with the judge that the General Counsel presented sufficient other evidence to sustain his evidentiary burden, we do not rely on GC Exh. 49 and we find it unnecessary to pass on the Respondent's exceptions to the judge's determination that any attorney-client privilege with respect to that exhibit had been waived.

Chairman Miscimarra disagrees with the judge's waiver analysis and his application of the factors identified in *Lois Sportswear, U.S.A. v. Levi Strauss & Co.,* 104 F.R.D. 103, 105 (S.D. N.Y. 1985). However, he agrees with the majority that the General Counsel met his evidentiary burden even without GC Exh. 49.

Chairman Miscimarra disagrees with the judge's statement that the General Counsel does not have to prove a connection between an employer's antiunion animus and the adverse employment action, the lawfulness of which is at issue. In *Wright Line*, 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 1083, 1089 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). Thus, Chairman Miscimarra would find that under *Wright Line*, the General Counsel must establish a link or nexus between the employee's protected activity and the employer's decision to take the employment action alleged to be unlawful. See *Libertyville Toyota*, 360 NLRB 1298, 1306 fn. 5 (2014) (then-Member Miscimarra, concurring in part and dissenting in part), enfd. 801 F.3d 767 (7th Cir. 2015); *Starbucks Coffee Co.*, 360 NLRB 1168, 1172 fn. 1 (2014) (then-Member Miscimarra, concurring); see also *AutoNation, Inc. v. NLRB*, 801 F.3d 767, 775 (7th Cir. 2015) (holding that "there must be a showing of a causal connection between the employer's anti-union animus and the specific adverse employment action on the part of the decisionmaker"); *Nichols Aluminum, LLC v. NLRB*, 797 F.3d 548, 554–555 (8th Cir. 2015), denying enforcement of 361 NLRB No. 22 (2014) ("Simple animus toward the union is not enough. While hostility to a union is a proper and highly significant factor for the Board to consider when assessing whether the employer's motive was discriminatory, general hostility toward the union does not itself supply the element of unlawful motive.") (alterations and internal quotations omitted). Applying this standard, Chairman Miscimarra finds the General Counsel made the requisite prima facie showing required under *Wright Line* in this case.

Because he finds that Cunningham did not lie, Chairman Miscimarra finds it unnecessary to rely on the judge's alternative rationale that any untrue statements by Cunningham during the investigation were protected under the rationale of *Paragon Systems, Inc*., 362 NLRB No. 182 (2015).

[3] In accordance with our recent decision in *King Soopers, Inc.,* 364 NLRB No. 93 (2016), we shall order the Respondent to compensate Cunningham for her search-for-work and interim employment expenses regardless of whether those expenses exceed interim earnings. 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). For the reasons stated in his separate opinion in *King Soopers,* 364 NLRB No. 93, slip op. at 9-16, Chairman Miscimarra would adhere to the Board's former approach, treating search-for-work and interim employment expenses as an offset against interim earnings.

With respect to the reporting requirement for allocation of backpay, we do not rely on the judge's citation to *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Instead, we rely on *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), which the judge properly applied in his recommended Order.

We shall modify the judge's recommended order to reflect these remedial changes, to conform to the Board's standard remedial language, and in accordance with our decision in *Excel Container, Inc.*, 325 NLRB 17 (1997). We shall also substitute a new notice to conform to the Order as modified.

(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 Bianca Cunningham full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make whole Bianca Cunningham for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the judge's decision as amended in this decision.

(c) Compensate Bianca Cunningham for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29, 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.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge of Bianca Cunningham, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her 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 after service by the Region, post at its retail stores in Brooklyn, New York, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 29, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed any of the facilities 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 the closed facilities any time since August 24, 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the Respondent's motion to reseal the record is denied.

Dated, Washington, D.C. June 9, 2017

Philip A. Miscimarra, Chairman

Mark Gaston Pearce, Member

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

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

[4] 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."

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against any of you for engaging in activities on behalf of the Communications Workers of America, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against any of 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, within 14 days from the date of the Board's Order, offer Bianca Cunningham full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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

WE WILL compensate Bianca Cunningham for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 29, 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 Bianca Cunningham, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

The Board's decision can be found at www.nlrb.gov/case/29-CA-158754 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.

John Mickley, Esq. and *Brady J. Francisco-Fitzmaurice, Esq.*, for the General Counsel.
Atur Talwar, Esq., for the Charging Party.
Arthur G. Telegen, Esq. and *Howard Wexler, Esq. (Seyfarth Shaw,LLP),* for the Respondent.

DECISION

STATEMENT OF THE CASE

JOHN T. GIANNOPOULOS, Administrative Law Judge. Cellco Partnership d/b/a Verizon Wireless (Respondent or Verizon), is accused of violating Sections 8(a)(1) and 8(a)(3) of the National Labor Relations Act (Act) by discharging Bianca Cunningham (Cunningham) because she assisted the Communication Workers of America, AFL–CIO (Charging Party or Union) and because she engaged in concerted activities with other employees for the purposes of mutual aid and protection.[1] This case was tried in Brooklyn, New York, from January 19–22, February 8–9 and 17–19, 2016, pursuant to a complaint and notice of hearing dated November 18, 2015 (Complaint) issued by the Regional Director for Region 29 on behalf of the General Counsel.[2] Based upon the entire record, including my observation of the demeanor of the witnesses,[3] and after considering the briefs filed by the General Counsel, the Union, and Verizon, I make the following findings of fact and conclusions of law.

I. JURISDICTION AND LABOR ORGANIZATION

Respondent is a Delaware general partnership, and a wholly-owned subsidiary of Verizon Communications Inc., with a principal office and place of business located in Basking Ridge,

[1] Citations to the transcripts will be denoted by "Tr." with the appropriate page number. Citations to the General Counsel's Exhibits, Respondent's Exhibits, Union Exhibits, and Joint Exhibits will be denoted by "GC Exh." "R. Exh.." "U Exh." and "Jt. Exh." respectively. The transcripts contain certain errors, which I have corrected sua sponte. *Mcar, Inc.*, 333 NLRB 1098, 1099 (2001) (judge, sua sponte, corrects errors in the transcripts). The transcript corrections will be marked as an exhibit, received into evidence, and served upon the parties.

[2] All dates are in 2015 unless otherwise noted.

[3] Credibility resolutions are based upon witness demeanor. In making my determinations I considered "[a]ll aspects of the witness's demeanor including the expression of his countenance, how he sits or stands, whether he is inordinately nervous, his coloration during critical examination, the modulation or pace of his speech and other non-verbal communication." *Penasquitos Village v. NLRB*, 565 F.2d 1074, 1078–1079 (9th Cir. 1977). I have also considered the inherent probability of the testimony and whether such testimony was in conflict with credited testimony or documentary evidence. Testimony contrary to my findings has been discredited.

New Jersey.[4] It also has offices and places of business in Brooklyn, New York, where it is engaged in the business of providing wireless telecommunications services. Respondent derives annual gross revenues in excess of $100,000, and purchases and receives equipment and other goods and materials in excess of $5000 directly from points outside the State of New York. 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. Accordingly, this dispute affects commerce and the Board has jurisdiction pursuant to Section 10(a) of the Act.

II. FACTS

A. Background

Verizon is a nationwide wireless service provider with retail stores throughout the country.[5] This case involves the company's Brooklyn retail stores, which had been recently unionized, and stems from the decision made by Victory Eshareturi (Eshareturi) to "walk off" her job on May 21, 2015, after communicating with coworker and union activist Bianca Cunningham ("Cunningham").[6] After an initial investigation of the incident, Respondent decided to fire Eshareturi for violating its Code of Conduct by "walking off the job without reason or justification, and dishonesty during an investigation." After further investigating the incident, Respondent changed its decision; Eshareturi was given a final written warning and Cunningham was fired. Respondent asserts that Cunningham was fired for cause while the government claims the Cunningham's discharge violated the Act. Evidence was introduced over 9 days of hearing to determine Respondent's true motive in discharging Cunningham. (R. Exh. 7; Jt. Exh. 10; GC Exh. 1(m), GC Exh. 1(d), GC Exh. 14.)

1. Cunningham and the Union Drive in Brooklyn

Bianca Cunningham started working for Respondent in September 2010, at a call center in Little Rock, Arkansas. She then transferred to New York, ultimately ending up in Bay Ridge, Brooklyn in April 2012 as a retail sales representative.[7] Respondent operates six retail stores in Brooklyn, New York: Montague; Atlantic Terminal; Bay Ridge; Bensonhurst; Kings Highway; and Brighton Beach. These stores sell cellular phones, accessories, and related items and services. (Tr. 107–108, 206–208; Jt. Exh. 3.)

Some time towards the end of 2013, after a brief conversation with a customer in the Bensonhurst store who was a union member, Cunningham called a general number for the Union and left a voicemail.[8] As a result of the phone call, Cunningham eventually met with a union organizer. Before the meeting, Cunningham contacted workers she trusted at other stores; at her first meeting with the Union it was decided Cunningham would build an organizing committee based upon her initial connections. Cunningham reached out to an employee at every Brooklyn store, and eventually found one person in each store that agreed to become part of the organizing committee. There were seven members in total, one worker from each store and Cunningham. (Tr. 213–220.)

The organizing committee started meeting regularly; Cunningham oversaw its expansion and became the liaison between the Union and the committee. When the committee believed it had sufficient support, Cunningham wrote a mission statement, setting forth what the group hoped to gain by unionizing. One day, on Cunningham's day off, she and the union organizer went to each Brooklyn store distributing copies of the mission statement to workers. At the same time, they gave out red wristbands and collected union authorization cards from employees. The pair went to all six Brooklyn stores in 1 day. (Tr. 221.)

On March 31, 2014, just a few days after they started collecting cards, the Union filed an election petition for a unit of Brooklyn based customer service representatives. An election was held on May 14, 2014, and the workers voted to unionize by a vote of 39 to 19 with two challenged ballots; the Union was certified May 30, 2014. (Tr. 222; Jt. Exh. 4–6.)

After the election, in June 2014, Cunningham was elected by her coworkers to be a member of the bargaining committee.[9] The Union's bargaining committee and Verizon started bargaining regularly in July 2014 for an initial contract. As of the date of the hearing, after having about 39 bargaining sessions, the parties had yet to reach agreement on a first contract; Cunningham was present for all but a handful of the bargaining sessions. (Tr. 223–224, 480–484, 1123, 1341.)

Along with participating in the Brooklyn bargaining, Cunningham began speaking on behalf of the Union at public rallies, on national conference calls, and spoke on stage at the Union's national convention in 2014. She would also sit-in as a member of the bargaining committee for a Verizon wireless retail store in Everett, Massachusetts, which voted to unionize in December 2014.[10] (Tr. 224–25, 277, 480.)

---

[4] See Verizon Communications Inc. Form 10-K (Part I, and Exh. 21), filed with the Securities and Exchange Commission on February 23, 2016. *Humphrey Hospitality Trust, Inc. Securities Litigation*, 219 F.Supp.2d 675, 684 (D.Md. 2002) (court may take judicial notice of 10-K filed with the SEC even though it was not attached to the Complaint); Fed. R. Evid. 201(b).

[5] See *Whitaker v. Verizon Wireless*, 2012 WL 4507725 (E.D. Tenn. 2012).

[6] Respondent consistently referred to Eshareturi's actions on May 21 as "walking off the job," "walked off the job," "walk off the job," or "walked off your shift." (R. Exh. 7 pp. 1, 3, 18; Jt. Exh. 10.)

[7] Respondent refers to their in-store retail sales representatives as "solutions specialists." (Tr. 233, 941; 1471.) They are paid a salary plus commissions on in-store sales. (Tr. 208, 312, 417.)

[8] At the time of the union drive, Al Graves was the Bensonhurst store manager, and was Cunningham's supervisor; he knew she was a union activist. Graves transferred to the store in May 2013, and reported to District Manager Mike Scribner. Graves' last day in Bensonhurst was November 15, 2014, when he transferred to the Bay Ridge store. Scribner left the Brooklyn zone in February 2015. (Tr. 110–114, 148–151, 216.)

[9] The original bargaining committee consisted of two representatives from the Union, Pat O'Neil and Roger Young, along with three Verizon Wireless employees, Cunningham, Tatiana Hill, and Laurie Joseph; however, Joseph did not stay on the committee. (Tr. 223.)

[10] The Brooklyn stores, along with the store in Everett, Massachusetts are the only Verizon Wireless retail stores in the United States that are unionized. (Tr. 480.) As with the Brooklyn stores, as of the date of the hearing, the Union was still bargaining for an initial contract for the Everett employees. (Tr. 480.)

Towards the end of 2014, Cunningham was featured in union videos that appeared on YouTube (U. Exh. 1); the videos were produced before the election in Everett. In one video, Cunningham addresses what appear to be unionized workers for Verizon's "land-line" division at an outdoor rally.[11] The other video appears to be a promotional piece for the Union, discussing the organizing drive in Brooklyn, and prominently displays Cunningham along with her coworker Tatiana Hill (Hill). In the video Cunningham states that workers had "issues with management . . . abusing their power," "bullying situations," and "sexual harassment;" a voice in the video identifies Cunningham and Hill as the two individuals who started a "movement" among young workers at Verizon.[12] (U. Exh. 1; Tr. 332.)

After the Brooklyn workers unionized, they elected shop stewards for each store. Although Cunningham was not elected as a shop steward, because of her prominence and membership on the bargaining committee, employees would bring their work-place concerns directly to her, as would the shop-stewards. Depending upon the situation, Cunningham would bring the issue to the attention of the bargaining team, and some matters would be discussed directly at the bargaining table. For other matters, Union Staff Representative Pat O'Neil (O'Neil) who was the Union's chief negotiator, would discuss the matter directly with Verizon's Director of Labor Relations Brett Ulrich (Ulrich). (Tr. 226–229, 499, 1123, 1127.)

2. Eshareturi's Employment with Verizon

Victory Eshareturi started working for Respondent in February 2012. She worked at a variety of locations as a retail sales representative, including stores in Bay Ridge, Bensonhurst, Montague, and Kings Highway. At various times during her employment, she worked at retail stores where Al Graves ("Graves") was the store manager. It appears that the first time she worked with Graves was at the King's Highway store for a few months.[13] (Tr. 401–403; Jt. Exh. 3.)

From the beginning, Eshareturi's relationship with Graves was troublesome. Eshareturi believed that, from the start, Graves seemed to have a problem with her, and "it was like he just didn't like me." Eshareturi thought Graves was mad at her for some reason, that he was directing customers away from her, and diverting transactions to other representatives to ensure she would not get any sales. At the King's Highway store, it appears that Eshareturi was having a problem with another sales representative named Terri, and thought Graves was favoring Terri over her. In one incident involving the two, Graves was yelling at Eshareturi that she wasn't allowed to sit in a certain location at the store. After a few months, Eshareturi was transferred to Bensonhurst with a different store manager. (Tr. 155, 403–406, 411–412, 416–417.)

According to Graves, Eshareturi's transfer occurred because of the "situation" that was going on between the two of them. After working for about a year in Bensonhurst, Eshareturi transferred to the Montague store for about a year, and then transferred to Bay Ridge around December 2014 or January 2015. When Eshareturi transferred to Bay Ridge, Graves was the store manager.[14] (Tr. 141, 413.)

When Graves found out Eshareturi was being transferred to his store, he objected. Graves repeatedly asked Ryan Broomes (Broomes),[15] Respondent's Brooklyn district manager, and the human resources department, to remove Eshareturi from his store—but it was to no avail. Graves described the relationship between himself and Eshareturi as volatile enough that he felt uncomfortable being in the same room with her. He testified that he once had to "physically get involved" in a matter involving Eshareturi and another employee, and that created tension between himself and Eshareturi. (Tr. 154–156, 165.)

Eshareturi also complained about working with Graves in Bay Ridge. In March 2015, Eshareturi protested to Respondent that Graves had random outbursts, and that he had a "temper tantrum" when Eshareturi wanted to discuss a performance agreement with him.[16] She complained that Graves had to be "calmed down" by other employees, that she felt uncomfortable speaking to him because he can be "moody at times," and she asked to discuss the situation with Graves' superiors.[17] Eshareturi had also reached out to the Union, through Cunningham, about her problems with Graves. During the first week of May 2015, she called Cunningham for advice on how to handle the situation with Graves.[18] Eshareturi called Cunningham because she knew that Cunningham "had worked with the Union." (Tr. 233, 418–419.)

Broomes knew that Eshareturi was having problems with Graves, and that there was friction between the two. The problems between them led to Broomes meeting with Eshareturi on May 20 to ask if she was interested in transferring to another store. Eshareturi told him that she did not want to transfer because she was making good money at the store, where there

[11] In the video, Cunningham discusses the organizing drive in Brooklyn saying, in part, that in order to organize, employees had to overcome "an intense anti-union campaign full of lies," and "scare tactics." (U. Exh. 1; filename: "CWA 1109 Bianca Cunningham" 00:42–00:45 and 01:18–01:24.)

[12] See U. Exh. 1 filename: "Verizon workers organize – Brooklyn, N.Y."

[13] Neither Eshareturi nor Graves could recall the exact date they first worked together, but it appears from the record it was some time in 2012. (Tr. 182, 408–409, 411.)

[14] Eshareturi learned a few days before her transfer that Graves was the Bay Ridge store manager. Eshareturi did not complain because she had already protested her transfer because the store was too far away and she didn't drive. She was told "it's done," so she did not think it made sense to continue complaining. (Tr. 413–415.)

[15] Broomes became the Brooklyn area district manager in March 2015, having been asked by the company to transfer to this position from another managerial job within Verizon. He was told the reason for the transfer was that Brooklyn needed "fresh management." When he came to Brooklyn he already knew the Union was in place, and within the first couple of months he learned that Cunningham was involved in bringing the Union into Brooklyn. (Tr. 733–734, 832–833.)

[16] She emailed Wendy McLean, the assistant manager in Bay Ridge (Tr. 1060), and also had a discussion with District Manager Broomes. (Tr. 721.)

[17] See R. Exh. 13 (Bates # CWA0081-82).

[18] Cunningham testified that Eshareturi first called her about problems with Graves in May at the time of a Floyd Mayweather fight. (Tr. 233–234.) Mayweather fought Emmanuel "Manny" Pacquiao on May 2, 2015. In re: *Pacquiao-Mayweather Boxing Match Pay-Per-View Litig.*, 122 F. Supp. 3d 1372, 1373 (J.P.M.L. 2015)

was good traffic and a good customer base. (Tr. 421, 446, 721, 734–777.) It is against this backdrop that the incident of May 21 occurred.

3. May 21, 2015 incident at the Bay Ridge Store

On May 21, Eshareturi was scheduled to work the closing shift, closing the store with Graves; she clocked into work at 10:58 a.m. At some point that day, Eshareturi was involved in an incident with Graves involving a customer sale. According to Eshareturi, Graves was angry and aggressive, and instead of allowing her to help the next available customer, Graves told her that he was taking the sale, and Graves processed the transaction so he would get credit for the sale. When Eshareturi asked him why he took credit for the sale, and whether they could discuss the issue later, Graves became very angry and told Eshareturi that they were not going to talk about it.[19] Eshareturi could not understand why Graves was so angry, and felt very anxious because he was the only manager there; she did not know what Graves was planning to do next. (Tr. 423–424; R. Exh. 3, 19.)

Although Eshareturi was scheduled to close the store with Graves, she did not want to stay as she did not want there to be any type of situation happening between the two of them. However, she did not know what to do. She clocked out at 4:24 p.m. to take her lunch break, eat, and try to figure out her next move. (Tr. 423–424, 454; R. Exh. 3, 19.)

At 5:06 p.m., Eshareturi called Bianca Cunningham, who was working at the Bensonhurst store. When Cunningham answered the phone, Eshareturi was crying hysterically and was speaking very fast. Eshareturi told Cunningham that she had another altercation with Graves, was scheduled to close the store with him, and that she did not feel comfortable doing so because she didn't know what was going to happen.[20] Cunningham told her to "hang-tight" while she made a few telephone calls. Immediately after hanging up with Eshareturi, Cunningham tried calling Roger Young ("Young"), the Union's executive vice president, eventually leaving him a voicemail saying there was a retail worker in Bay Ridge that had a situation with her manager and was very upset and crying. (Tr. 236–240, 640, 645; R. Exh. 16; GC Exh.9 p.6.)

Next, there were a series of text message conversations regarding Eshareturi's situation between two distinct groups. One conversation was between Cunningham and a group of union representatives/officials which included Young, Pat O'Neil, and Hill.[21] (Jt. Exh. 8, Tr. 200, 240–242, 478, 645.) The other conversation was between Cunningham and Eshareturi.[22] (Jt. Exh. 7.) During this timeframe Eshareturi also had two telephone conversations with Ryan Broomes, and O'Neil called Ulrich. The chronological sequence of the conversations is as follows:

> 5:16 p.m. text Bianca to Pat/group: Pat I have a rep in Bay ridge who just called hysterically crying saying she feels like Al (mgr) is going to harm her .. I have no idea what can be done or what to tell her
>
> 5:20 p.m. text Victory to Bianca: Should I call Ryan [Broomes] to ask if I can go
>
> 5:22 p.m. text Bianca to Victory: Yes
>
> 5:22 p.m. text Bianca to Victory: I'm speaking to hr right now so that will speed it up
>
> 5:22 p.m. text Victory to Bianca: Thanks
>
> 5:22 p.m. text Pat to Bianca/group: Get someone else in the store to stay with her and find out what is happening.[23]
>
> 5:23 p.m. Eshareturi calls Broomes (Tr. 737–38; GC 28 p.2)
>
> 5:24 p.m. text Pat to Bianca/group: If she feels threatened about her safety she should leave the store
>
> 5:27 p.m. text Bianca to Pat/Group: She's leaving now
>
> 5:28 p.m. text Pat to Bianca/Group: Good. When you find out what happened please let me know.
>
> 5:29 p.m. text Bianca to Pat/Group: Ok I will . .
>
> 5:29 p.m. text Bianca to Victory: Just email me a summary of what happened please. *****@verizonwireless.com [work email]
>
> 5:29 p.m. text Bianca to Victory: Don't worry about Ryan
>
> 5:30 p.m. text Bianca to Victory: I'm on vacation so actually email *****@gmail.com [personal email]
>
> 5:31 p.m. text Bianca to Pat/Group: I'm having her email me a statement

[19] I credit Eshareturi's testimony about what transpired on May 21 regarding her interaction with Graves, his demeanor as being angry, aggressive, rude, and her subsequent telephone calls with Broomes. I also credit her testimony that she subjectively believed that she could not stay in the store that night with Graves as the only manager because she thought something was going to happen to her and didn't know what Graves was planning to do. (Tr. 422–426, 428–433.) I note that, because of the events of May 21, Graves testified he was put on an "action plan" composed of him saying that he can walk away from employees during times of conflict, and requiring him to take some courses; it was also put into his appraisal. (Tr. 154–155.)

[20] The call lasted two minutes. (GC Exh. 9 p. 6.)

[21] Cunningham had previously set up this texting group on her phone. The four generally discussed bargaining issues in their group texts. (Tr. 387.) This text exchange is referred to below as "Bianca-Pat/group."

[22] This text exchange is referred to as "Victory-Bianca" and is italicized. The text messages in both conversations are reproduced as they appear, including misspellings, grammatical, and punctuation errors.

[23] At 5:23 p.m., Bianca called Bay Ridge Shop Steward Kimonia Middleton. Middleton was not aware of the situation, and could not see Eshareturi at the time of the call. Middleton told Cunningham that she would try to find Eshareturi and check to see where she was. (Tr. 255; GC Exh. 9 p.6.)

5:31 p.m. O'Neil calls Ulrich, leaving him a voicemail[24]

5:34 p.m. text Victory to Bianca: Ok. Thank you. Sorry to bother u on vacation. I really appreciate it. Ryan said he would look at the schedule and call me back. I'll send the email this evening.

5:35 p.m. text Bianca to Victory: Thank you

5:38 p.m. Broomes calls Eshareturi (Tr. 739)

5:43 p.m. text Tatiana to Group: She[Eshareturi] said that she was available for a tablet n Al didn't give it to her. She's saying that there is tension between him n [sic] her from past stores. She just doesn't feel comfortable closing with him tonight and she wants to go home.

5:43 p.m. text Tatiana to Group: I asked Kimonia if there was any type of threat she's replying now

5:47 p.m. text Victory to Bianca: So Ryan called me back on my way back to the store. He keeps asking me weird questions about what we discussed yesterday. He is trying to make it sound like I am back peddling because I told him yesterday I did not want to be transferred.

5:49 p.m. text Victory to Bianca: I told him I had to clock back in. To get off the phone.

5:49 p.m. text Victory to Bianca: I told him I was calling to get permission to leave and he keep asking questions

5:49 p.m. text Bianca to Victory: You don't want to be transferred. Stick to your guns .. you can leave just make sure you email me

5:50 p.m. Victory to Bianca: Ok

5:50 p.m. Eshareturi clocks out for the day (R. 18; Tr. 457)

7:49 p.m. Eshareturi emails Cunningham about the day's events (GC. 33 bates# VZW 011772)

7:54 p.m. Victory to Bianca: I just sent you email. Ryan left me a voicemail saying he heard I left before the end of my shift and that I should call him back to discuss it.

9:15 p.m. Cunningham forwards Eshareturi's email to O'Neil and notes that Eshareturi ended up leaving because of the confrontation (GC. 33 bates# VZW 011772)

9:16 p.m. Bianca to Victory: I got your email sorry. Let's wait until tomorrow and I'll have more info.

9:28 p.m. O'Neil emails Cunningham that he will follow up (GC. 33 bates# VZW 011771)

9:30 p.m. Cunningham emails O'Neil that she told Eshareturi she would be in touch with her tomorrow (GC. 33 bates# VZW 011771)

Regarding Eshareturi's conversations with Broomes that day, Eshareturi first called Broomes at 5:23 p.m.[25] She asked Broomes whether she could leave the store, telling him that she did not feel comfortable being at work with Graves. The initial conversation was short, lasting about 2 minutes—with Broomes asking her why she felt uncomfortable. Broomes then told her that he needed to look at the schedule, and that he would call her back. (Tr. 430, 737–738, GC Exh. 28 p. 2.)

After he got off the phone with Eshareturi, Broomes reviewed a "coaching portal" submitted by Graves earlier that day with his version of events. He then called Staci Hunt (Hunt), one of Respondent's human resources business partners. (GC Exh. 28 p. 2; Tr. 860, 1269.)

At about 5:38 p.m., Broomes called Eshareturi back. However, while Eshareturi was explaining to him why she wanted to leave the store early that night, Broomes was asking whether she wanted to be transferred—focusing back on the conversation they had the day before. Eshareturi kept telling Broomes that she did not want to be transferred; instead she did not want to close the store that night with Graves being the only manager present. She kept asking Broomes for permission to leave, but instead of asking about Graves' conduct, Broomes repeatedly asked her why she had previously told him that she didn't want to be transferred. With the conversation going nowhere, Eshareturi told Broomes that she had to clock back in from lunch to get him off the phone. She clocked back into work at 5:44 p.m. Upon going back to work Eshareturi gathered her belongings and walked off the job—without approval—clocking out for the day at 5:50 p.m. In all, Eshareturi worked just under 6 hours that day. (Tr. 429–430, 457, 738–739; R. Exh. 3, 18, 19; Jt. Exh 7.)

At 6:06 p.m. Broomes called Graves who told him that, after returning from her lunch break, Eshareturi took her belongings and left for the day without telling anyone. Broomes immediately called Eileen Lambert ("Lambert"), Respondent's senior manager for human resources, to update her; he also shared this information with Hunt. At 6:19 p.m., Broomes called Eshareturi, leaving her a voicemail saying that he heard she left before her shift ended, and asking her to call him back to discuss the issue. (Tr. 45, 740; GC Exh. 28 p. 2; R. Exh. 13 bates #CWA 0079; Jt. Exh. 7.)

At 8:14 p.m., Broomes also called Wendy Taccetta ("Taccetta"), director of retail sales for the region that included the Brooklyn stores, to share this information with her.[26] (Tr. 740,

[24] In the voicemail, O'Neil told Ulrich that there was "something going on in Bay Ridge with Al and one of the workers there." O'Neil said he wanted to give Ulrich a "heads up," and that it was "no great rush whatever is going to happen is going to happen." O'Neil then asked Ulrich to call him. (R. Exh. 8–9; Tr. 580–581, 593.)

[25] One minute earlier, Cunningham answered "yes" to Eshareturi's inquiry as to whether she should call Broomes.

[26] Taccetta became Respondent's director of retail sales for the eastside of New York in April 2014 just after Broomes became the Brook-

899; R. Exh. 13 bates #CWA79.) Between his initial call with Eshareturi and the end of the day, there were a total of 14 calls between Broomes and Al Graves, Wendy Taccetta, human resources manager Marielena McDonald (McDonald), and Hunt.[27]

4. Discussions on May 22

The next day, Broomes had discussions with Ulrich and Taccetta about Eshareturi leaving work, before he called Eshareturi at around 7 p.m., it was her scheduled day off. Eshareturi told Broomes she felt uncomfortable working with Graves the day before, that she did not know what to do, so she called Cunningham. According to Broomes, Eshareturi then told him that Cunningham advised her that she had spoken to Verizon's "HR" and they had approved Eshareturi going home. Broomes replied that he did not believe Cunningham had spoken to Verizon's human resources department because they would have telephoned him. He continued to ask Eshareturi why she felt it was necessary to leave the store. He also asked Eshareturi if she intended to come into work the next morning, and whether she would be comfortable going to work with Graves. Eshareturi told Broomes that she was planning to work the next day because Graves would be busy performing managerial jobs in the morning. Broomes then told her that he was transferring her to another store, effective June 1. (GC Exh. 28; R. Exh. 28 p. 3.) (Tr. 745–746.) (GC Exh. 20 p. 29.)

Later that night Broomes again called Eshareturi, this time telling her that she was not to return to work until hearing from him or human resources.(GC Exh. 28 p. 4.) Eshareturi never returned to the Bay Ridge Store. (Tr. 431.) Afterwards, Broomes compiled all his notes from the phone calls on May 21 and 22, and put them into an email that he sent to Taccetta, Lambert, Ulrich, McDonald, and Hunt on May 23. (Tr. 747–749, 746; GC Exh. 28.)

While Broomes was working the phones about Eshareturi walking off the job, on May 22 O'Neil and Ulrich had multiple conversations about the incident. During these conversations Ulrich told O'Neil that he had received information that there was an issue with Eshareturi leaving the store early. O'Neil replied that Eshareturi was hysterical, crying, and that she felt uncomfortable and unsafe. Ulrich said that the company was looking into what happened and they were going to put Eshareturi on paid leave until they could determine what caused her to feel uncomfortable, as Respondent did not want her to be in circumstances that would make her feel that way in the future.[28] (Tr. 493–495; 595–597, 1353; R. Exh. 10.)

5. The investigation into Eshareturi walking off the job

a. The May 27 Interviews

On May 27, Hunt and Jaleena Redding, from Respondent's human resources department, interviewed Eshareturi about her walking off the job on May 21; Young was also present for the Union. The interview occurred in the basement of the Bensonhurst store and started with Redding discussing Respondent's Code of Conduct requirement that employees be truthful, honest, and forthright. (Tr. 648; GC Exh. 16–18, 60; R. Exh. 4 p. 10; R. Exh.7 pp. 4–8; R. Exh. 13 bates #CWA 0028.)

After asking Eshareturi to run through the incident with Graves on May 21, Redding said that it was brought to Verizon's attention that Eshareturi had called Cunningham on May 21. She asked Eshareturi to tell them about the conversation with Cunningham. Eshareturi told the investigators that she called Cunningham for guidance on what to do, because she thought Graves was going to do something crazy. She told Cunningham that she felt threatened, and Cunningham said she was looking into it, but that if Eshareturi felt threatened or thought something was going to happen, then it was "OK" for her to leave. (R. Exh. 7; GC Exh. 16, 17, 60.) Redding asked Eshareturi whether she told Broomes on May 22 that Cunningham had spoken to "HR" and got approval from "HR" for her to leave. (GC Exh. 17.) Eshareturi said that she did not remember, but told them that it "was more that Bianca was trying to figure out what to tell me to do." (GC Exh. 17 p. 7; GC Exh. 16; R. Exh. 13 bates# CWA 0028.)

Hunt then asked Eshareturi whether her conversation with Cunningham was via text message or whether they had talked at any point. Eshareturi could not remember, but thought it was all by text. She then stated that Cunningham said she was going to reach out to people to get advice on whether or not she could leave; Eshareturi thought Cunningham mentioned she might reach out to "HR" but she did not believe that Cunningham "said HR said you can go in those words—in her words she said if you feel threatened you can go." (GC Exh. 17 p. 8.) In response to Verizon's questions, Eshareturi said that she did not know where Cunningham got guidance from—but that Cunningham did say that it was OK for her to leave. Eshareturi said that she left because she really felt that something was going to happen to her. (GC Exh. 16; GC Exh. 17; R. Exh. 13 bates #CWA 0028.)

After the meeting ended, Hunt told Young that they wanted to ask Cunningham some questions regarding the events of May 21. This was the first time Young had learned Verizon wanted to interview Cunningham, and he asked whether Cunningham knew she was going to be interviewed; they told him "no." That morning, before the interviews, Respondent had drafted a list of questions to ask both Eshareturi and Cunningham, but never informed anyone that they wanted to interview Cunningham before the meeting. (Tr. 261, 657, 1274; GC Exh. 60 p. 5.)

Cunningham was working at the Bensonhurst store, so Young went upstairs and asked her to come to the meeting; Cunningham was surprised. Again, the interview started with Redding discussing the Code of Conduct requirements to be

lyn district manager. (Tr. 899.) She was responsible for Respondent's stores in Brooklyn, Long Island, Manhattan (above 57th Street), and the counties of Rockland and Westchester. Taccetta worked for Respondent since 1999, and was the director of business sales before moving to this new position in April 2014; when she started in April 2014, Taccetta knew that Bianca Cunningham was a union activist. (Tr. 899–900, 1017–1018.)

[27] Al Graves—2 calls; Wendy Taccetta—2 calls; Marielena McDonald—1 call; Eileen Lambert—4 calls; and Staci Hunt—5 calls. (R. Exh. 13 #CWA 79.)

[28] O'Neil claims that on May 22, he told Ulrich that he had advised Cunningham to tell Eshareturi to leave the store if she felt unsafe—so it was O'Neil's advice that Eshareturi was following. (Tr. 596–597.) Ulrich denies that this portion of the conversation occurred. (Tr. 1353.)

truthful. And, as per the questions they had drafted that morning, Redding asked Cunningham about her conversation with Eshareturi on May 21. Cunningham told the investigators that Eshareturi reached out to her, asking for advice, saying she felt threatened/unsafe at work because of Graves. Cunningham told Eshareturi to reach out to Broomes if she felt unsafe. She also told Eshareturi that she would try to make a phone call because "we had a direct relationship with Brett" Ulrich. Cunningham initially denied telling Eshareturi to go home. However, when later asked the same question, she said that Eshareturi asked for her "personal opinion" and she told Eshareturi that, if Cunningham was in the same situation and felt threatened she would go home; but it was only her personal opinion and not a direction. When Redding asked if Cunningham spoke to anybody else, Cunningham replied that she "spoke to our connect with Brett [Ulrich] which is Pat O'Neil" who then spoke to Ulrich about the situation. Hunt said it was their understanding that Eshareturi had told Broomes that Cunningham received approval from "HR," and asked Cunningham if she knew where that would have come from. Cunningham replied that it was probably a misunderstanding, because she was going to make a phone call—which Eshareturi must have assumed was going to be to "HR" but she was really reaching out to Ulrich. Hunt asked if the two actually spoke on the telephone, or whether the conversation was by text message. Cunningham said the conversation occurred over the phone, and the only texts may have been "I'll call you in a second." Towards the end of the meeting, Cunningham confirmed that her direction to Eshareturi was to reach out to Broomes. Cunningham did not have her phone with her during the meeting and she had not reviewed her text messages before the interview. She testified that during the interview she was trying to be truthful to the best of her recollection at the time. (Tr. 261–270; GC Exh. 18, 19; R. Exh. 13 p. 15.)

b. The June 1 Interviews

On June 1, Respondent again interviewed both Eshareturi and Cunningham separately about the May 21 incident. Again, the interviews took place in the basement of the Bensonhurst store. Present for both interviews were Young, Hunt, and Broomes. As with the previous sessions Eshareturi was interviewed first, and again Cunningham did not know she was going to be questioned until just before the interview occurred. (Tr. 272, 663; GC Exh. 20; R. Exh. 13 bates #CWA 0042–0047, 0056–0060.)

I. THE MEETING WITH ESHARETURI ON JUNE 1

Eshareturi's interview started at 3:45 p.m. with Broomes saying they wanted to meet with her to get some clarity on the responses she gave during her previous interview. Hunt reminded Eshareturi about Verizon's Code of Conduct, and the requirements to be honest and cooperate with the company's investigation. Hunt stated that the last time they met, Eshareturi mentioned a text message conversation where she was reaching out to Cunningham for guidance and Cunningham told Eshareturi that if she felt something would happen then it would be "OK" to leave. Hunt asked if Eshareturi had those text messages with her, and whether Respondent could see them. After a discussion between Young and Broomes, Eshareturi replied that she could not remember exactly when they spoke and when they texted, but that there were some texts back and forth, and they also spoke over the telephone. (GC Exh. 20; R. Exh. 13 p. 39–42.)

Hunt reminded Eshareturi that in her previous interview she said that the conversation was all by text message and that, when Hunt previously asked her if they spoke on the phone, Eshareturi said she could not remember. Eshareturi replied saying that they probably did speak, but that she could not remember exactly at what point they texted and at what point they spoke. Hunt again asked Eshareturi if she had any text messages from that conversation. Eshareturi responded that they may be on her phone—and asked if Respondent was asking her to take out her phone and show them her text messages. Broomes said yes, that he thought it was important and asked if she did not mind taking a look at her phone. (GC Exh. 20.)

After Eshareturi said that the messages would be on her personal phone, Young asked whether Respondent was asking her to look through her personal phone, or asking her to elaborate on what happened that evening. Broomes replied saying that the company wanted to see the text messages, however if Eshareturi did not feel comfortable providing the messages, then "that's entirely OK." Hunt similarly told Eshareturi that they needed her permission, and if she did not want to give it then they would have to accept her answer. (GC Exh. 20 p. 5–6.)

Hunt then said they only wanted to see her text messages because Cunningham had told them that the conversation was generally over the telephone, with only some quick texts, which was the opposite of Eshareturi's recollection. Eshareturi replied saying that there was both texting and talking, but she did not remember how much of the conversation was exchanged over text and how much occurred over the telephone, she just remembered communicating both ways. (GC Exh. 20 p. 7–8.)

Broomes said one of the reasons he wanted more information was because Eshareturi had told him that Cunningham spoke to someone at HR who said she could leave. Eshareturi replied saying that when Broomes asked her who gave her permission to leave, she remembered telling him that she was not sure, that she thought Cunningham was talking to someone who had something to do with "HR," but she was not one hundred percent sure. Broomes maintained that Eshareturi had told him Cunningham spoke to someone from Verizon's "HR." Eshareturi remembered being unsure, saying she may have misunderstood Cunningham because they were talking and texting. Again, Broomes maintained that Eshareturi did not have this uncertainty when they spoke. After some discussion between Broomes and Young, Eshareturi said that Cunningham may have mentioned "HR" in there somewhere, but she was not one hundred percent sure. (GC Exh. 20 p. 8–10.)

Broomes then asked Eshareturi what directions Cunningham gave her when they spoke. Eshareturi said Cunningham told her that if she were in a situation where she did not feel safe, she would leave. Broomes then asked who Eshareturi had spoken to first, himself or Cunningham. Eshareturi was not sure, but thought she had spoken to Cunningham first—asking her what she should do, and whether Eshareturi should ask Graves to leave; Cunningham suggested she call Broomes and ask him if

she could leave. Broomes asked if Eshareturi had spoken to him after talking with Cunningham, and Eshareturi answered "yes." Hunt asked about the timeline, and Eshareturi told them that she first spoke to Cunningham, then spoke to Broomes, then either spoke or texted with Cunningham. Then Broomes called her back, because he was checking on the schedule, and after speaking with Broomes, then she either spoke or texted Cunningham. (GC Exh. 20 p. 11–16.)

Both Hunt and Broomes again probed into the timeline, asking whether Eshareturi spoke to Cunningham or Broomes first. Eshareturi confirmed on multiple occasions throughout the interview that she spoke to Broomes after her discussion with Cunningham. Broomes said that he was struggling with the timeline, but acknowledged having two separate conversations with Eshareturi that day. (GC Exh. 20 p. 17–18.)

Hunt asked to "backtrack" to get a definitive answer as to whether Eshareturi would show them her text messages. Eshareturi told them she felt "weird" about doing so. Hunt noted that they could not replay a phone conversation but with the text messages they could see what transpired. (GC Exh. 20 p. 18–20.)

Broomes then discussed his May 21 conversation with Eshareturi, saying it sounded like Eshareturi was uncomfortable because she believed Graves was funneling sales away from her. Eshareturi disagreed, saying that it wasn't just the sales, but the entire interaction with Graves made her feel as if he was going to do something to her; she didn't know what to do when she spoke. She was trying to ask if it was okay for her to go, but because Broomes was asking her so many questions, she thought she was not properly explaining things to him. (GC Exh. 20 p. 22–24.)

Broomes asked Eshareturi why she never called him back on May 21 before she clocked out, saying he could not understanding why he "never got the opportunity to close this out with you." Eshareturi replied that she was very anxious. The questioning continued from both Broomes and Hunt, covering topics including whether other managers were present at the store the day she left, Broomes' meeting with Eshareturi on May 20, her call with Broomes on May 22, and whether Eshareturi had previously contacted human resources about Graves. (GC Exh. 20 p. 27–31, 40–43.)

During the interview, Broomes asked Eshareturi at what point during the day she started feeling "uncomfortable" or "intimidated." Eshareturi said that it was always awkward working with Graves, but on that day it was different, and had never been that bad before. Graves was looking to start something with her like a fight, an argument, or something. Eshareturi explained that the last time Graves started something with her for no reason, he tried to get Eshareturi and another employee into some type of physical altercation. Eshareturi was worried that Graves was going to try something similar. (GC Exh. 20 p. 32–33.)

The meeting ended with Hunt asking whether Cunningham's comment about speaking to "HR" was by text or in a telephone conversation, and what parts of their conversation was by text vs. telephone. Eshareturi said she did not remember what was said and by which method, recalling that they spoke both ways. The meeting ended at 5:40 p.m., almost 2 hours after it started. (GC 20 p. 48.)

II. THE MEETING WITH CUNNINGHAM ON JUNE 1

In contrast to the meeting with Eshareturi, Cunningham's meeting on June 1 was short, lasting 10 minutes. After discussing the Code of Conduct requirement to be honest, truthful, and cooperate during an investigation, Broomes and Hunt asked Cunningham about the timeline of the initial conversation between herself and Eshareturi, in relationship to Eshareturi's conversation with Broomes. They wanted to know which came first. Cunningham replied that, after instructing Eshareturi to contact Broomes, Eshareturi said that she was going to reach out to him; otherwise Cunningham did not know. (GC Exh. 22, 21; Tr. 273.)

Regarding her conversation with Eshareturi, Broomes asked whether Cunningham would share her text messages with them to "fill in the gaps." Cunningham said that the texts were only "quick stuff," like "I'll call you back," or "give me a few minutes," and were nothing in great detail. Because it was her personal phone, Cunningham told them that she was not comfortable with their request to turn over her text messages.[29] Broomes asked whether she remembered what time of day the conversation occurred, and whether she could tell from her call log. Cunningham said she thought it was around 6 p.m., but was not sure, and that it was too long ago for her to tell from her call log. Hunt then asked if Eshareturi was upset when they spoke on the phone, and Cunningham replied that Eshareturi was "hysterical," to the point Cunningham was "scared for her." (Tr. 273–276; GC Exh. 21, 22; R. Exh. 13 bates #CWA0059–60.)

c. Respondent Decides to Fire Eshareturi

As of June 8, Respondent had decided to fire Eshareturi. That day, Broomes sent Hunt an email with a draft "conclusion" setting forth Respondent's reasoning to terminate Eshareturi for: (1) violating the Code of Conduct "when she walked off the job," and (2) being "dishonest during the subsequent investigation." On June 9, Hunt made some edits and forwarded it to McDonald for her thoughts; McDonald made some small changes and sent it back to Hunt, who then forwarded it back to Broomes. Then on June 10, Respondent completed the formal Business Request for Termination for Eshareturi. Broomes, whose name is on the document, identified it as the "final document" in the decision to terminate her. The reasons for termination are that Eshareturi "walked off the job without reason or justification and dishonesty during an investigation." (R. Exh. 7; GC Exh. 61; Tr. 782.)

On June 12, Ulrich contacted Verizon's Executive Director of Labor Relations Matt Antonek (Antonek) telling him they were planning to inform Eshareturi that she would be terminated within the next few days. (GC Exh. 48.) Instead, Respondent

[29] Cunningham had not reviewed her May 21 text messages as of the June 1 interview. (Tr. 274.) Cunningham's June 2015 phone bill shows that she had 1008 text messages, 961 mobile-to-mobile messages, and 367 picture and video messages. (GC Exh. 9.) Considering only the regular text messages, this averages to over 33 text messages per day. Thus, by June 1 she would have sent/received over 300 text messages since her May 21 exchange with Eshareturi.

waited over a month; on July 21 Ulrich left O'Neil a voicemail telling him that Respondent intended to fire Eshareturi. (Tr. 498, 1365–1366.)

On July 22, the Union and Respondent had a bargaining session scheduled in New Haven, Connecticut. O'Neil drove to Connecticut with Cunningham. During a break in the bargaining session, Ulrich told O'Neil and Cunningham that Eshareturi was going to be fired, saying that she was dishonest in the company investigation regarding: her being in touch with Cunningham; Cunningham contacting human resources and receiving permission to leave; along with the mode of the conversation with Cunningham being text message versus phone call. The parties agreed to meet in 2 weeks for an "*Alan Richey*" meeting to discuss Respondent's decision to fire Eshareturi.[30] That same day Ulrich sent a letter to O'Neil confirming the company's decision to fire Eshareturi, saying they intended to finalize the decision and communicate it to Eshareturi on or before August 5; until such time she remained on paid leave. (Tr. 278–279, 498–504, 1365–1367; R. Exh. 26.)

As O'Neil and Eshareturi were driving back from Connecticut, they started discussing the company's decision to fire Eshareturi, trying to figure out what occurred. Cunningham began going through the text messages on her phone.[31] She found the texts between herself and Eshareturi on May 21, read through them, and exclaimed to O'Neil that she did—in fact—say "HR" in one of the texts; she read the text to O'Neil who was driving.[32] (Tr. 280, 505.)

d. Eshareturi's August 6 "Alan Ritchey" meeting

The parties met on August 6 to discuss the company's decision to fire Eshareturi. Present for the Union were Cunningham, Hill, O'Neil, and Young; Ulrich was there for the Respondent and took notes of the meeting. During the meeting, the Union stated its belief that the situation came down to a misunderstanding as to what occurred on May 21. There was no dispute that Eshareturi left work early, but the Union argued that she was not trying to be dishonest during the investigation. (Tr. 1385–1386; R. Exh. 33.)

O'Neil, who was the primary spokesperson for the Union at the meeting, said that Eshareturi was emotional, crying, and very upset when she spoke with Cunningham, that Cunningham conveyed she wanted to reach out to the company, and that Cunningham's way of getting in touch with Verizon was through the Union. Because Eshareturi was hysterical, felt uncomfortable, and threatened, O'Neil said that he communicated to Cunningham that, if Eshareturi felt threatened, she should leave and O'Neil would get in touch with Ulrich. O'Neil said Cunningham called Eshareturi back, saying that if Cunningham were in a situation where she felt unsafe, she would leave. (R. Exh. 33; Tr. 673.)

Cunningham then told Ulrich that it was her intent to let Eshareturi know she would reach out to the company. O'Neil said Eshareturi was told that "HR" was going to be contacted, and then heard back from Cunningham saying if she was in a similar situation she would go home. (R. Exh. 33.)

Cunningham then told Ulrich she had found the relevant text messages on her phone, and began reading them to him. Ulrich asked to see the actual messages, and Cunningham handed her phone to him, asking that he not scroll past the May 21 messages. Ulrich complied, and read the texts. He then asked for screenshots of the messages along with the email referenced in the texts. After an inquiry from O'Neil, Ulrich confirmed that the statement about Cunningham reaching out to "HR" was the critical issue regarding Eshareturi. (Tr. 1387–1394; R. Exh. 33.)

The conversation then shifted as to why Eshareturi did not share the texts with the company when asked. O'Neil speculated that Eshareturi may have had something on the phone she was uncomfortable sharing. O'Neil ended the meeting by saying everyone's intention was to share the truth, and hopefully this would allow Eshareturi to remain employed. Ulrich said that he would take a look at things, and get back to the Union. (R. Exh. 33.)

e. August 10 telephone calls between Respondent and the Union

On August 10, Ulrich called O'Neil and told him that the company had now identified a discrepancy in Cunningham's interviews and the text messages calling into question her honesty during the investigation. Ulrich said that Verizon would now be investigating Cunningham along with Eshareturi. O'Neil became agitated, as he thought the company was trying to set up Cunningham up for termination. He told Ulrich "don't go there," that this would ruin their relationship, and that he would be calling his attorney; he then hung up on Ulrich. (Tr. 527–528; 1397–1398.)

That same day, in an attempt to go over Ulrich's head and speak to his superior, O'Neil called Antonek. O'Neil gave Antonek his perspective on the situation involving the investigation into Cunningham, including his belief that the investigation was a witch hunt and the company was trying to set up Cunningham. He also told Antonek that the previous investigatory interviews were lengthy, and were more like interrogations than an investigation. Antonek assured O'Neil that he would get in touch with "people" and let them know they should not treat Cunningham that way. He believed Respondent was considering bringing Eshareturi back after the new evidence, and that they needed to get documentation on the record from Cunningham regarding the evidence in order to reverse their initial decision. Antonek did not believe it was a "witch-hunt." (Tr. 529–532, 1135.)

f. August 11 Investigative Interview with Cunningham

On August 11, the Company conducted an investigatory interview with Cunningham; present for the meeting was Cun-

[30] The Union and Respondent had agreed to a process whereby they would meet and discuss all pending terminations before the employee was actually fired. (Tr. 1367.) They called these discussions "*Alan Richey*" meetings in reference to the Board's decision in *Alan Ritchey, Inc.*, 359 NLRB 396 (2012). *Alan Ritchey, Inc.* is part of a group of Board decisions which were later invalidated by the Supreme Court which found the President's recess appointments to the Board were not valid under the Recess Appointments Clause. *NLRB v. Noel Canning*, 134 S. Ct. 2550 (2014).

[31] Cunningham had not previously looked back at the May 21 text messages. (Tr. 371.)

[32] Prior to this, O'Neil did not know that there were text messages between Eshareturi and Cunningham. (Tr. 506.)

ningham, Young, Broomes, and Hunt. This was Cunningham's third investigatory meeting. Again, before the meeting started, nobody from the company told Cunningham the reason for the interview. Based upon a conversation with the Union, Cunningham was under the impression that the reason for the meeting was only to show Broomes and human resources her text messages. (Tr. 376–377, 387–388; GC Exh. 23, 24; R. Exh. 12 p. 40.)

Instead, after Hunt reviewed the Code of Conduct requirements to be truthful, Broomes told Cunningham there were discrepancies between her statements and the evidence that needed to be resolved before making a final determination on Eshareturi's employment. Therefore it was necessary to question Cunningham specifically about these issues. A copy of Eshareturi's May 21 email to Cunningham was circulated, and Broomes quizzed Cunningham as to how she could access her work email account at 9:15 p.m., when she had left work that day at 6:30 p.m. Cunningham speculated that Eshareturi may have also sent the email to her personal email address, and pointed out that one of the text messages included her personal email. Broomes kept pressing the issue, trying to determine how an email sent to her work address could be forwarded from her personal email address to the Union after she had clocked out, and wanted a copy of the full email trail from Cunningham. Cunningham replied that she erases her emails. (GC Exh. 23, 24; R. Exh. 12 p. 40.)

Broomes next quizzed Cunningham about the email, and whether Eshareturi really felt "threatened" and "unsafe" in the workplace. He also asked Cunningham to confirm that she provided Ulrich the entire text message conversation between herself and Eshareturi on May 21; Cunningham confirmed that it was complete. (GC Exh. 23, 24; R. Exh. 12 p. 40.)

Broomes then asked about her previous interview statements that the only text messages to Eshareturi were statements like "I'll call you in a few" or "Are you OK," and quizzed her about the fact that neither of these comments appear in the texts she provided. Cunningham replied that her answers were based upon her memory on that day. Hunt pressed the issue, and Cunningham again said that her interview answers were based upon her memory of the events. Broomes asked if there were any more text messages or written communication pertaining to Eshareturi's decision to leave her shift, and Cunningham said no; the bulk of the conversation was over the phone. Broomes quizzed Cunningham about the text conversation, noting it was much longer than what she had stated in her previous interviews, and asked Cunningham to explain the discrepancy. Cunningham replied that the bulk of the conversation was over the telephone, and she had not reread her text messages, so at the time she answered the questions as she remembered. (GC Exh. 23, 24; R. Exh. 12 p. 40.)

Broomes noted that Cunningham had previously told them that she never said anything about "HR" in her discussion with Eshareturi, but that she actually texted Eshareturi "I'm speaking to HR right now so that will speed it up," and asked her to explain the inconsistency. Cunningham again replied that, at the time of her initial interviews, she had not reread the texts, and did not remember the text conversation, so she answered the questions to the best of her memory. Cunningham also said that she thought Broomes had been asking about her telephone conversations, as opposed to texts. Broomes asked whether what was said over the telephone was different than what she said by text. Cunningham explained that it wasn't different, it was the same thing—just different wording. She explained that if she said she was going to call Ulrich—to her Ulrich is "HR." So when she said "HR" she was speaking to someone—Pat O'Neil—who was speaking with Ulrich. (GC Exh. 23, 24; R. Exh. 12 p. 40.)

Broomes then asked Cunningham to explain her statement during previous interviews that she never advised Eshareturi "to go or said that it was OK to go," in light of her text which says "You can leave just make sure that you email me." Cunningham said that Eshareturi had asked her for personal advice, she spoke with O'Neil who told her Eshareturi should leave if she felt threatened, and she gave Eshareturi her personal opinion. In essence, Cunningham explained, it was advice regarding what Eshareturi could do, as opposed to an order to leave. Cunningham said that she and O'Neil were worried about Eshareturi's safety and also did not think she could deal with customers in a hysterical state. Hunt then asked Cunningham if she remembered receiving an email, at her personal address, from Eshareturi at 7:49 p.m. on May 21. Cunningham replied that she did not remember, as it was so long ago. The hour-long meeting ended with Young protesting the fact Respondent had not notified Cunningham beforehand about the meeting. (GC Exh. 23, 24; R. Exh. 12 p. 40.)

g. August 14 Investigative Interview with Eshareturi

On August 14, Respondent held a 2½-hour investigatory interview with Eshareturi; it was her third interview about her walking off the job on May 21. Present for the meeting was Eshareturi, Young, Hunt and Broomes. The meeting started with both Hunt and Broomes separately reminding Eshareturi of the Code of Conduct requirement that she cooperate fully and be honest and truthful. Much of the interview focused on Broomes and Hunt trying to get Eshareturi to sign a consent form to allow Respondent to pull her personal cell phone records, or to otherwise have Eshareturi voluntarily produce the records from her May 21 interaction with Cunningham. On at least six separate occasions, at different points during the interview, either Broomes or Hunt asked Eshareturi to sign a consent form, or to voluntarily provide the records. Each time Eshareturi declined to do so, noting that she communicated with Cunningham on her personal cell phone, and that she felt uncomfortable handing over her private phone records to Respondent. (GC Exh. 25; R. Exh. 12 p. 47–56.)

Along with trying to gain access to Eshareturi's phone records, throughout the interview Respondent pressed Eshareturi on whether she actually spoke with Cunningham on the telephone on May 21, if so at what specific time, and how many times they may have spoken. At one point Broomes told Eshareturi that her telephone records may prove to be very useful in corroborating her initial story regarding the conversation with Cunningham being primarily by text. Throughout the questioning, even while refusing them access to her personal phone records, Eshareturi continually confirmed that she did, in fact, speak on the phone with Cunningham, but that she simply

could not recall the details regarding what time they spoke, or the parts of the conversation that occurred over the telephone as opposed to text messages. Broomes even asked to know what specific device Eshareturi used to text with Cunningham, and whether she would have used the same device to speak with her that night; Eshareturi confirmed that she used her personal cell phone for both. (GC Exh. 25; R. Exh. 12 p. 47–56.)

Broomes told Eshareturi that the Union had provided them with a copy of the text message string between herself and Cunningham, and showed them to her. Broomes next pressed Eshareturi on why she did not call him back on May 21 before leaving work early, or even the next day, notwithstanding the fact Broomes had left her a voicemail. Eshareturi replied that she simply did not remember why, speculating that she was probably very upset about what happened that day. (GC Exh. 25; R. Exh. 12 p. 47–56.)

The questioning next turned to the use of the term "HR" by Cunningham, with Broomes telling Eshareturi that, when they eventually spoke on May 22, Eshareturi told him Cunningham said that she had spoken to "HR" and that "HR" had approved her going home. Broomes asked if Eshareturi was referring to the text message exchange with Cunningham. Eshareturi replied that she remembered something being said about "HR" but was not entirely sure if she was remembering it correctly, as she did not go back and look at her text messages or phone calls. After the same question was posed again by Hunt, Eshareturi said that she knew the word "HR" came up in her conversation with Cunningham, but was not sure whether it was via text message or in a telephone conversation. After a restroom break, Hunt asked Eshareturi if there were any other text messages referencing "HR." Eshareturi said that she remembered the word "HR" being used, but again did not remember if it was a call or text message until they showed her the text message string, and she saw that it was via text. Hunt asked if Eshareturi still had the text messages on her phone, and Eshareturi replied that she did not know because she had not looked. (GC Exh. 25; R. Exh. 12 p. 47–56.)

Towards the end of the meeting, Broomes asked Eshareturi why she was unwilling to share her text messages with the company when they needed them to make a decision regarding her employment and they supported her initial statement that Cunningham was in touch with "HR" and that it was "OK" for her to leave. Eshareturi replied that she did not believe she needed to give an explanation, as it was her private phone, and that she did not believe she should be required to surrender her private phone records or call logs—saying that it was like being spied upon. Broomes then asked if someone told her not to provide the company with the text messages, and Eshareturi denied that was the case. (GC Exh. 25; R. Exh. 12 p. 47–56.)

Hunt asked Eshareturi whether she knew the content of the text messages when they previously interviewed her, and Eshareturi said no, because she had not looked at them. The last issue discussed was Eshareturi's May 21 email to Cunningham. Broomes showed the email to her and asked Eshareturi to turn over what she sent Cunningham from her sent-email folder. Eshareturi complied. Broomes and Hunt then asked if there were any other emails that day about her leaving the store, and Eshareturi replied there was only the one email. The meeting ended at 5:35 p.m. (GC Exh. 25; R. Exh. 12 p. 47–56.)

h. August 17 Conference Call with Cunningham

On Monday, August 17, Respondent held a short meeting, via conference call, with Cunningham; it was Cunningham's day off and she was at home. Present on the call was Cunningham, Young, Broomes, and Hunt. Broomes started the call by asking whether Cunningham would provide Respondent with her phone and text records from May 21, between noon and 5:50 p.m. Cunningham asked if they wanted her private phone bill, and Broomes said that she could either print out a copy of the bill or sign a consent form and the company could pull her text and call records. Broomes told Cunningham that they were looking for more clarity regarding her phone communication with Eshareturi, including the time-stamps of the communications. Cunningham told them that she was not comfortable with the request, and needed to think about it. Broomes asked how much time she needed, and Cunningham replied that she needed until Wednesday. Broomes pressed her for an earlier decision, and asked if he could call her the next day, because they were "trying to reach a decision on the investigation." Cunningham replied that she would rather have the conversation on Wednesday. On that Wednesday, August 19, the parties had a bargaining session and Respondent was told that Cunningham would not provide her phone records to the company. (GC Exh. 27; Tr. 292–295.)

i. Respondent decides to fire Cunningham and drafts a Business Request for Termination to initiate the process

Respondent's Business Request to Terminate Cunningham is dated August 18, and is addressed from Broomes to Taccetta. Regarding Respondent's practice for drafting a Business Request for Termination, Taccetta, the individual Respondent claims was the reviewing official who approved Cunningham's termination, testified that the face of the form lists the individual who is creating the document, and their leadership chain of command.[33] She receives the Business Request for Termination from the subordinate who is listed on the document. For example, regarding the Business Request to Terminate Eshareturi, Taccetta testified that Broomes created the document and Taccetta's name is in both fields because Taccetta is both a business unit director and Broomes' direct supervisor.[34] (Tr. 916–918, 994–995; GC Exh. 33; R. Exh. 7.)

According to Taccetta, the decision to begin drafting a Business Request for Termination is made by either her or the district manager, "at some point saying we've reached a place where I've done enough diligence to say this is something we need to begin." The decision to review an employee's conduct for termination is made first, and then the review for termina-

[33] Taccetta testified that there is always a Business Request for Termination when someone is discharged. She may, or may not, see the Business Request for Termination, depending upon the circumstances and whether she has discussed the specific situation with a subordinate. The document is always generated, and is put in the employee's file. (Tr. 906, 908.)

[34] Broomes drafted the conclusion for Eshareturi's termination and sent it to Hunt for her review and editing. (GC Exh. 61 bates# VZW004280.)

tion paperwork is created.[35] After the decision to begin the termination process is made, then either the store manager, the district manager, or human resources drafts the actual document, which is then circulated for review to make sure it is complete; if after the document is circulated it does not "feel" complete then the document is edited to answer any outstanding questions. Ultimately the Business Request for Termination goes to either Taccetta or a district manager for approval. (Tr. 909, 913–914.)

As for the Business Request to Terminate Cunningham introduced into evidence as General Counsel Exhibit 33, although it is dated August 18, the document itself, along with the recommendation to fire Cunningham, was completed before that date.[36] Some time after August 14, Broomes started collaborating with McDonald to compose the document seeking Cunningham's discharge. McDonald compiled the various information and typed up the form. (Tr. 813, 831, 1525.)

The Business Request for Termination recommends that Cunningham be fired because her conduct violated Respondent's Code of Conduct, specifically: lying multiple times during a series of investigations involving Eshareturi's walking off the job; and engaging in misconduct by improperly giving Eshareturi permission to leave the workplace. The specific lies Cunningham was being fired for included: (a) denying that she told Eshareturi she could go home on May 21; (b) denying that she told Eshareturi that she was in contact with "HR"; and (c) claiming that her entire communication prior to Eshareturi walking off the job was by telephone, and any texts were, at most saying she would "call [her] back" or asking if "she was OK." (GC 33) Broomes testified that he agreed Cunningham should be terminated for the reasons stated in the Business Request for Termination, including the conclusion that Cunningham engaged in misconduct by improperly giving Eshareturi permission to leave the workplace. (Tr. 813, 816–817, 831.)

j. Cunningham's termination

On Friday, August 21, at 9:57 a.m., O'Neil emailed a 3-page letter to Ulrich, trying to clarify the events of May 21, and arguing that there was never an intent to mislead the company.[37] In the letter, he again informed Respondent, as he had during Eshareturi's August 6 "*Alan Ritchey*" meeting, that he was the one who told Cunningham that Eshareturi should leave, and that he would contact HR. That same day, at just before 8 p.m., two of Respondent's in-house attorneys were exchanging emails regarding Cunningham's discharge.[38] One of the attorneys noted to his colleague that Broomes, McDonald, and Lambert did not have O'Neil's letter and was seeking input on "how this impacts how we stage the termination request process." He then proposed the following process regarding Cunningham's discharge: (1) McDonald and Broomes send the termination recommendation to Taccetta and Lambert; (2) Taccetta approves and Lambert concurs with the approval; (3) Lambert sends the recommendation to Cari Driscoll (Driscoll), Respondent's human resources director for the Northeast, for review; (4) Driscoll concurs with the termination. The attorney also inquired as to whether they should circulate the termination request over the weekend— so they could fire Cunningham on Monday August 24—or whether the goal was to circulate the recommendation on Monday so it did not appear that they were so eager to fire Cunningham that they deliberated over the weekend.

The email was forwarded to Ulrich, who replied just before 8:30 p.m., that he believed it would be a "tough sell" to delay until Tuesday and lobbied for processing the termination over the weekend so they could fire Cunningham by Monday afternoon at the latest. Ulrich wanted to have McDonald and Broomes send out the recommendation on Saturday August 22, in the afternoon, which would allow Taccetta and Lambert Sunday and Driscoll Monday to process the recommendation. (GC Exh. 49.)

One of the lawyers asked Ulrich whether "the clients" understood that firing Cunningham did not mean that she would not become a paid organizer and that Cunningham could still be at the bargaining table after she was fired.[39] Ulrich replied that he had informed them that it was likely she would become a paid organizer but only spoke to a few of them about her remaining at the bargaining table.[40] The next day, one of the attorneys wrote to his colleague and to Ulrich saying that if there were any specific items in the "exhibit packet" to Cunningham's termination request which had not been sent to McDonald, including O'Neil's letter, that should be done before the "formal exhibit packet" was shared with her that afternoon. The attorney asked Ulrich to do so, and instructed him to tell McDonald that the attachments he was sending should be considered as part of the overall case and that he could discuss them with her. Ulrich complied with the directive. (GC Exh.49, 66; Tr. 1181.)

Respondent followed the process proposed in the August 21 email virtually to the letter. On Sunday, August 23, McDonald sent an email to Taccetta and Lambert, copying Broomes and Ulrich, stating that McDonald and Broomes were recommending Cunningham's termination. Attached to the email was an exhibit packet containing 63 pages, encompassing some of the same witness statements in the Business Request to Terminate Cunningham sent on August 18. However, it had also been

[35] There have been occasions, although rare, that after reviewing a Business Request for Termination, a decision is made to give a warning instead of a discharge. (Tr. 911.)

[36] Respondent objected to the admission of General Counsel 33, claiming that it was a "draft." (Tr. 816.) However, Broomes testified that there was no reason to believe that GC Exh. 33 was not the final Business Request for Termination of Employment for Cunningham. (Tr. 816) I specifically credit this testimony from Broomes; GC Exh. 33 was not a draft. Respondent also objected to the admissibility of GC Exh. 33, claiming it was covered by the attorney client privilege. As discussed in Sec. III(B) below, GC Exh. 33 is not a privileged document.

[37] The letter is dated August 20, but it was not emailed to Ulrich until the morning of August 21. (Tr. 541; GC Exh. 13 p. 2–5.)

[38] See GC Exh. 49. The admissibility of GC Exh. 49 is discussed in Sec. III(C) below.

[39] Ulrich testified that "the clients" referred to Taccetta, Lambert, Broomes, and Hunt. (Tr. 1180–1181.)

[40] Ulrich testified that he told Taccetta and Driscoll that it was likely Cunningham would become a paid union organizer after she was fired, and would also remain at the bargaining table. (Tr. 1191.)

lengthened significantly—being nearly twice as long as the August 18 document.[41] Also, Respondent removed that portion of the recommendation to fire Cunningham for "misconduct when she improperly gave [Eshareturi] permission to leave the workplace." Instead, the August 23 packet recommended that Cunningham be fired for "[d]ishonesty during an investigation," in violation of Respondent's Code of Conduct. (R. Exh. 12; GC Exh. 33.)

Again, following the template proposed in the August 21 email, on Sunday, August 23, just before 4:30 p.m., Taccetta replied to everyone in the email chain approving Cunningham's termination. That same day, at 8:22 p.m., Lambert replied to the email concurring with the termination decision. On Monday, August 24, at 7:52 a.m., Driscoll emailed everyone that she also concurred. The staging of the termination approval process proceeded just as it was proposed in the August 21 email. (GC Exh. 49; R. Exh. 12.)

On August 24, Cunningham was working at the Bensonhurst store. At some point in the morning Broomes and Hunt arrived at the store. They asked Cunningham to join them in the basement where they gave her a letter stating she had violated the Code of Conduct and that Respondent intended to fire her. Cunningham was put on a paid leave of absence until the decision was finalized. Broomes told Cunningham that she was not to return to the Bensonhurst location without directly hearing from him; August 24 was Cunningham's last day at work. (Tr. 295–296; GC Exh. 10.)

As with Eshareturi, the parties had an "*Alan Ritchey*" meeting on August 31 to discuss Verizon's decision to fire Cunningham. Present at the meeting was O'Neil, Young, Cunningham, Hill, Ulrich and Jennifer Godfrey, a Verizon legal support employee. O'Neil described the meeting as a formality and the Union had little hope Cunningham would be reinstated. During the meeting, O'Neil argued that the issue involving Cunningham was simply a case of miscommunication, not a "clear case of dishonesty," and that lying involves someone trying to intentionally mislead. In reply, Ulrich said that while mistakes are possible, when an individual is "questioned about whether something occurred, and the answer is categorically 'No,' that is a case of dishonesty." (R. Exh. 11 p. 9.) The meeting ended with Ulrich telling the union representatives that they would "be in touch." Cunningham was officially terminated on September 14. (Tr. 549, 611; GC Exh. 14; R. Exh. 11.)

j. Text message Conversation between Bianca Cunningham and Al Graves

While Cunningham's investigation was proceeding, Graves and Cunningham had a series of text message conversations discussing work issues, the investigation into Cunningham and Eshareturi, along with other mundane matters such as movies. Some time in August, Graves gave his personal cell phone number to an employee and asked her to pass it on to Cunningham; Graves wanted to check in and see how she was doing, and he also wanted to try and resolve the issue regarding Eshareturi. This caused Cunningham to contact Graves via text message on August 12. (Tr. 137–139, 184.) The two had a sporadic text message conversation over several weeks. The entire text message chain from August 12 through September 11 was entered into evidence.[42] (Jt. Exh. 2.) The chronological sequence of the more relevant text messages in this matter are as follows:[43]

Wednesday, August 12, 2015

12:39 p.m. Bianca to Al: Hi Graves. It's Bianca

12:40 p.m. Al to Bianca: What's good sis.

12:40 p.m. Bianca to Al: Hanging tough .. these people are on a witch hunt

12:41 p.m. Al to Bianca: I'm sure they are. I want to touch base with u They definitely have a hit list

12:42 p.m. Al to Bianca: And will use anyone who's down for it

12:44 p.m. Bianca to Al: Yeah everyone I see around, me is down … I had a very interesting encounter with Broomes yesterday and I see he's very motivated to prove he's different

12:44 p.m. Al to Bianca: Different from what

12:45 p.m. Al to Bianca: I think he just has a different approach But the intent is the same

12:47 p.m. Bianca to Al: To me he's more motivated to capture the runaways than the rest of the klan

Worse I mean.

12:48 p.m. Al to Bianca: Yeah he definitely has something. To prove To himself. And them

12:48 p.m. Bianca to Al: Exactly

12:48 p.m. Al to Bianca: He has a list and he won't deviate from it[44]

12:49 p.m. Bianca to Al: Why do I feel like the list is solely

[41] Also, unlike the other Business Requests to Terminate introduced into evidence, the August 23 email and exhibit packet is not on the usual form template used by Respondent for such documents. (Compare R. Exh. 12 with R. Exh. 7, 19, 34, 35, 36, 38, 39, 40, 41.)

[42] The text messages were produced to Respondent pursuant to a trial subpoena served upon the Union. Respondent's attorney stated that, given the content of the text messages, it was possible that at some point in the foreseeable future that Graves would no longer be employed by the company. (Tr. 101–103.)

[43] The text messages are reproduced as they appear, including misspellings, grammatical, and punctuation errors.

[44] During his testimony about the text messages, it was clear Graves understood his texts would not help Respondent's case, and at times he tried to explain away the impact of the words he used. However, the words he used are clear.

on my store??

12:49 p.m. Al to Bianca: No matter what and if u defend yourself he will just intensify

I think so too

I think he wants your store and me.

For his own reasons

The store is looked at as a strong hold A base per say[45]

12:50 p.m. Bianca to Al: I believe that. He has an ego

12:51 p.m. Al to Bianca It's huge but he's also inescure and I don't think he gets validation from his peers or even at home.

That doesn't. Make him less dangerous tho Actually. More

12:53 p.m. Al to Bianca Him and Mike Scribner were very close[46]

And you were definitely on his list[47]

12:53 p.m. Bianca to Al: I didn't know that

12:54 p.m. Al to Bianca: Mike trained him in indirect and they definitely speak
When u got on the balance score card he tried to push me to get u to stay on
This is why I use to go hard on everyone to just stay off

12:55 p.m. Al to Bianca: These people are disgusting. And ryan has I morals and frankly he seems he has an issue with black people himself

12:56 p.m. Bianca to Al: I completely agree. he always makes these references to the show Power with me

12:57 p.m. Bianca to Al: What they fail to realize is that people will stand by the choice they made whether I'm there or not.

12:59 p.m. Al to Bianca: 100%

1:00 p.m. Al to Bianca: And frankly they only justified why anyone would need some protection.

* * *

1:10 p.m. Bianca to Al: The Victory situation is BS .. I know you guys shouldn't have been together. Any 2 people could have issues . that doesn't make you a bad mgr or her a horrible rep.

1:10 p.m. Al to Bianca: Wooooow
That was a set up
Mike told me he wanted her to flip out

1:11 p.m. Al to Bianca: And it back fired. so they had to try and write me up.

1:11 p.m. Bianca to Al: They are so thirsty for me to say she shouldn't feel how she did or that you're not a good mgr.

1:14 p.m. Bianca to Al: My eyes are open though.
I've prepared for this .. it's the calm before the storm they created.

1:14 p.m. Al to Bianca: Yep because of they want angela to look good an me to look bas

1:15 p.m. Al to Bianca: That's all because that's her people but they look silly I'm the only black male manager out here how do u look

* * *

Friday, August 14, 2015

5:48 p.m. Al to Bianca: I'm not supposed. To say anything. So keep. It on the low. But victory was at 915 Broadway with ryan and hr. Word is she looked straight crazy.

5:59 p.m. Bianca to Al: I knew about the meeting. I heard it wasn't good

5:59 p.m. Al to Bianca: Like how?

6:00 p.m. Al to Bianca: She won't go down without a fight and she shouldn't cause really they set her up too

* * *

6:15 p.m. Bianca to Al: At the end of the day if they're gonna fire her then it should be legit reasoning .. that's all I care about

6:16 p.m. Al to Bianca: Agreed

6:23 p.m. Al to Bianca: These people really showing there intentions tho

6:29 p.m. Bianca to Al: Yo they're scraping the barrel to fire

[45] Graves testified that the Bensonhurst employees were considered to be the strongest union supporters and that is why some employees were put into the Bensonhurst location. (Tr. 131.)

[46] Scribner was Broomes' predecessor, and was the district manager overseeing Brooklyn while Graves was the general manager in Bensonhurst during the union drive. Scribner continued working for Verizon through at least February 2015. (Tr. 111–112, 151, 146, 209.)

[47] Graves testified that he had clashed with Scribner over the way Scribner was treating Cunningham, and it came to the point that he spoke to Hunt about it. (Tr. 145.)

me

6:33 p.m. Al to Bianca: Straight coward ass shit
That's discrimination. That's hr in there feelings in
the end this is there mess

6:34 p.m. Al to Bianca:And all they have done is reinforce why anyone would fight for themselves

6:34 p.m. Bianca to Al: Exactly … confusing as to why Ryan is doing HRs job???

6:34 p.m. Al to Bianca: And ryan is a combination of helena and mike He's He's a straight house ni**a. Samuel Jackson from django[48]

6:35 p.m. Al to Bianca: They sold him some shit and he's running with it Cuse hr can't come out here and do there own dirty
Work

6:36 p.m. Al to Bianca: He's trying. To get too believe me But I know eillen
and her sank crew crew wants u[49]

6:37 p.m. Bianca to Al: It's gross .. he's so invested in taking away someone's security

* * *

Tuesday, August 18, 2015

10:24 a.m. Al to Bianca: I see Victory is not going down without a fight. Ryan just called me and asked if I jade an electronic File on her. I don't have anything on an employee. Thst could lead to termination.

That's never beeny.job

10:31 a.m. Bianca to Al: They're trying to get both if us to sign the consent form for them to access our bills. she told them no so now they're salty bc based in the evidence provided they will have to give her job back.

10:34 a.m. Al to Bianca: Of course. She didn't do anything to get fired they jumped the gun and. Now they look stupid and exposed

10:36 a.m. Al to Bianca: These people really put themselves. Out in the open any employees manager or rep who trust them is a straight fool.

10:36 a.m. Bianca to Al: [indiscernible emojis] this is a straight witch hunt

10:37 a.m. Al to Bianca: Witch hunt and a lynching. I see it

10:38 a.m. Bianca to Al: Yep.

* * *

Friday, August 21, 2015

9:59 a.m. Al to Bianca: Hey Bianca how you holding up out there

10:02 a.m. Bianca to Al: I'm hanging tough.. just waiting it out now. I'm at peace with whatever.

10:38 a.m. Al to Bianca: That's good as long as your quiet internally that's what matters because they really want to take away thst pece of mind and self.

Monday, August 24, 2015

12:54 p.m. Bianca to Al: They pulled the trigger

12:56 p.m. Al to Bianca: Ryan is a piece of shit

* * *

Monday, August 31, 2015

12:39 p.m. Al to Bianca: Hey just to give you a heads up ryan tried to get slick with my appraisal and hold me accountable for the victory thing. Of course im not signing it and I'm still working on my rebuttle emal

12:41 p.m. Bianca to Al: Oh ok .. I figured he would try that

* * *

III. EVIDENTIARY ISSUES

A. The General Counsel's Request for an Adverse Inference

The General Counsel seeks evidentiary sanctions against Respondent for its failure to produce subpoenaed documents in a timely manner. Specifically, the government requests I draw an adverse inference and find that, "had Respondent produced the subpoenaed documents in a timely manner, those documents would not have supported Respondent's defense and instead would have shown that [its] termination of Bianca Cunningham amounted to disparate treatment."[50]

"The Board is entitled to impose a variety of sanctions to

[48] During the text message exchange Graves, who is African American, uses the "n-word" to refer to Broomes, who is also African American, on at least two occasions and also refers to him using other derogatory terms.

[49] Graves confirmed he was referring to Eileen Lambert. (Tr. 176)

[50] See GC Exh Br., at p. 81.

deal with subpoena noncompliance." *McAllister Towing & Transp. Co.*, 341 NLRB 394, 396 (2004), enfd. 156 Fed. Appx. 386 (2d Cir. 2005). The authority to sanction a party for noncompliance with a Board subpoena is a matter committed in the first instance to the judge's discretion. Id. at 396; *Teamsters Local 19 (Peerless Importers)*, 345 NLRB 1010, 1011 (2005). In some instances sanctions are appropriate where a party simply *delayed* disclosing responsive documents, and the delay caused prejudice to a party's case. *Station Casinos, LLC*, 358 NLRB 1556, 1569 (2012) (Board affirms evidentiary sanctions imposed by judge who struck the testimony of four witnesses for whom the charging party made late subpoena disclosures, causing prejudice).

The adverse inference rule is "disappointingly free of mystery and mumbo-jumbo." *Intl Union, United Auto., Aerospace & Agr. Implement Workers of Am. (UAW) v. NLRB*, 459 F.2d 1329, 1335 (D.C. Cir. 1972). "[I]t is more a product of common sense than of the common law." Id. "Simply stated, the rule provides that when a party has relevant evidence within his control which he fails to produce, that failure gives rise to an inference that the evidence is unfavorable to him." Id. at 1336. There is no requirement that a party initiate court enforcement proceedings before an adverse inference may be drawn. Id. at 1338–1339; *American Service Corp.*, 227 NLRB 13, 16 (1976).

Here, the General Counsel issued a trial subpoena on December 17, and provided Respondent's counsel with a courtesy copy on the same date. (GC Exh. 2; Tr. 95, 1550.) On January 4, 2016, Respondent filed a Petition to Revoke. I issued a written Order on January 14, 2016, denying, in pertinent part, Respondent's Petition. (GC Exh. 4, GC Exh. 1(I).) Despite having over 30 days' notice of the types of disparate treatment documents which were being sought by the General Counsel, Respondent did not begin searching for some of those documents until January 15—4 days before the hearing opened.[51] (Tr. 59–61, 68; GC Exh. 3.) In fact, notwithstanding the clarity of the Order denying the Petition to Revoke, at the first day of hearing Respondent stated that it had not performed any email server searches, claiming it could not do so without first having relevant search terms, although emails in managers' offices were produced. (Tr. 42.) Therefore, the General Counsel asserts that sanctions are warranted because Respondent could not possibly have gathered and produced all responsive documents in such a short time, and that its failure to perform comprehensive email searches prejudiced its ability to properly examine witnesses.[52]

The General Counsel also asserts that evidentiary sanctions are warranted because of Respondent's "rolling" production, which included a production on the first day of hearing, then on seven separate occasions thereafter.[53] Indeed, the Respondent produced subpoenaed documents on the last day of the hearing, at which point I instructed the General Counsel that I would entertain a motion to reopen the record if anything relevant was discovered in the newly produced documents that needed to be introduced into evidence. (Tr. 1549–1552.)

Instead of seeking to reopen the record, the General Counsel asks that I draw an adverse inference as an evidentiary sanction against Respondent. Notwithstanding the General Counsel's arguments, because I find that the government was able to sustain its evidentiary burden in this matter. Despite the General Counsel's claims of delayed and piece-meal document production, there has been no prejudice. Therefore, I find that no adverse inference is warranted.

B. General Counsel Exhibit 33 is not privileged

Respondent asserts that General Counsel Exhibit 33, Cunningham's Business Request for Termination, was improperly admitted into evidence, claiming it was subject to the attorney client privilege and was inadvertently disclosed to the General Counsel.[54] However, I find that the document was properly admitted into evidence, that it is not privileged, nor was it inadvertently disclosed.

As noted earlier, I specifically credit Broomes' testimony that General Counsel 33 was not a draft document, but was the final Business Request for Termination that was used to review whether Cunningham's conduct warranted termination. In that respect, I do not credit the testimony of McDonald who claimed: it was a draft; that nobody asked her to start drafting the document;[55] and that it was created for the purpose of discussing with, and getting legal advice from, counsel. [56] (Tr. 1535)

According to Taccetta, Respondent creates a Business Request for Termination in the ordinary course of business, whenever there is a termination, and it is placed in the employees' file. (Tr. 906–908.) Nowhere in Taccetta's testimony about the process for creating and reviewing a Business Request to Terminate did she testify that the document is created for the purpose of discussing with, or getting legal advice from, legal counsel. Instead, it appears this is a routine business document created whenever Respondent decides to terminate an employee. See *Sajda v. Brewton*, 265 F.R.D. 334, 340 (N.D.Ind. 2009) (finding that company's accident report and computer template used to compile accident information were discoverable when generated in the ordinary course of business, and forwarding the information to counsel did "not cloak it in attorney-client

[51] A party served with a Board subpoena has an obligation to begin a good faith effort to gather responsive documents after the subpoena is served, and cannot wait until its petition to revoke is formally denied. *McAllister Towing & Transp. Co.*, 341 NLRB 394, 397 (2004). "A subpoena is not an invitation to comply at a mutually convenient time," and "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." Id.

[52] See GC Exh. Br., at p. 86–91.

[53] Id. at p. 83–86, noting that the subpoenaed documents were produced on: January 19, 20, 21, 26, 29, February 6, 16, and 19, 2016.

[54] See R. Exh. Br., at p. 53–56.

[55] Taccetta testified that the triggering event for drafting such a document is that either herself, or the district manager [Broomes] decide they have done sufficient due-diligence and termination is warranted. The next step is creating and then reviewing the requisite paperwork such as the Business Request for Termination.

[56] Respondent, itself, introduced into evidence the Business Request for Termination of nine separate employees, including Eshareturi, on forms identical to the one in GC Exh. 33 used for Cunningham. (R. Exh. 7, 19, 34, 35, 36, 38, 39, 40, 41.) There was no claim that any of these documents were "drafts" or were otherwise privileged.

privilege"); Cf., *Laws v. Stevens Transport, Inc.*, 2013 WL 941435, at *5–6 (S.D. Ohio 2013) ("Plaintiffs may not inquire as to what defendants communicated to counsel, or what advice he gave in response, but they are entitled to discover the facts which the investigation uncovered and any conclusion reached by defendants' personnel"); 1 McCormick On Evid. § 91 (7th ed.) ("A mere showing that the communication was from client to attorney does not suffice, but the circumstances indicating the intention of secrecy must appear").

Broomes testified he started collaborating with McDonald on the document after August 14; McDonald herself testified that she did not fully draft the document, but compiled the information.[57] (Tr. 1525) At no point did Broomes, whose testimony I credit regarding General Counsel 33, state that the document was created for the purpose of discussing with, or getting advice from, counsel. Accordingly, McDonald's testimony was nothing more than a self-serving attempt to cloak a document created in the ordinary course of business with the protections afforded by the attorney-client privilege.[58] Finally, although Respondent claimed at various points that it was in possession of a cover email from McDonald to its attorneys regarding General Counsel 33,[59] no such email was ever introduced into evidence, nor was such an email produced for an in-camera review. Arguments and statements of counsel are not evidence. *Chicago Typographical Union 16 (Chicago Sun-Times)*, 296 NLRB 180, 182 fn. 4 (1989).

Citing Respondent's Exhibit 20, Ex. A, Verizon also claims that the production of General Counsel 33 was inadvertent, and that it originally withheld the document as well as the cover email, along with subsequent emails.[60] However, none of the specific documents cited by Respondent give sufficient information to determine the true nature of the subject matter of the documents withheld. And again, none of these documents were submitted for an in-camera review. Moreover, General Counsel 33 is stamped VZW 011748—011781, and these document numbers *are not* contained in Respondent's privilege log. Nor are any pages of the document marked "DRAFT," "CONFIDENTIAL" or "PRIVILEGED." All this supports a finding that the disclosure was not inadvertent.

As with all evidentiary privileges, the burden of proving the attorney-client privilege rests on the party asserting it. *United States v. International Brotherhood of Teamsters, AFL–CIO*, 119 F.3d 210, 214 (2d Cir. 1997); *Weil v. Investment/Indicators, Research & Mgmt., Inc.*, 647 F.2d 18, 25 (9th Cir. 1981). Any ambiguities as to whether the essential elements have been met are construed against the privilege. *Koumoulis v. Independent Financial Marketing. Group., Inc.*, 295 F.R.D. 28, 38–39 (EDNY 2013), affd., 29 F. Supp. 3d 142 (EDNY 2014). And, "[w]here there are several possible interpretations of a document based upon the surrounding circumstances, the party asserting the privilege must produce evidence sufficient to satisfy a court that legal, not business, advice is being sought." Id. (quoting *Urban Box Office Network, Inc.*, 2006 WL 1004472 , at *6 (SDNY 2006). Here, Respondent has failed to meet its burden; General Counsel Exhibit 33 was properly admitted into evidence.

C. General Counsel Exhibit 49 was properly admitted

1. Background

General Counsel Exhibit 49 is a 4-page email chain consisting of 10 separate emails. The emails are primarily to/from Respondent's in-house counsel and Ulrich.[61] The 4-page document was produced to the General Counsel with the other subpoenaed documents. At hearing, Respondent objected to the documents being admitted into evidence, claiming it was covered by the attorney-client privilege. The General Counsel asserted the document was not privileged, as the communication related to business matters, and did not seek legal advice.[62] Also, if it was privileged, the government argued that any such privilege was waived upon its production. (GC Exh. 50; R. Exh. 20; Tr. 1147–1151.) At hearing, citing the four-part test in *Lois Sportswear, U.S.A. v. Levi Strauss & Co.*, 104 F.R.D. 103, 105 (SDNY 1985), I admitted the document and stated that I would fully address the issue in my written decision. To allow the parties an opportunity to appeal, or take exception to my ruling, I placed the document under seal.[63] (Tr. 1178.)

In its posthearing briefs, Respondent argues that my ruling was in error, and that the document was improperly received into evidence. The General Counsel argues that the exhibit was properly admitted into evidence, but that it was an error to admit the document under seal, and asks to have the exhibit unsealed. For purposes of this discussion it is not necessary to determine whether all, or only certain parts, of General Counsel 49 are privileged.[64] Instead, assuming arguendo that the entire

[57] When asked if she wrote GC Exh33, McDonald testified that she "compiled the information," she did not write it fully. (Tr. 1525.) Some of the information contained in GC Exh. 33 comes directly from Broomes' notes. (GC Exh. 28.)

[58] Respondent's claim that there is nothing in the record to suggest that Taccetta reviewed GC Exh. 33 is of no import. Taccetta was never asked whether she did, or did not, review the document. Moreover, Taccetta testified she does not always review every Business Request for Termination. (Tr. 906–908.)

[59] See Tr. 852; R. Exh. Br., at p. 54, fn. 31.

[60] See R. Exh. Br., at p. 55–56.

[61] The substance of the document is discussed above in Section II(A)(5)(j).

[62] Emails concerning business matters do not constitute legal advice simply because an attorney or attorneys are involved in the communications. See, In re *Lidoderm Antitrust Litigation*, 2016 WL 861019 at *6–7 (N.D. Cal. 2016).

[63] No party sought special permission to appeal my trial ruling. Compare *CNN America, Inc.*, 352 NLRB 265 (2008) (Board grants employer's request for special permission to appeal trail judge's evidentiary ruling, vacates the ruling, and remands the matter to the judge for action consistent with the Board's Order).

[64] Certain parts of the document, such as the dates and times of the emails between Ulrich and counsel, and the general subject matter of the communications are clearly not privileged. *United States v. Doyle*, 2007 WL 2325361, at *7 (E.D. Wis. 2007) (collecting cases and noting that the "attorney client privilege protects only the contents of communications between counsel and client," and not the date or time those communications occurred); *Oasis Int'l Waters, Inc. v. United States*, 110 Fed. Cl. 87, 100 (2013) (collecting cases and observing that "[a]lthough information may be privileged as it appears in an attorney-client communication, the broad subject matter or general nature of the communication . . . generally is not").

document is privileged, I find that the circumstances of this case warrant a finding of waiver.

2. Legal Standard

"Voluntary disclosure of privileged communications to a third party" may result "in waiver of the attorney-client privilege and, where applicable, work product immunity." *Local 851 International Brotherhood of Teamsters v. Kuehne & Nagle Air Freight, Inc.*, 36 F.Supp. 127, 129 (1998) (citing *United States v. Gangi*, 1 F.Supp.2d 256, 263 (SDNY 1998) ("Even privileged documents, however are not protected if a party voluntarily discloses them.") "Inadvertent disclosure will be deemed waiver when caused by the disclosing party's inadequate precautions to maintain the confidentiality of the privileged communication." Id. at 130; See also *Gangi*, 1 F. Supp. 2d at 264 ("[I]f a client wishes to preserve the privilege it must treat the confidentiality of attorney-client communications like jewels—if not the crown jewels" quoting *In re Sealed Case*, 877 F.2d 976, 980 (D.C. Cir. 1989)). In *Lois Sportswear, U.S.A., Inc.*, 104 F.R.D. at 105, the court set a four part test that has become the standard for determining whether inadvertent disclosure of privileged documents waives the attorney-client privilege. The court is to examine: (1) the reasonableness of the precautions taken to prevent inadvertent disclosure; (2) the time taken to rectify the error; (3) the scope of discovery and the extent of the disclosure before their return is sought; and (4) the "overreaching" issues of fairness. Id.

3. Application of the Lois Factors

a. The reasonableness of precautions taken

Respondent's trial co-counsel, an associate at the firm, oversaw the document production and performed the bulk of the document review; he was assisted by two other associates for purposes of reviewing comparator disciplines. Regarding the process used to mark whether a document was privileged, documents were loaded into a specialized software program wherein each document could be marked "responsive," "non-responsive," or "privileged." The privilege category contained two options: "work product" or "attorney-client." Everyone in the process was given the names of all the relevant attorneys, both in-house and trial counsel, and instructed that if a document was privileged to check the privilege box, and then the box containing the reason for the privilege. Regarding documents that were deemed "responsive," no other review of the document was generally performed before it was produced electronically to the General Counsel.[65] (Tr. 1171–1176.) In its brief, Respondent states that General Counsel Exhibit 49 was marked "attorney client" in the software program, but was never marked as being "privileged" thereby resulting in its production and its omission from the privilege log.[66]

Here, while the general process used by Respondent appears reasonable, it is troubling there is no definitive marking or stamp on the document itself that would identify it as being "PRIVILEGED" or "CONFIDENTIAL."[67] This is a factor to consider when determining the reasonableness of the precautions taken.[68] *De Espania v. American Bureau of Shipping*, 2005 WL 3455782 at *4 (SDNY 2005); *LaSalle Bank Nat. Ass'n v. Merrill Lynch Mortgage Lending, Inc.*, 2007 WL 2324292, at *4 (SDNY 2007) (finding the reasonableness of counsel's "page-by-page" review of documents before production was "severely undercut" by counsel's "failure to notate the subject document with any sign of its attorney-client or attorney work product nature"); *S.E.C. v. Cassano*, 189 F.R.D. 83, 85 (SDNY 1999) (regarding an internal memorandum that was inadvertently disclosed, the court noted "it is difficult to understand why this document, given its sensitive nature, was not stamped 'confidential' or 'privileged'").

Also, the actual document produced was not included in Respondent's privilege log, which is another factor to consider.[69] *American Bureau of Shipping*, 2005 WL 3455782 at *4. In *American Bureau of Shipping*, the magistrate judge found that a procedure, which was strikingly similar to the one used by Respondent here, was insufficient, and effect[ed] a waiver of any privileges otherwise applicable. Id. As such, applying the first *Lois Sportswear* factor, I find that the reasonableness of Respondent's efforts was lacking, and favors the General Counsel's position of waiver.

b. Time taken to rectify error

This factor weighs in favor of the Respondent. Upon the General Counsel's attempt to introduce the document into evidence, Respondent lodged a timely objection that the document was covered by the attorney-client privilege. (GC Exh. 1147.)

c. Scope of discovery and extent of disclosure

Respondent produced 12,000 pages of documents pursuant to the General Counsel's subpoena. (Tr. 1176.) Of those, Verizon asserts that 36 privileged pages were inadvertently produced.[70] The small number of pages disclosed, in relationship

[65] Along with being produced to the General Counsel, the Union also had full access to all documents produced. (Tr. 1174–1176.)

[66] R. Exh. Br., at p. 58. Respondent claims that, although GC Exh. 49 was not included in its privilege log, "all prior communications on the email 'string' . . . were withheld from production and listed on the Company's privilege log." Id. (citing R. Exh. 20, Ex. A rows 750–753). However, I note that GC Exh. 49 contains ten separate emails. It appears that rows 750–753, cited by Respondent, only contain *four* individual communications.

[67] Some of the individual emails in GC Exh. 49 contain a template-statement saying that the email "*may* contain information that is private or confidential," (emphasis added). However, numerous other emails, that are clearly neither privileged nor confidential, were introduced into evidence with an identical template statement, which appears to be added automatically by the sender regardless of the confidential/privileged nature of the communication. (GC Exh. 11 p. 3; GC Exh. 29; GC Exh .28 p. 5; GC Exh. 48; GC Exh. 61 p. 6; GC Exh. 62; GC Exh. 66; GC Exh. 67 p. 2; R. Exh. 2.)

[68] Also troubling is the fact that, once a document was deemed "responsive" there was generally no other review conducted. Since the documents were produced electronically, it seems that a simple word-search of the relevant names of the lawyers involved would have been prudent, and simple to perform.

[69] Before the hearing opened, Respondent argued that it should not be required to produce a privilege log. See GC Exh. 1(I) p. 5–6; GC Exh. 4 p. 8–9.

[70] This includes GC Exh. 49, which is a 2-page document, and GC Exh. 33, which is a 34-page document.

to the entire production, would favor Respondent. *Strategem Development Corp. v. Heron, Int'l*, 153 F.R.D. 535, 544 (SDNY 1994) (finding no waiver where 6 privileged documents were disclosed during the production of 40,000 documents). However, the fact that disclosure here was complete, in that Respondent's "counsel served the [document] on his adversary," favors the General Counsel. *Teamsters Local 851*, 36 F.Supp.2d at 134. As such, this factor is neutral, favoring neither party.

d. Overreaching issues of fairness

I find that this factor, which "focuses on whether the act of restoring immunity to an inadvertently disclosed document would be unfair," heavily weighs in favor of the General Counsel, and supports a finding that any privilege attaching to General Counsel Exhibit 49 is waived. *Teamsters Local 851*, 36 F.Supp.2d at 134 (internal quotation omitted). "Case law supports a finding of waiver where a party makes assertions," takes positions in litigation, or advances claims or defenses "that in effect put his privilege communication in issue." Id. Judge Learned Hand's explanation of waiver in *U.S. v. St. Pierre*, involving the Fifth Amendment privilege, is equally applicable here, "[i]t must be conceded that the privilege is to suppress the truth, but that does not mean that it is a privilege to garble it; although its exercise deprives the parties of evidence, it should not furnish one side with what may be false evidence and deprive the other of any means of detecting the imposition." 132 F.2d 837, 840 (2d Cir. 1942), cert. granted, 318 U.S. 751 (1943), cert. dismissed, 319 U.S. 41 (1943).

Throughout this litigation, Respondent has made assertions and advanced positions which are seemingly contradicted by General Counsel Exhibit 49, particularly with respect to who made the decision to terminate Cunningham, and when the decision was made. On multiple occasions, Respondent has asserted that Taccetta was the final decision-maker, and that the decision to fire Cunningham was made on Sunday, August 23. (Tr. 994–996, 1190.) However, General Counsel Exhibit 49 suggests that the final decision regarding Cunningham's discharge was made by others, beforehand, and that the hierarchy of the decision-making process, with Taccetta as the decision-making figurehead, was "stage[d]."(GC Exh. 49 p. 2.)

Moreover, Ulrich testified that he was not involved in the decision-making process to fire Cunningham, and that he only concurred after-the-fact. (Tr. 1161.) However, General Counsel Exhibit 49 suggests that Ulrich was much more deeply involved in the entire process than he testified. The same holds true with respect to his testimony that he did not know how McDonald received the exhibit packet to Cunningham's termination report. (Tr. 1188; R. Exh. 12.) Finally, the fact Verizon was concerned about Cunningham remaining at the bargaining table, or becoming a paid organizer, as discussed in the document, undercuts Respondent's continuous assertion that Cunningham's union activities played no role in the decision-making process to discharge her.

On balance, the overreaching considerations of fairness weigh heavily in favor of finding a waiver. Accordingly, for this and the other reasons discussed above, I find that Respondent has waived its claim of privilege.[71] General Counsel Exhibit 49 is admissible, and was properly admitted into evidence during the hearing.

Finally, I agree with the General Counsel's argument that the document should be admitted into evidence, without seal. "Litigation is to be conducted in public unless there is some compelling reason not to . . . [c]losed proceedings breed suspicion of prejudice and arbitrariness, which in turn spans disrespect for [the] law." *United States v. Carr*, 2012 WL 3262821, at *6 (N.D. Ill. 2012) Having found that Respondent has waived any claim of privilege, there is no compelling reason for General Counsel Exhibit 49 to be sealed—it is therefore received into evidence fully, and is unsealed.

IV. ANALYSIS

A. Legal Framework

The Amended Complaint alleges that Verizon fired Cunningham because she engaged in protected, concerted activities in violation of Section 8(a)(1) of the Act, and that the discharge independently violated Section 8(a)(3) of the Act as she was also fired because of her activities on behalf of the Union. To determine whether an employee's termination is unlawful, the Board applies the burden shifting analysis set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 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). Under this framework, the General Counsel must prove by a preponderance of the evidence that an employee's union or protected activity was a motivating factor in the employer's actions. The elements required to support such a showing are union or protected concerted activity, the employer's knowledge of that activity, and animus on the part of the employer.[72] See, e.g., *Consolidated Bus Transit*, 350 NLRB 1064, 1065 (2007), enfd. 577 F.3d 467 (2d Cir. 2009).[73]

If the General Counsel makes this initial showing, the burden of persuasion shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even if the employee had not engaged in protected activity. *Id.* at 1066; see also *Ready Mixed Concrete Co. v. NLRB*, 81 F.3d 1546, 1550 (10th Cir. 1996) (by shifting the burden the employer's justification becomes an affirmative defense). Where an employer's explanation is "pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon." *Limestone Apparel*

[71] Even if GC Exh. 49 were inadmissible, the General Counsel presented sufficient other evidence to sustain its evidentiary burden in this matter.

[72] Proving that an employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel 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).

[73] "[W]here the Employer's proffered non-discriminatory motivational explanation is false even in the absence of direct motivation the trier of fact may infer unlawful motivation." *Roadway Express*, 327 NLRB 25, 26 (1998).

Corp., 255 NLRB 722, 722 (1981), enfd. 705 F.2d 799 (6th Cir. 1982).

1. Union and concerted Activity

Cunningham engaged in union and concerted activities on May 21 when she discussed with Eshareturi her fear about closing the store with Graves, her altercation with Graves earlier in the day, and whether she should leave early. She also engaged in union activity by discussing Eshareturi's problems with Young, O'Neil, and Hill. She further has a long history of advocacy on behalf of the Union.

Regarding the incident on May 21, along with being Eshareturi's coworker, in the same bargaining unit, Cunningham was a member of the union bargaining committee, and had a history of bringing employee problems to the attention of the committee. Eshareturi had previously reached out to Cunningham about problems with Graves because she knew that Cunningham "had worked with the Union." Thus, I find that Eshareturi contacted Cunningham on May 21 both as a coworker, and as an agent of the Union. During the hearing, Respondent's counsel admitted that Cunningham engaged in protected conduct when she was communicating with Eshareturi on May 21.[74]

Cunningham also has an extensive history of union activities—independent of her text and telephone conversation with Eshareturi and the Union on May 21. She was the employee that originally contacted the Union, she built and chaired the union organizing committee, distributed and collected authorization cards, and after the Union won the election she became an active member of the bargaining committee, being present at all but a few of the 39 bargaining sessions.

2. Knowledge

There is little doubt that Respondent, at its highest levels, knew about Cunningham's union and protected, concerted activities. Regarding her general activities on behalf of the Union, in August 2015, her store manager noted how Cunningham was able to handle the pressure of being the "lead person in the union," and complimented her on a speech she gave a month earlier in downtown Manhattan at a union rally. (Tr. 231.) Ulrich first met Cunningham at the bargaining table his first day of work in September 2014, and was aware she was involved in the union organizing campaign. (Tr. 1130.) Broomes learned that Cunningham was involved with efforts to unionize Brooklyn within the first few months of his starting in Brooklyn in March 2015, and he knew she was on the Union's bargaining team. (Tr. 733–374.) Taccetta knew Cunningham was an active union supporter from the time of the original union vote. (Tr. 1017–1018.)

Moreover, regarding the May 21 incident, Respondent clearly knew that Eshareturi reached out to Cunningham for advice on what to do regarding her situation with Graves, and that Cunningham gave her instructions to leave. Respondent also knew—as early as May 21 that, after speaking with Eshareturi, Cunningham spoke with Pat O'Neil at the Union, who was the Union's "connect" with the company. Her conversation with O'Neil was again discussed in Cunningham's June 1 and August 11 investigative interviews. And, before the August 18 Business Request to Terminate Cunningham was drafted, on August 6 O'Neil definitively told the company that he was the one who communicated to Cunningham that Eshareturi should leave if she felt uncomfortable or threatened; thus Cunningham was communicating instructions from union officials to Eshareturi that she should leave on the night of May 21 if she felt threatened.[75] O'Neil again informed the company of this fact in his August 21 letter. Taccetta specifically references this letter in her approval of Cunningham's termination, and Respondent states that this letter was forwarded to all relevant decisionmakers. Therefore, before Cunningham was fired in September 2016, Respondent knew that she was communicating the Union's instructions to Eshareturi, a member of the bargaining unit, that she should walk off the job if she felt unsafe.

3. Animus

Discriminatory motive, or animus, can be proved by direct evidence, or it may be inferred from the totality of the circumstances. *Fluor Daniel, Inc.*, 311 NLRB 498, 498 (1993); *Asociacion Hospital Del Maestro*, 291 NLRB 198, 204 (1988). Thus, discriminatory motive may be shown by a variety of factors, including: (1) timing;[76] (2) the presence of other unfair labor practices;[77] (3) statements and actions showing the employer's general and specific animus;[78] (4) disparate treatment;[79] (5) departure from past practice;[80] (6) failing to adequately investigate whether the employee engaged in the alleged misconduct;[81] and (7) evidence demonstrating that an employer's proffered explanation for the adverse action is a pretext.[82] Finally, the Board will infer an unlawful motive or animus where the employer's action is "baseless, unreasonable, or so contrived as to raise a presumption of unlawful motive." *J.S. Troup Electric*, 344 NLRB 1009 (2005) (citing *Montgom-*

[74] Respondent's counsel stated "Your, Honor, just so maybe I can make this easier, the company—Respondent does not claim that Ms. Cunningham was not engaged in protected conduct when she was communicating with Ms. Eshareturi on May 21st." (Tr. 836.) "[C]ourts must rely on the representations of counsel about their client's positions." *Britto v. Salius*, 360 F.Appx 196, 199 (2d Cir. 2010) (summary order); *Link v. Wabash R. Co.*, 370 U.S. 626, 634, (1962) (In "our system of representative litigation . . . each party is deemed bound by the acts of his lawyer-agent").

[75] Because Respondent knew this fact before Cunningham was terminated, there is no need to resolve the conflicting testimonies as to whether O'Neil also told this to Ulrich in their May 22 telephone conversation.

[76] *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) ("timing alone may suggest anti-union animus as a motivating factor in an employer's action").

[77] *Mid-Mountain Foods, Inc*., 332 NLRB 251, 251 fn.2, 260 (2000), enfd. 11 Fed.Appx. 372 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534, 534 (1993).

[78] *NLRB v. Vemco, Inc.,* 989 F.2d 1468, 1473–1474 (6th Cir. 1993) (statements, even if lawful, serve as background evidence of animus); *Affiliated Foods, Inc*., 328 NLRB 1107, 1107 (1999).

[79] *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999).

[80] *JAMCO*, 294 NLRB 896, 905 (1989), affd. mem., 927 F.2d 614 (11th Cir. 1991), cert. denied, 502 U.S. 814 (1991).

[81] *W.W. Grainger, Inc., v. NLRB*, 582 F.2d 1118, 1121 (7th Cir. 1978).

[82] *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998).

ery Ward & Co., 316 NLRB 1248, 1253 (1995)); *ADS Electric Co*., 339 NLRB 1020, 1023 (2003); *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966).

Here, I find that animus is shown through a variety of contexts. Although not alleged in the complaint as an independent violation, Graves' text messages to Cunningham that: the company has a "hit list;" that Broomes has a "list" he won't deviate from; that Cunningham was on Scribner's "list;" and that Lambert and her "crew" wanted Cunningham; are all evidence of animus. *H.B. Zachry Co.*, 319 NLRB 967, 977 (1995) (statement to union activist that he was on the company's "hit list" a violation of Section 8(a)(1))*; Host International*, 290 NLRB 442, 443, 455 (1988) (supervisor's statement the employee was on a "hit list" with the names of other coworkers who engaged in concerted activities evidence of animus relating to refusal to hire allegation); *KTRH Broadcasting Co.*, 113 NLRB 125, 126 (1955) (supervisor's "friendly warning to [union activist] that 'they are out to get you at all costs' was a threat" in violation of Section 8(a)(1)); *Avondale Industries, Inc.*, 329 NLRB 1064, 1411 (1999) (telling employee who was wearing union insignias to "watch [his] butt" because "you know they are out to get you," constitutes an illegal threat). Similarly, Graves' text message that Cunningham's store "is looked at as a strong hold [a] base per say," also evidences antiunion animus.[83] *R&S Truck Body Co., Inc.*, 333 NLRB 330, 336 (2001) (statements from front-line supervisors, including comment that "the aluminum department was the [union] campaign's wellspring" a violation of Section 8(a)(1)).

Also, evidence of animus is Respondent's Code of Conduct that was in place at the time of Cunningham's discharge, which contains various provisions that are overly-broad, and if alleged in the Complaint, would have been found to violate Section 8(a)(1) of the Act. In *Cellco Partnership d/b/a Verizon Wireless*, JD (SF)–38–15, 2015 WL 5560242 (2015), the judge involved found two provisions of Respondent's Code of Conduct, which are identical to the provisions in evidence here, to violate Section 8(a)(1).[84] *Stoody Co., Div. of Thermadyne, Inc.*, 312 NLRB 1175, 1182 (1993) (unlawful handbook rule evidence of animus); *West Michigan Plumbing & Heating, Inc.*, 333 NLRB 418, 418 fn. 2 (2001) (employee handbook provision which independently violated Section 8(a)(1) evidences animus).

The most compelling evidence of animus comes from the disparate treatment evidence. Although the Respondent contends that Verizon has "[c]onsistently [t]erminated [e]mployees [f]or [l]ying [d]uring an [i]nvestigation," the facts show otherwise.[85] The record shows instances where workers lied during an investigation into alleged misconduct and were not terminated, or others who engaged in far worse conduct than Cunningham, and were similarly not fired. *Connecticut Health Care Partners*, 325 NLRB 351, 362 (1998) (treating employees who engaged in similar or worse conduct more leniently evidence of pretext); *T. Steele Construction, Inc.*, 348 NLRB 1173, 1186 (2006) ("When employees who were not involved in protected activity are given lesser discipline for worse conduct it suggests an improper motive").

For example, Store Manager Arlene Francis, knew that her assistant manager purposely changed the time sheet of nine employees, by deleting 104 hours of overtime. The assistant manager sent Francis an email explaining what she did, and Francis replied that they would discuss the matter. (GC Exh. 37; GC Exh. 41.) One of the employees who noticed the reduced pay complained, and an investigation ensued. During the investigation, Francis falsely told her district manager that she had no knowledge of the email from her assistant manager. Also, when forwarding the email to her district manager, Francis cut out that portion of the email chain showing that she replied to the assistant manager thereby trying to delete evidence of her knowledge; however the deletion was uncovered. (GC Exh. 35, 36, 37, 38.) In lieu of discharge, Francis was given a final written warning; the assistant manager who purposely changed the time sheet of the nine employees received a written warning—notwithstanding the implications of wage theft. (GC Exh. 35, 41.) Francis' final written warning specifically notes that during the investigation Francis told her district manager that she "had no knowledge of the email . . . however, records indicate that you replied to her, which indicates that you acknowledged its receipt." (GC Exh. 35 p. 2.)

Unbelievably, when asked to explain the difference in the severity of Francis' discipline, in relation to Cunningham's discharge for allegedly lying, Taccetta, who approved Francis' discipline, refused to admit that Francis lied—claiming that Francis simply forgot about the email. Indeed, Taccetta's testimony went through a variety of contortions – all to avoid saying that Francis lied during the investigation into potential wage theft; I do not credit Taccetta's self-serving testimony which I find was given to avoid a direct comparison to Cunningham's alleged lying. (Tr. 950–965; 1003–1113.) Taccetta quickly accepted Francis' explanation that she forgot about the email, but when Cunningham said that she had forgotten about the content of her text messages, she was branded a "liar."[86]

The record contains other instances of disparate treatment. Some employees who were on Taccetta's team, who committed misconduct and then lied during an investigation into gift card abuse, were not fired[87]—but received written warnings.[88] (Tr.

[83] Graves testified that the employees in Cunningham's store were considered to be the strongest union supporters and that is why during the organizing campaign some of the employees were put into that location. (Tr. 131.)

[84] I adopt Administrative Law Judge Cracraft's analysis and findings regarding the rules in question: §1.6 Solicitation and Fundraising Rule (R. Exh. 4 p. 13); and §3.4.1 Prohibited Activities rule (R. Exh. 4 p. 22).

[85] See R. Exh. Br., at p. 42.

[86] Both managers and rank-and-file employees are held to the same obligations set forth in Respondent's Code of Conduct. (Tr. 928.)

[87] Respondent's contention that this is not evidence of disparate treatment, because the employees were instructed by their supervisors to engage in the gift card abuse, is not persuasive. There is no evidence the employees were instructed to lie during the investigation; all five employees who lied during the investigation were given written warnings. (GC Exh. 47; Tr. 1507.)

[88] Taccetta received an email from McDonald regarding the discipline to be meted out. (Tr. 1052–1053; GC Exh. 50, 47.) Driscoll and Lambert were also involved in the gift card abuse investigation. (GC Exh. 65.) Because human resources executives were directly involved in the decision-making process regarding Cunningham's discharge, and

1061; GC Exh. 47.) Other employees, who reported to Taccetta's counterpart Greg Schenkel, who oversees the lower-half of Manhattan, also committed gift-card abuse and lied during the related investigation, but only received written warnings. (Tr. 1219–22; GC Exh. 52.)[89]

Another employee took a store demo tablet home for personal use while on a vacation. When confronted about the missing tablet the employee initially lied, saying he had left it in his car which was then traded in when he purchased a new vehicle. Eventually the salesman admitted to taking the device home, but did not know the whereabouts of the tablet; this employee only received a written warning. (GC Exh. 59, 58.)

Other employees engaged in conduct far more egregious than Cunningham's, yet were not fired. One employee fabricated a time record, but only received a documented counseling. (GC Exh. 42.) Another employee had money consistently missing from his register, yet only received a written warning. (GC Exh. 43.) One worker, who used foul language, and blurted out in the store "you all can kiss my A**" received a final written warning. (GC Exh. 45.) Another worker who used profanity, and told his colleague "I'll slap you back to Trinidad" and "who the f*ck do you think you're talking to" was given a final written warning, despite the fact his outburst could be heard from the sales floor. (GC Exh. 44; 62.) Also, Taccetta authorized a final written warning for a manager who made a comment to an employee about her pregnancy status, kicked a wall in front of employees, and failed to show up for meetings. (Tr. 1045–1046; GC Exh. 46 Bates #8333.) One salesman received a written warning for using fraudulent coupons on at least two occasions. (GC Exh. 57.)

Finally, the length and breadth of the investigation into the events of May 21 involving Eshareturi's walkout also suggests animus. Evidence shows that employees assigned to stores, other than the unionized Brooklyn locations, left work early and simply received written warnings in seemingly routine fashion. Whereas here, the investigation into what happened the night of May 21 involved multiple investigatory interviews, with high-level participants, detailed planning with prearranged questions, and spanned many months.

For example, one employee in a non-unionized store, who was scheduled to work the closing shift, left almost 3 hours early without her manager's approval, and received a written warning; the decision was made within 5 days. (GC Exh. 39; Tr. 997–1002.) Instead of a prolonged investigation, there was simply a "conversation" with the employee.[90] (Tr. 999.) One employee who worked at Freehold Mall left work without authorization to return an item at Nordstrom and received a documented counseling; the decision was made within a few weeks. (Tr. 53.) Another employee in a non-union store, who had multiple instances of misconduct, including leaving early without telling anyone he had left, received a written warning. (GC Exh. 56.) Still another employee in a nonunion store left work 6 hours early, and then called out the next day, but only received a written warning. This same employee came into work late 42 times, left early three times, and called out 4 times, yet was not fired. (GC Exh. 34.) I believe these instances further support a finding of animus.

4. Respondent has not rebutted the General Counsel's case

With the General Counsel having presented a prima facie case of discrimination, the burden of persuasion shifts to Respondent to show that it would have taken the same action against Cunningham absent her protected activity. Respondent has not rebutted the General Counsel's case. As such, I find Verizon's contention that it was not motivated by animus against Cunningham's protected conduct is pretext.

In attempt to rebut the General Counsel's prima facie case, Respondent argues that it consistently terminates employees for lying during an investigation, and introduced into evidence a number of employee discharges to try to support this claim. However, a review of these discharges show that the employees in question did not just lie during an investigation, but also engaged in other misconduct.[91] For example, one store manager threatened an employee, texting from a store phone: "They are coming after you. You better get your people ready." (R. Exh. 19.) Another manager made a derogatory, homophobic, slur. (R. Exh. 38.) One employee engaged in fraud regarding the processing of coupons. (R. Exh. 37.) Another worker processed artificially inflated trade-in transactions. (R. Exh. 39.) One salesman accessed a customer's account without authorization. (R. Exh. 34.) Another employee gave a customer the middle finger. (R. Exh. 35.) One worker added two tablets to a customer's account without authorization, resulting in unauthorized purchases. (R. Exh. 36.) Two managers were instructing employees to fraudulently inflate the trade-in value of devices. (R. Exh. 40, 41.) One manager used somebody else's login to process a certified-like-new-replacement for a family member, giving him a better tablet. (R. Exh. 21.) Finally, a call center supervisor, who was offered a demotion before being fired, was having a sexual relationship with a subordinate. (R. Exh. 44.) None of these examples help Respondent's case.

Respondent also asserts the best comparator is Eshareturi herself; however Eshareturi's discipline similarly does not help Respondent. According to Verizon, in Broomes' telephone conversation on May 22, Eshareturi told Broomes that Cunningham advised her that she had spoken with Verizon's "HR"

were also directly involved in the gift card abuse investigations, along with the unresolved question as to who actually gave final approval to fire Cunningham, I find these instances relevant to the issue of disparate treatment.

[89] I find that discipline issued by Schenkel are relevant comparators. Along with the issues identified above in fn. 88, Taccetta testified that she contacts Schenkel, who is the other person in the New York metropolitan area with her title, about discipline to ensure that she is treating employees as consistently as possible. (Tr. 904, 915, 1074.) Thus, disciplines issued to other New York metropolitan area retail employees are relevant in analyzing disparate treatment.

[90] Taccetta's failure to give a direct answer to the question of whether she was aware of an investigation into this incident is but one example of her trying to deflect direct questions, and instead provide answers that she perceived would help Respondent's case; I do not find Taccetta credible in this respect.

[91] I find the conjecture from Respondents' witness as to whether these employees who engaged in misconduct would have been fired if they did not lie during the investigation to be speculative, self-serving, and not worthy of credit.

and they had approved Eshareturi leaving early. However, the text message exchange shows otherwise. Cunningham did not say HR approved Eshareturi leaving. Assuming Broomes was truthful, this inconsistency is not even mentioned in Eshareturi's ultimate written discipline, whereas Cunningham was fired, in part, for allegedly misrepresenting facts by denying that she used the word "HR" in her texts.

Notwithstanding, even if these employees were fired only for lying during the investigation, the problem for Respondent is that it cannot rebut the General Counsel's prima facie case "simply by showing that examples of consistent past treatment outnumber the General Counsel's examples of disparate treatment. The Respondent must prove that the instances of disparate treatment shown by the General Counsel's examples were so few as to be an anomalous or insignificant departure from a general consistent past practice." *Avondale Industries, Inc.*, 329 NLRB 1064, 1066 (1999). Respondent has not done so here. Assuming some of the comparators were fired for lying during an investigation, other employees were not. Therefore, "the record of disciplinary action is mixed . . . [and] the General Counsel's case has not been rebutted." Id. at 1067.

As such, Respondent's inability to rebut the General Counsel's case alone supports a finding that Respondent violated Section 8(a)(1) for discharging Cunningham for engaging in protected, concerted, activities and also violated Section 8(a)(3) for discharging her because of her activities in support of the Union.

5. Respondent's questions were prying into protected conduct

In addition to the holding above, I find that because Cunningham's alleged lying occurred while Respondent was prying into Cunningham's protected conversations with both Eshareturi and O'Neil, she was under no obligation to disclose the protected nature of those discussions. *Paragon Systems Inc.*, 362 NLRB No. 182 slip op. at 5 (2015) (citing *United Services Automobile Assn.*, 340 NLRB 784, 786 (2003) enfd. 387 F.3d 908 (D.C. Cir. 2004)). "An employer may not discharge an employee for lying in response to such questions." Id. (citing *St. Louis Car Co.*, 108 NLRB 1523, 1525–1526 (1954)).

It is clear from the text message exchanges between Cunningham and O'Neil, and between Cunningham and Eshareturi, that, notwithstanding Cunningham's answers during her investigatory interviews, when she texted Eshareturi "you can leave just make sure you email me," she was passing on instructions from O'Neil at the Union to Eshareturi. In its post-hearing briefs, Respondent contends that Eshareturi's walk-out was unprotected, claiming it was not for the "purpose of mutual aid or protection," and that therefore Cunningham's advising Eshareturi she could leave was similarly unprotected conduct. I disagree.

Here, Eshareturi felt unsafe at the store and reached out to Cunningham because of her work with the Union. Cunningham, who was concerned for Eshareturi's safety, contacted O'Neil at the Union. O'Neil, who was also concerned for Eshareturi's safety, gave Cunningham instructions to have Eshareturi leave the store if she felt unsafe. A Union official instructing an employee in the bargaining unit he represents to tell her coworker, who is in the same bargaining unit, to walk off the job if she feels unsafe at work is, by its very nature, concerted activity, for the purpose of mutual aid or protections. *Cf., Calvin D. Johnson Nursing Home,* 261 NLRB 289 (1982) (Board noting that "we have consistently held that employee complaints about their supervisors' treatment of them constitute protected concerted activity"). Employees have the right to walk off the job where their safety is an issue. *NLRB v. Washington Aluminum Co.*, 370 U.S. 9 (1962); *Don Chavas, LLC d/b/a Tortillas Don Chavas,* 361 NLRB No. 10 (2014).

To further argue that Cunningham's conduct was unprotected, Respondent cites to *Fresenius USA Manufacturing, Inc.*, 362 NLRB No. 130 (2015). However, Respondent's reliance of *Fresenius* is misplaced. In *Fresenius*, the discriminatee anonymously wrote offensive statements on posted union literature which was viewed by female employees as offensive and threatening. Id. slip op. at 1. During the subsequent investigation of the offensive statements, the discriminatee lied about the authorship of the statement, and then tried to conceal his identity as the confessor. Id. The Board found that the employer had a right "to question an employee about facially valid claims of harassment and threats, even if that conduct took place during the employee's exercise of Section 7 rights." Id. The facts here are clearly distinguishable, as Cunningham never made any threatening or offensive statements.

In *Fresenius,* the Board also found that employee's dishonesty "did not implicate a legitimate interest in shielding his Section 7 activity from employer inquiry" because he "had no reasonable basis to believe Fresenius was attempting to pry into protected union activity generally or that he would suffer reprisal for the activity in question because of its prounion content." Id. slip op. at 2. Here, the facts are the opposite. Respondent's questioning of Cunningham clearly pried into her union and protected activities, her discussions with Eshareturi and those with O'Neil and the other union officials. Additionally, here other employees lied, misrepresented facts, or were dishonest during investigations and were not fired. Evidence of disparate treatment was absent in *Fresenius.*

6. Truthfulness during investigation was pretext

Finally, I also believe the evidence supports a finding that Respondent was not willing to tolerate the Union advising an employee, in the newly unionized stores, to walk off the job, and was using the claim of dishonesty during an investigation as pretext to disguise its true motive. Respondent claims that issues had arisen about truthfulness early in the investigation. Specifically, regarding Broomes' call with Eshareturi on May 22, Eshareturi's Business Request for Termination, dated June 10, states as follows:[92]

> Below is a summary of discussions with Victory Eshareturi held by Ryan Broomes (DM), Al Graves (GC), in this matter.
>
> * * *
>
> Friday 5/22/2015 DM Ryan Broomes's Follow up Calls

[92] See R. Exh. 7 p. 1–3. Cunningham's Business Request to Terminate has the same summary. (GC Exh. 33 p. 4–5; R. Exh.12 p. 7.)

> Following my call to Al, I called Victory. I advised that after thinking about her concerns further, I thought it best that she not return to work until she heard from HR or me. I explained this will give me the opportunity to review her concerns further, and ensure that we are making the best decisions before she returns to works. [sic] Her time out of the business (while continuing to be paid) would also serve the purpose of further investigating Victory's walking off the job and the questions that had arisen about the truthfulness of the explanation she offered me. (R. Exh. 7 p. 3. emphasis added.)

However, in an email dated May 23 addressed to Taccetta, Lambert, Ulrich, McDonald, and Hunt, 1 day after the conversation occurred, regarding this very same conversation, Broomes writes:

> Follow up Calls [on May 22]
> Following my call to Al, I called Victory. I advised that after thinking about her concerns further, I thought it best that she not return to work until she heard from HR or I. I explained that this will give me the opportunity to review her concerns further, and ensure that we are making the best decisions before she returns to works [sic]. (GC Exh. 28 p. 3–4.)

The June 10 Business Request to Terminate Eshareturi makes it appear that, as of May 23, Broomes immediately had questions about Eshareturi's truthfulness—thereby substantiating further investigation and her termination. However, nowhere in Broomes' May 23 email does he mention that Eshareturi was being placed on leave to investigate her walking off the job or questions pertaining to truthfulness.[93] Instead, from the May 23 email, it appears that Eshareturi is being put on paid leave to protect her from any further clashes with Graves until her transfer to King's Highway is finalized as of June 1. This is also consistent with what Ulrich told O'Neil in their May 22 phone call, when he told O'Neil that Respondent did not want her to be in circumstances that would make her feel uncomfortable.

Clearly the issue of Eshareturi's alleged untruthfulness in her explanation to Broomes as to why she walked out on May 21 was added into Broomes' recap of his follow-up calls sometime in the intervening 3 weeks, to support Respondent's decision to fire Eshareturi. When Cunningham came forward with the text messages—Respondent "pivoted" and used the same excuse of "untruthfulness" to fire Cunningham; somebody was going to be fired for the walk-out in Brooklyn; if not Eshareturi then Cunningham. Respondent was looking for a reason to terminate somebody for this walk out in Brooklyn.[94] *Limestone Apparel Corp.*, 255 NLRB at 722 ("where an administrative law judge has evaluated the employer's explanation for its action and concluded that the reasons advanced by the employer were pretextual, that determination constitutes a finding that the reasons advanced by the employer either did not exist or were not in fact relied upon").

For the reasons set forth above, I conclude Respondent violated Section 8(a)(1) of the Act for discharging Cunningham because she engaged in protected, concerted, activities and also violated Section 8(a)(3) of the Act for firing Cunningham because of her activities in support of the Union.

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. The Communication Workers of America is a labor organization within the meaning of Section 2(5) of the Act.
3. By discharging Bianca Cunningham because of her activities on behalf of the Communication Workers of America (Union), Respondent has violated Section 8(a)(3) of the Act.
4. By discharging Bianca Cunningham because she engaged in protected, concerted activities the Respondent violated Section 8(a)(1) of the Act.
5. 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 shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Specifically, having found that Respondent violated Sections 8(a)(3) and 8(a)(1) of the Act by discharging Bianca Cunningham, I shall order Respondent to offer her full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice of her seniority or any other rights or privileges previously enjoyed, and to make her whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

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) enf. denied on other grounds sub. nom., *Jackson Hospital Corp. v. NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). Respondent shall compensate Cunningham for any adverse tax consequences of receiving a lump-sum backpay award. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Additionally, Respondent shall file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

The Respondent shall also be required to expunge from its files any and all references to Cunningham's discharge and notify Cunningham and the Regional Director of Region 29 in writing that this has been done and that her wrongful discharge will not be used against her in any way. The Respondent shall also post the notice in accordance with *J. Picini Flooring*, 356

[93] It is also missing from the "call timeline" he sent to McDonald on June 5. (R. Exh. 13, Bates # CWA 0067.)

[94] The fact that Cunningham's original Business Request to Terminate notes that one of the reasons she should be fired was because she "engaged in misconduct when she improperly gave Victory E. (coworker) permission to leave the workplace," further supports this conclusion. (GC Exh. 33.) So does Respondent's ultimate decision to give Eshareturi a final written warning, in part, for walking off the job on May 21. (Jt. Exh. 10.)

NLRB 11 (2010).

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[95]

ORDER

The Respondent, Cellco Partnership d/b/a Verizon Wireless, Basking Ridge, New Jersey, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for engaging in activities on behalf of the Communication Workers of America (Union).

(b) Discharging or otherwise discriminating against employees for engaging in concerted activities protected by Section 7 of the Act.

(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 Bianca Cunningham reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make whole Bianca Cunningham whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Bianca Cunningham for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 29 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.

(d) Within 14 days from the date of this Order, remove from its files any references to its unlawful discharge of Bianca Cunningham, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her 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 the Order.

(f) Within 14 days after service by the Region, post at its Brooklyn, New York retail stores (retail stores in the Brooklyn, New York (Montague; Atlantic Terminal; Bay Ridge; Bensonhurst; Kings Highway; and Brighton Beach), copies of the attached notice marked "Appendix."[96] Copies of the notice, on forms provided by the Regional Director for Region 29, 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. 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 2015.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 29 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. August 1, 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 a representative 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 discharge or otherwise discriminate against you for supporting, or engaging in activities on behalf of, the Communication Workers of America, or any other labor organization.

WE WILL NOT discharge or otherwise discriminate against you for engaging in concerted activities protected by Section 7 of the Act.

[95] 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.

[96] 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."

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, within 14 days from the date of this Order, offer Bianca Cunningham full reinstatement to her former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

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

WE WILL compensate Bianca Cunningham for the adverse tax consequences, if any, of receiving lump-sum backpay awards, and WE WILL file with the Regional Director for Region 29, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay awards to the appropriate calendar years.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Bianca Cunningham, and we will, within 3 days thereafter, notify her in writing that this has been done and that her discharge will not be used against her in any way.

CELLCO PARTNERSHIP D/B/A VERIZON WIRELESS

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/29-CA-158754 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.