

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 27

E SOURCE COMPANIES, LLC

and

Case 27-CA-202883

SHARON COOKSEY, an individual.

COUNSEL FOR THE GENERAL COUNSEL'S POST-HEARING BRIEF

Submitted by:

Angie Berens
Todd Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
1961 Stout St., Suite 13-103
Denver, Colorado 80294
(720)598-7399

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I. STATEMENT OF THE CASE

This case was heard on February 20 and 21, 2018 by Administrative Law Judge Dickie Montemayor (ALJ), in Denver, Colorado. The charge was filed on July 21, 2017. The Complaint, issued on October 30, 2017, alleges that Respondent issued Charging Party Sharon Cooksey (Cooksey) a negative performance review in January, 2017, and discharged her on March 3, 2017 because she engaged in protected concerted activity, in violation of Section 8(a)(1) of the Act.

II. FACTS

A. RESPONDENT'S BUSINESS

Respondent is engaged in the business of providing research, best practices and benchmarking services to North American gas and electric utilities to help them more efficiently serve their customers. (Tr. 15-16).¹ Respondent's office is located in Boulder, Colorado. The Charging Party (Cooksey) was a 17-year employee of Respondent and worked as a Business Development Director ("BDD") until she was terminated on March 3, 2017 (Tr. 91). The BDDs are responsible for selling Respondent's services and products to the utilities. Prior to the summer of 2015, there were four BDDs, who covered all of North America. (Tr. 18). Beginning in the summer of 2015, there were three: Cooksey, Christopher Schieffer (Schieffer) and Ken Manness (Manness). Like Cooksey, Schieffer was a long term employee who had worked as a BDD for 19 years. (Tr. 141). In January or February 2016, Manness quit and Katie Ruiz (Ruiz) replaced him. (Tr. 18). Ruiz was a newer employee, who had worked in research, then briefly as an engagement manager for Respondent, prior to being promoted to the BDD position. (Tr.

¹ References herein are as follows: Tr. ___ refers to the hearing transcript and page number; GC ___ refers to General Counsel's exhibits; and R ___ refers to Respondent's exhibits.

18). The BDDs each covered a specific territory. Cooksey covered the “Midwest” territory, including the Midwest and coast through Texas, and the eastern half of Canada; Schieffer covered the West; and Ruiz the Northeast. Cooksey normally telecommuted from her home in Colorado Springs, but would travel and go into the Boulder office approximately once a month. Schieffer worked either from the Boulder office or telecommuted and traveled. Ruiz worked in the Boulder office. (Tr. 19).

The BDDs are supervised by the Vice President of Business Development.² During most of 2015, that was Mike Smith (Smith). For a few months in late 2015, the BDDs were supervised by COO Chris Doyle (Doyle). Either in December 2015 or January 2016, Mike Hildebrand (Hildebrand) took over as Vice President of Business Development and became their supervisor. (Tr. 21, 229). Hildebrand is physically located in Wisconsin. (Tr. 24) Hildebrand reported directly to CEO Wayne Greenberg, who is located in Boulder. (Tr. 231). Hildebrand and Greenberg met (usually by phone) several times a week. (Tr. 332-333). The team Hildebrand supervised in 2016 consisted of Cooksey, Schieffer, Ruiz and VP of Consulting Sales Maureen Russolo (Russolo). (Tr. 21-22).³ The team had regular meetings on Monday mornings led by Hildebrand, usually by WebEx or teleconference. After that meeting, they would hold the same meeting via the same means, with product managers and other staff, and often with CEO Wayne Greenberg (Greenberg) in attendance. (Tr. 23-24).

B. COMPENSATION

Respondent’s BDDs are paid a base salary plus commission. Compensation is detailed in compensation plans for each BDD that are presented to them at the beginning of each year. (Tr. 24-25). BDDs have to sign the plans in order to get paid. They are not negotiated. (Tr. 29).

² The position is also referred to as Vice President of Sales in the record.

³ Russolo only sold consulting; not products and services, and was compensated differently. (Tr. 22).

The BDD commission rates were similar until 2016. They typically ranged from 10-10.5%⁴ on new sales, and around 1% for renewals. (Tr. 24-25; GC 2). However, in 2016, Respondent drastically changed the compensation plan. It had much lower commission rates and much higher targets. (Tr. 35-36). In January 2016, Hildebrand met with each of the BDDs separately and explained generally how the new plan was going to work. There was no written plan yet, and he explained it by writing on a whiteboard. (Tr. 33). At the end of January 2016, the written plan was provided to the BDDs for their signatures. Under this new plan, instead of 10.5% on new sales, and 1% on renewals, the BDDs would get .8% on all sales up to a certain value, then if they exceeded that number it would increase slightly, but never near 10.5%. (Tr. 35, GC 6). For Cooksey, it was .8% commission until she sold \$3 million dollars, at which point it would increase (or “ramp up”) to 1.5% up to 5 million, then 2.25% up to \$6,700,000, and finally 4% if she sold over \$6,700,001.⁵ In addition, the BDDs’ sales goals (or “hurdles”) went up dramatically. In 2015, Cooksey’s annual goal was 3.4 million, and under the 2016 plan it almost doubled to 6.7 million. (Tr. 38, GC 6, p. 3). It was later amended to lower the ramp up number to 2.5 million, and the goal to 6,310,000. (Tr. 38; GC 7). Schieffer’s was initially the same, and Ruiz’s was lower, at \$5,625,000. (GC 34, p. 2).

C. PCA ENGAGED IN BY RESPONDENT’S EMPLOYEES

After the individual meetings with Hildebrand explaining the proposed plan in January 2016, Cooksey, Schieffer and Ruiz gathered in a cubicle at the Boulder office and discussed the plan and tried to figure out what to anticipate. (Tr. 42). Once the BDDs received the written 2016 compensation plan, they had ongoing discussions about it, regarding how it would actually

⁴ Under the 2015 plan, it was 10.5% for new business. (GC 2).

⁵ Ramp-ups are the target or hurdle that the BDDs must achieve under the 2016 plan in order to earn the next higher level of commission on sales. (Tr. 38).

work and how their pay would be affected. (GC 6; Tr. 44). Hildebrand had told the BDDs that they could discuss the plan amongst themselves and bring their concerns or ideas to him. (Tr. 44). In fact, they had several team meetings with Hildebrand (separate from the Monday morning meetings) at which the plan was discussed. (Tr. 44). At one such meeting that occurred in person in February 2016 with Hildebrand, Cooksey and Schieffer raised questions about why the ramp-ups were different, and why the sales quotas were so high. It was discussed that the growth of 35% Hildebrand spoke of was very high compared with prior years where it was 10-15%. Cooksey expressed concerns that the plan would result in a 35 to 45% pay reduction and Schieffer expressed similar financial concerns. (Tr. 46). At this meeting, Cooksey also stated that she kept a spreadsheet of all of her sales and would keep it for the first six months to compare her commissions under the 2015 and 2016 plan and give it to Hildebrand. (Tr. 48, 166, GC 10). She ultimately gave it to him in July. (Tr. 50). It illustrated the drastic pay cut under the 2016 plan. This pay cut affected all BDDs and they had discussed this fact both in and out of meetings with management. (Tr. 50).

On January 11, 2016, Schieffer sent an email to Hildebrand outlining his concerns and criticisms regarding the proposed plan, and there were subsequent responses back and forth. (GC 25). In his reply on January 12, Hildebrand said they would meet and talk it through on Friday, and in the meantime, asked Schieffer to “keep this in confidence for now.” As promised, Schieffer had a conversation with Hildebrand regarding the plan after this. Schieffer told Hildebrand why he thought the plan was flawed and that it was going to have a negative effect on the sales team, meaning the BDDs. (Tr. 157-158). Schieffer further testified that he knew none of the BDDs were pleased with the plan. (Tr. 160-161). He knew this from discussing the plan’s flaws with the BDDs, mainly with Cooksey and Manness. In fact, Schieffer knew that

Manness told HR that the plan was a contributing factor in his leaving. He further testified that they specifically discussed that it was a back-loaded plan, meaning that they would get different commission amounts on the same sale depending on whether they hit the targets and went to the next tier. (Tr. 160-163).

Finally, in March of 2016, Hildebrand directed Schieffer not to discuss the compensation plan with anyone. (Tr. 164: 1-14).

Respondent's COO Doyle held meetings with the BDDs in May and June, 2016 to discuss the compensation plan. (Tr. 51). Cooksey and Schieffer were present at the May meeting, wherein they complained about the impact of the new compensation plan. Schieffer stated that he was dipping into his savings because his income was so drastically reduced. (Tr. 51). All 3 BDDs were present at the meeting in June. At that meeting, Schieffer again spoke about dipping into his savings and said that he had credit card debt for the first time ever. Cooksey raised the manner in which the reduction in income would affect her retirement plans. She also mentioned the spreadsheet she was giving to Hildebrand, and Doyle said he would also like to see a copy of it when it was done. She did give it to him after completing it in July. Doyle expressed shock at the difference in income, and asked Cooksey if he could share it with share it CEO Wayne Greenberg, to which she agreed. (Tr. 53-54).

Thereafter, in August, 2016. Cooksey was in the Boulder office and stopped in to say hello to CEO Greenberg, since they were friendly and had known each other a long time. (Tr. 55-56). During their conversation, Greenberg mentioned that Doyle had shared her spreadsheet with him. He was shocked at the difference in income, and that he realized that the compensation plan was broken, but the budgets were set. He informed her they would have meetings in November to hear feedback to use in designing a new plan for 2017. (Tr. 56).

Greenberg also met with Schieffer in August, at which time Schieffer told him the plan was harmful. Greenberg also admitted it was broken to Schieffer. (Tr. 168).

During a team meeting on September 23, 2016, with Hildebrand, Schieffer, Ruiz, and maybe VP of Consulting Sales Maureen Russolo (by phone), they were trying to come up with ways the company could still make money and how the BDDs could earn what they were earning before. Cooksey suggested getting rid of the ramp-up system in order to simplify the plan. She suggested paying 5% on new business and 1% on renewals, and said that the engagement managers should get 1% on renewals to motivate them because in 2016, they weren't getting those commissions. She and Schieffer also advocated for Ruiz to be paid at the same level, since she was earning lower commissions, and they were all doing the same job. (Tr. 66-67). After the meeting, Cooksey sent a text message to the team members (Schieffer, Ruiz, Russolo). (Tr. 70-71; GC 16). She stated that she and Russolo spoken and agreed they should send a follow-up email to Hildebrand regarding the following: they were not expecting 10.5%, but new business should be between what they have now and 10.5%; there is no reason for Katie Ruiz to be paid less, and the same for Russolo; and they should get the same compensation for the same effort. (GC 15, 16). Ruiz and Schieffer replied by thanking Cooksey. (Tr. 72; GC 22).

A meeting was held on November 10, 2016 with Greenberg, Doyle, CFO Judy Lindenmeyer (Lindenmeyer), Hildebrand (by video), Cooksey, Schieffer and Ruiz. (Tr. 75, 169). At the meeting, Cooksey raised the fact that all the BDDs should be paid equally because they were all doing the same job and putting in the same effort. She also said that to drive new business, a comp plan should pay a higher commission rate for new sales. She again suggested 5% for new business, 1% for renewals, and 1% for renewals for the engagement managers. (Tr. 75). Schieffer discussed the financial effects he suffered from the 2016 plan, said that he was

checking his bank statement prior to the meeting to see if he was writing hot checks. He also brought up how the 2016 plan impacted his and the other BDDs' lives. (Tr. 75, 170). This was after BDDs had discussed the issue repeatedly amongst themselves and in team meetings. (Tr. 176). Lindenmeyer responded to these comments by telling him that he wasn't chained to his desk. (Tr. 80, 171). Cooksey and Schieffer discussed the fact that they thought they might be fired after this meeting. (Tr. 77).

After the meeting, Cooksey sent the following text message to Schieffer, Ruiz and Maureen Russolo: "Us vs them! No percentages given... no cap given...still backloaded and a rolling hurdle of 80% target for bonuses. Mike rolled his eyes repeatedly! He should turn off his camera[.]" (GC 17; Tr. 78, 178). When Cooksey made suggestions, Hildebrand was apparently rolling his eyes. (Tr. 78). Ruiz replied that she "should have just let myself cry when Wayne [Greenberg] made that Duke comment!..." This was regarding the Duke account that Ruiz had worked very hard on to renew, and Hildebrand took all the credit for it and Greenberg acknowledged him rather than her. (Tr. 79).

The day after this meeting, on November 11, 2016 Schieffer sent an email to Hildebrand providing feedback on the proposed 2017 plan. He posed questions about the plan and raised the issue of risk sharing. He noted that the sales team was being asked to share the risk, which they were already doing. (GC 27). Hildebrand shared Schieffer's feedback with Greenberg and Lindenmeyer. (Tr. 265).

Following the "broken" 2016 plan, Respondent instituted a compensation plan similar to those prior to 2016. (Tr. 88; GC 20). New sales earned 5% commission and renewals 1%. Sales goals were also reduced. For example, Cooksey's 2017 goal was reduced by a million dollars to \$5,631,000. (GC 20; Tr. 88-89).

D. PERFORMANCE EVALUATIONS AND SALES

Respondent's BDDs are given periodic performance evaluations. They were typically done twice a year, at mid-year in about July, and after the year end, in about January of the following year. (Tr. 56-58). The way the reviews work is that the BDD completes a self-evaluation and then gives it to the supervisor. Then the supervisor reviews it and inserts his own comments and ratings, and meets with the BDD to go over it together. (Tr. 61).

Cooksey was consistently a top sales performer for Respondent. She was never disciplined during her 17-year tenure and did not have any negative performance evaluations prior to her year-end review in 2016. (Tr. 122). As reflected in her 2015 performance review, her year end goal was \$4,002,409, and her actual sales were \$4,323,975, putting her at 108% of her quota.⁶ (GC 12, Tr. 60-61). As usual, Cooksey completed her portion of the review, gave it to COO Chris Doyle (who was her supervisor at the time) and then met with Doyle. In that meeting, Doyle told Cooksey that he thought she had a really good year. (Tr. 61:17-22).

Likewise, Cooksey's 2016 mid-year review was very positive. This review was done by Hildebrand, and both he and Cooksey rated her overall performance at 3.5 out of 5; between "meets" and "exceeds" expectations. In his overall remarks, Hildebrand stated as follows:

This year has been challenging for many of us, but you have weathered the storm nicely and are hitting your numbers. Congratulations! I know changes have occurred in the compensation plan, but as we have talked about many of those changes were long overdue. That said, I do appreciate your positive attitude and encourage you to seek me out directly (vs. sharing concerns with others) if there is anything you want to talk through. I am a long time Sharon fan and am glad to see you having a good sales year and exceeding the targets. I expect the second half of the year to be even better for the team overall and am counting on you to set the pace and be a positive example for others to follow.

(GC 13, p. 3). In addition, Cooksey earned bonuses in Quarters 1 and 2 in 2016 for exceeding her sales targets. (Tr. 63-64, GC 14).

⁶ The 2015 reviews do not contain numerical ratings like the later reviews.

Hildebrand gave Cooksey her 2016 year-end review in January 2017. They discussed it by phone due to a snowstorm that prevented Cooksey from making it into the Boulder office. She rated herself 3.9, and Hildebrand rated her 3.4. Again, this was between “meets” and “exceeds” expectations. (GC 18, Tr. 80). There were a number of positives in the review; however notably there were a number of negatives referring to Cooksey’s complaints about the compensation plan. For example, in the “Collaboration and Teamwork” section, she was rated at 3 by Hildebrand. The comments there indicated that she did a great job mentoring Katie [Ruiz], and helping other coworkers, which were all “wonderful things.” However, in that same section, he noted: “What hurt the achievement some of team collaboration was the complaining about the comp plan. She could have helped the teams attitude in this touchy situation by taking a different, more positive approach.” She had a 4 in this category mid-year. (GC 13, emphasis added). Under “Can-Do Attitude,” she was given a 3 by Hildebrand, which was down from a 4 in the mid-year review. In this section, he noted that she had many positive attributes, and that she “works hard and is persistent” and “was hitting her aggressive goal over the first half of the year.” However, he continued to state: “On the flip side there was one main thing that Sharon did that was a detriment to her attitude and the attitude of others was the open complaining about the comp plan.” (GC 18, p. 2). He further said she had bent Carolyn’s ear a numerous times, and “openly complained in the sales meeting a couple of times, once where she said ‘I made 200k last year and am not going to make that this year;’” and said that people complained about this comment.⁷ (GC 13, p. 2). Hildebrand also rated her a 3 in “Communication,” claiming she provided false optimism on

⁷ “Carolyn” is Carolyn Doyle, an engagement manager and COO Chris Doyle’s wife.

accounts regarding which of her sales were likely to close before the end of the year for forecasting purposes.⁸ In his overall remarks, Hildebrand stated as follows:

Sharon had a good year from a sales perspective, falling short of goal, but still selling more new and consulting than any of the other two BDDs. Congratulations! She also is kind, compassionate, and willing to help when needed. Really appreciative of that too. Unfortunately the two concerns mentioned prior were detriments in 2016: Over optimism on closing sales hurt forecasting and credibility, and the biggest concern was the too frequent complaining on the comp plan. This negativity diminished team morale and momentum. With Sharon being a long time member of the sales team, she could have (should have) played a big part in turning this sensitive situation into a positive and a rally cry for the team, but instead added fuel to the fire.

(GC 18, p. 3). Cooksey was not told during the review that there was a problem with her sales. (Tr. 85). Finally, Cooksey's rating for "Customer Focused" was 4- exceeds expectations, and Hildebrand commented that she was "...very customer centric and does her best to represent the voice of the customer. A strong suit for sure. Nicely done." Hildebrand did not testify to any specific customer complaints, and affirmatively stated that none were ever mentioned to Cooksey. (Tr. 291).

Cooksey was concerned about the negative comments and false statements in the review and drafted a "side note" to outline her concerns. She delivered it to HR Director Jessica Davis (Davis), who said she would put in her personnel file. (Tr. 87-88; GC 19). In that letter, she indicated that she thought her review was negative and did not reflect her success during the year. She cleared up a number of items referenced in the review. For example, regarding the discussions in group meetings where she cited her income, she clarified that she only referenced percentages, and never specific numbers. She also states that she spoke with Carolyn Doyle, and Doyle denied providing any feedback to management regarding her (Cooksey). She further

⁸ Cooksey explained that the last couple weeks of the month Hildebrand would ask the BDDs what they thought they could close before the end of the month, and they would give their best predictions. However, this always a "guesstimate" and not a firm projection. (Tr. 86).

noted that 35% growth was excessive based on previous growth of 10-12%, and that she was the only one to hit some of the quarterly targets and sold more than the other BDDs. (GC 19).

Schieffer's quarter 2 review for his performance through June 30, 2016 contained some comments similar to those in Cooksey's. For example, under "Collaboration and Teamwork," Hildebrand commented: "Even though things are much much better, I have to mention the negative attitude and outward complaining earlier this year was really destructive to teamwork, so stay positive and upbeat and if you have any specific issues please come to me directly." (GC 28). The only thing about which Schieffer had complained that year was the comp plan. (Tr. 123-124).

While Cooksey did not receive a Q3 review, Schieffer did. Hildebrand's comments in that review stated: "Sometimes he lets personal matters on the home front influence his behavior at work in a negative way." (GC 29). In response to the review, on January 16, 2017, Schieffer sent Hildebrand an email indicating he was disappointed with those comments. He noted: "If you are referencing my attitude, behavior and/or comments regarding the recent compensation meeting with senior management, that was in response to the indifference shown by management regarding the impact that they created in my life (and Sharon's) by the 2016 compensation plan." (GC 30, p. 1-2; Tr. 187-188).

Schieffer was given his 2016 year-end review in January 2017 by Hildebrand. It bears some striking similarities to Cooksey's. Under "Communication" Hildebrand gave him a 2 – Below Expectation – for his "communication outbursts." He states: "...there were three specific situations where your communication was insubordinate: 1) our one on one phone conversation about the 2016 commission plan on January 14, 2016, 2) a meeting with management about the 2017 commission plan on November 10, 2016, and 3) your email to me about issues on the home

front affecting your attitude at work on January 16, 2017.” (GC 31, p. 1). Regarding “Can-Do Attitude,” he received a 2 – Below Expectation. Hildebrand noted that Schieffer had many positive attributes and was a hard worker. But, he says: “On the flip side there is one main thing that Christopher [Schieffer] does that was and still is a detriment to his attitude; the open complaining about the comp plan. He could have helped the team’s attitude in this touchy situation by taking a different, more positive approach. The open complaints about the comp plan are tiring for many and negatively affects the morale of the entire team.” (GC 31, p. 2). Again, in his comments at the end of the review, he states that Schieffer’s “behavior on three specific occasions previously mentioned were nothing short of unprofessional and insubordinate – again these were 1) our one on one phone conversation about the 2016 commission plan on January 14, 2016, 2) at a meeting with management about the 2017 commission plan on November 10, 2016, and 3) his email to me about issues on the home front affecting your attitude at work on January 16, 2017.” (GC 30, p. 3; Tr. 188-192).

Finally, prior to her termination on March 3, 2017, Cooksey exceeded her sales goals in January and February, and received \$500 monthly bonuses each of those months. (GC 20, 21; Tr. 89-90).

E. COOKSEY’S TERMINATION

Cooksey was terminated from her job on March 3, 2017. On that date, she went to the Boulder office for what she thought was a team meeting. However, when she walked into the conference room, only Hildebrand and HR Director Davis were present. Hildebrand told Cooksey that this was one of the hardest things he had to do, and that she was a good friend and valued employee, but they’ve “decided to go with a fresh new team with different skill sets” and she was no longer employed by E Source. Then he left the room. Davis thereafter gave her

a separation agreement, which she told her to have an attorney review, and a packet of information regarding COBRA and how she would be paid on sales she had already closed. (Tr. 91-92, 123). While Hildebrand testified that there was a script from which he read when terminating her, and could not recall if he mentioned the fact that she wasn't meeting her sales goals, Cooksey testified that there was no script. (Tr. 321, 371).

On that same date, Schieffer was also terminated. (Tr. 194). His experience was similar to Cooksey's. Hildebrand told him "they're looking for people with different skill sets and you are no longer part of the sales team." There was no further discussion with him, and Davis gave him the separation agreement, check and COBRA information. (Tr. 196-197). The only BDD remaining then was Ruiz, who was new to the position and much less vocal about the 2016 compensation plan. (Tr. 130-131, 176).

Hildebrand testified that in October 2016, CEO Greenberg had slated Cooksey and Schieffer to be part of a layoff, and Hildebrand argued against it because they had a heavy renewal period coming up at the beginning of 2017.⁹ (Tr. 259). Hildebrand also emailed HR Director Davis regarding what to say if Cooksey or Schieffer asked if they were getting fired. He thought that they "could/should" terminate Schieffer at any time, but that he was "holding out hope for Sharon to straighten up and will talk to Wayne [Greenberg] again about staggering/delaying her departure, but I don't think he is open to that." (R 2, Tr. 269). According to Hildebrand, he had multiple conversations with Greenberg on the subject, and he continued to urge him to keep Cooksey onboard throughout 2016. Nonetheless, he testified that it was Greenberg's decision to terminate them. (Tr. 263, 269-271). Hildebrand was the one to inform her because he was her direct supervisor. (Tr. 270-271).

⁹ In all, 5 or 6 employees (non BDDs) were laid off in October. (Tr. 260).

Greenberg testified that because sales growth had only achieved 1.6%, he considered laying off Cooksey and Schieffer in the fall of 2016, and that this was completely his decision. (Tr. 350). He claims this decision was made in August or September, for an October layoff. Despite the fact that Ruiz had not met her targets either, he did not consider laying her off at that time, stating “she wasn’t doing great either, but she was brand new and had the background we really wanted.” (Tr. 351). He likewise testified that he and Hildebrand had discussed the layoffs many times, and he ultimately decided not to lay off Cooksey and Schieffer in October at the urging of Hildebrand. As the head of sales, Hildebrand was concerned about the upcoming renewal season, and that Cooksey and Schieffer “were our best chance of hitting our numbers for the year.” (Tr. 259). Greenberg claims he only used sales data to decide to terminate Cooksey and Schieffer in March. (Tr. 353-354, GC 34).

Greenberg testified that he was a “hands-on” CEO at this small company of roughly 90 employees, where he knew everyone by name. (Tr. 332-333). He further testified that when he came in as CEO, he was tasked with growing the business. Greenberg directly supervised Hildebrand and they spoke several times a week. They discussed specific sales accounts and opportunities. (Tr. 342-343). He did not supervise Cooksey, but testified that he was with her at the Tennessee Valley Authority (TVA) conference in spring 2016, and that he found her to be disengaged, in that she was outside in the break area. Cooksey explained that some of the sessions were for TVA employees only, and that she was going to check voicemails and emails and go after some sales while she was there. He told her to “Go get ‘em.” (Tr. 364-365). Greenberg denies this. (Tr. 360). Greenberg also testified that when he and Cooksey shared a taxi ride to the airport after the TVA conference, he Cooksey told him she was planning to retire within the year. (Tr. 360). Cooksey testified that Greenberg thanked her for being there even

though TVA was no longer her account and she was not getting paid on it, and did not say anything about her being disengaged. Cooksey credibly testified never told him she was retiring within a year. (Tr. 365-366).

Unrelated to the conference, Greenberg also claims he received a complaint about Cooksey in September 2016, from a customer who threatened to take away her business if they continued to have Cooksey representing the account. (Tr. 344). However, he did not tell Cooksey about the complaint, and did not recall if he mentioned it to Hildebrand. The account was not transferred from Cooksey and the customer did not cancel its business. (Tr. 359).

Regarding new sales vs. renewals, in 2015 Cooksey was the first to sell some of Respondent's new products. She sold the Energy Efficiency Predictor to Oncor Energy for over \$100,000. In 2016, she was the first to sell the newly rolled out Innovation Accelerator to Entergy; and she was the only person who sold it that year. At the time of her termination, she had a meeting set up with Oncor Energy for the Innovation Accelerator. That meeting, along with many others she had scheduled, were never cancelled or reassigned by the company after she was terminated. (Tr. 368-369). Cooksey was also the first to sell the Journey Hub mapping tool in 2016, and she successfully packaged it with consulting for sale to Ameran Illinois for over \$250,000. Greenberg denied knowledge of any of these significant new product sales by Cooksey. (Tr. 361).

III. ISSUES

The issues in this case are as follows:

- 1) Whether Charging Party Cooksey received a negative 2016 year-end performance review due to her protected concerted activity.
- 2) Whether Cooksey was discharged on March 3, 2017 because she engaged in protected concerted activity.

IV. ARGUMENT

A. COOKSEY WAS ENGAGED IN PROTECTED CONCERTED ACTIVITY.

To be protected under Section 7 of the Act, employee conduct must be both concerted and for the purpose of mutual aid or protection. *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). For an employee's activity to be concerted, the employee must be engaged with or on the authority of other employees and not solely on behalf of him or herself. *Meyers Industries*, (*Meyers I*), 268 NLRB 493, 497 (1984), revd. sub nom *Prill v. NLRB*, 755 F.2d 1481 (D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988), on remand *Meyers Industries* (*Meyers II*), 281 NLRB 822 (1986), affd. sub nom *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). Whether an employee's activity is concerted depends on the manner in which the employees' actions can be linked to those of coworkers; and there is no requirement that "an employee's activity and that of his fellow employees combine in any particular way." *Fresh and Easy Neighborhood Market*, 361 NLRB at 153. The concept of mutual aid or protection focuses on "whether the employee or employees involved are seeking to improve terms and conditions of employment or otherwise improve their lot as employees." *Id.* (citing *Eastex Inc. v. NLRB*, 437 U.S. 556, 565 (1978)). Concertedness and "mutual aid or protection" are analyzed under an objective standard. An employee's subjective motive for taking action is not relevant in determining whether the action was concerted. *Fresh & Easy Neighborhood Market*, 361 NLRB at 153. "Employees may act in a concerted fashion for a variety of reasons – some altruistic, some selfish – but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991) enfd. mem. 989 F.2d 498 (6th Cir. 1993). It is well established that an employee may act partly from selfish motivation and still be engaged in concerted activity, even if he or she is the only immediate beneficiary. *Fresh and Easy Neighborhood Market*, 361 NLRB at

154; see also *Circle K Corp.*, 305 NLRB at 933; *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987) enfd. 853 F.2d 966 (1st Cir., 1988). Further, the Board has held that “[w]here an employee’s objectives in taking certain action may be mixed, and one supports a finding of concertedness, [the Board] may not ignore it in favor of one that does not.” *Circle K Corp.*, 305 NLRB at 934 fn. 9. Finally, the question of whether activity is concerted is based on a factual one based on the totality of the record. *National Specialties Installations, Inc.*, 344 NLRB 191, 196 (2005); *Ewing v. NLRB*, 861 F.2d 353 (2d. Cir. 1988).

Examining the record as a whole, there can be no doubt that under the pertinent standards articulated above, Cooksey was engaged in concerted activity. Almost immediately after the proposed 2016 compensation plan was revealed, the BDDs gathered in a cubicle to talk about it. Once they received the written plan, they had ongoing conversations about its defects. (Tr. 44). In addition, the employees’ concerns with the plan were raised in numerous team meetings. They expressed concerns over the ramp-up numbers, the unachievable sales quotas, and that the plan would result in a pay cut for all of the BDDs. (Tr. 46, 50). Schieffer conveyed to Vice President of Business Development Hildebrand that the plan would have a negative effect on the sales team. In the meetings with COO Doyle in May and June, Cooksey and Schieffer both expressed how the cut in pay under the 2016 plan would affect their financial situations. (Tr. 53-54). In August, both of them also explained to CEO Greenberg the problems with the plan, and Greenberg admitted that the plan was broken. (Tr. 55-56, 168). During the September 23 meeting between Hildebrand and the BDDs, they tried to come up with ways Respondent could still make money, and the BDDs could earn what they earned before. Cooksey suggested raising the commission percentages on new business and renewals, and giving a percentage to the engagement managers; and she and Schieffer advocated paying Ruiz at the same level they were

being paid. (Tr. 66-67). These sentiments were expressed in a text message Cooksey sent to the BDDs and Russolo, right after the meeting, in which she indicated they should send Hildebrand a follow-up email proposing higher commission percentages and advocating for equal pay for Ruiz. (GC 15-16). Further indicating concert, Schieffer and Ruiz replied and thanked Cooksey for doing that. (GC 22; Tr. 72).

In the meeting on November 10, 2016 with Greenberg, Doyle, Lindenmeyer and Hildebrand, Cooksey advocated for all the BDDs to be paid equally, and made suggestions for higher commission rates. Schieffer expressed concerns over how the plan impacted his and the others BDDs' lives. (Tr. 75, 170). After this meeting, Cooksey sent another text message to the BDDs and Russolo, proclaiming it was "Us vs. them!" (GC 17). The foregoing examples clearly illustrate the "concertedness" of Cooksey's complaints about the compensation plan.

Cooksey's concerted activity was also "protected," as it was undertaken for the purpose of mutual aid or protection. The Board has held that since wages are the most important and vital term and condition of employment, employee complaints about wages are protected activity. *Rogers Environmental Contracting, Inc.*, 325 NLRB 144 (1997). The examples above establish this element as well. In particular, Cooksey and Schieffer were concerned with how the plan affected each other and Ruiz. They advocated for Ruiz being paid equally, and a more reasonable commission rate, which would result in greater income for all of the BDDs.

Respondent will attempt to argue that Cooksey's activity was only concerned with her own financial situation. The evidence shows that while she was concerned with the effects on her own circumstances, as was Schieffer, they were also concerned for each other and Ruiz. As discussed above, one can have both selfish and group concerns, and that does not diminish the protected concerted nature of the action.

B. COOKSEY WAS GIVEN A MORE NEGATIVE REVIEW BECAUSE SHE ENGAGED IN PROTECTED CONCERTED ACTIVITY

A less favorable evaluation is an adverse employment action for purposes of Section 8(a)(1). *Parkview Hospital, Inc.*, 343 NLRB 76 (2004); *Bell Halter, Inc.*, 276 NLRB 1208 (2001). The record evidence establishes that lower scores were given and derogatory comments made because of Cooksey's protected concerted activity. One need only read the evaluation itself to discern this element. The 2016 year-end evaluation (GC 18) specifically cites to her protected concerted "complaining" about the compensation plan. Hildebrand states: "What hurt the achievement of some of team collaboration was the complaining about the comp plan. She could have helped the teams attitude in this touchy situation by taking a different, more positive approach;" and "On the flip side there was one main thing that Sharon [Cooksey] did that was a detriment to her attitude and the attitude of others was the open complaining about the comp plan." Finally, his remarks noted that Cooksey:

"...had a good year from a sales perspective, falling short of goal, but still selling more new and consulting than any of the other two BDDs. Congratulations! She also is kind, compassionate, and willing to help when needed. Really appreciative of that too... the biggest concern was the too frequent complaining on the comp plan. This negativity diminished team morale and momentum. With Sharon being a long time member of the sales team, she could have (should have) played a big part in turning this sensitive situation into a positive and a rally cry for the team, but instead added fuel to the fire."

(GC 18, p. 3).

While Cooksey's overall score was a 3.4, which is between "meets" and "exceeds" expectations, Hildebrand readily admitted that it was the complaining about the compensation plan resulted in lower scores in various categories, which ultimately affected the overall score. (Tr. 288-289, 290, 312). Moreover, the comments themselves are negative in nature, as they reflect poorly on Cooksey's performance for "complaining about the comp plan," which is protected concerted

activity. Accordingly, the negative aspects of the review constitute an adverse employment action.

In determining whether an adverse employment action is unlawful, the Board applies the 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). Under *Wright Line*, the General Counsel must make a prima facie showing that the employee's protected concerted activity was a substantial or motivating factor in the employer's decision to take adverse action. The elements required to meet this burden are that the employee was engaged in protected activity, the employer had knowledge of that activity, and there was animus against the employee's protected conduct. Proof of motive can be based on direct or circumstantial evidence from the entire record. *Ronin Shipbuilding*, 330 NLRB 464 (2000). Animus may be inferred from circumstantial evidence, such as timing, disparate treatment, or shifting explanations for the conduct. *Village Red Restaurant Corp. d/b/a Waverly Restaurant*, 366 NLRB No. 42, 10 (2018); *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1185 (2011). Once the General Counsel meets its initial burden, the burden shifts to the employer to demonstrate that it would have taken the same action absent the protected concerted activity. An employer cannot simply present a legitimate reason for its action, but must persuade the Judge by a preponderance of the credible evidence that it would have taken the same action even in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), enfd. in pertinent part 795 F.3d 18 (D.C. Cir. 2015). If the evidence establishes that the proffered reasons for the employer's action are pretextual (false or not actually relied upon), the employer fails by definition to show that it would have taken the same action absent the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

General Counsel has established a prima facie case regarding Cooksey's performance review. The record evidence demonstrates that her protected concerted activity was a motivating factor for the negative review. As discussed above, there is no doubt that Cooksey was engaged in protected concerted activity. The record evidence also shows that Respondent was aware of the protected concerted activity. The review itself makes clear that Hildebrand had knowledge of the protected concerted activity. As noted above, Hildebrand directly references her complaining about the compensation plan and "negativity" right in the review itself.¹⁰ (GC 18). There can likewise be no doubt that the topic was discussed repeatedly with Hildebrand in team meetings, and in a meeting with upper management on November 10, 2016. The same comments noted in Cooksey's and Schieffer's 2016 year-end reviews regarding complaints and negativity over the compensation plan establish animus on the part of Respondent. Hildebrand was clearly not happy with the complaining, and at one point even directed Schieffer not to discuss the compensation plan with anyone. (Tr. 164). The animus toward the protected activity is likewise expressed in Schieffer's 2016 year-end review, going so far as deeming him insubordinate for complaining about the compensation plan. (GC 31).

Despite its attempts to legitimize its unlawful action, Respondent cannot meet its burden to show that it would have taken the same action (the negative review) absent Cooksey's protected conduct. Again, the review itself references the protected concerted activity. While Cooksey had "a good year from a sales perspective, falling short of goal, but still selling more new and consulting than any of the other BDDs," the concern was her "too frequent complaining about the comp plan" and her "negativity" that "diminished team morale." (GC 18). Cooksey did a great job helping coworkers, but the "complaining about the comp plan... hurt the

¹⁰ He noted similar complaints in Schieffer's 2016 year-end review, going so far as to call him insubordinate in phone conversations, the meeting with management on November 10, 2016, and his email of January 16, 2017. (GC 30, 31).

achievement of team collaboration” and she should have taken a “different, more positive approach.” (GC 178, p. 2). While she “works hard,” the “one main thing Sharon did that was a detriment to her attitude and the attitude of others was the open complaining about the comp plan.” (GC 18, p. 2).¹¹ In addition, Hildebrand testified that lower scores were given because while Cooksey had a lot of positives, the complaining about the compensation plan were a negative, thereby reducing the numbers. (Tr. 288-289, 290, 312). Specifically, Hildebrand admits that in the “Collaboration and Teamwork” section, her score was lower because of her complaining about the comp plan. (Tr. 288-289). He also specifically admits that Cooksey’s rating under “Can-Do Attitude” would have been a 4 (exceeds expectations) based on her hard work and hitting her aggressive goals; but the complaining would be a 2 (below expectations), resulting in the final score of 3 (meet expectations). (Tr. 290, 312). In his remarks in the review, he congratulated her on her sales, and admitted in his testimony that was doing well compared to the other BDDs, but not hitting her goal. (Tr. 292). He further confirmed that none of the BDDs hit their goals. In fact Ruiz missed her target by 37.68%, vs. 16.23% by which Cooksey missed hers. (Tr. 279-284; GC 34).

By contrast, in Cooksey’s 2016 mid-year review, Hildebrand noted that he appreciated her “positive attitude” and encouraged her to “seek me out directly (vs. sharing concerns with others) if there is anything you want to talk through.” (GC 13, p. 3). Tellingly, the 2016 year-end review, which occurred after Cooksey and Schieffer raised issues more publicly, including at

¹¹ Hildebrand backpedaled and made an unsuccessful attempt to explain the comments regarding the complaints about the compensation plan in order to conform his testimony to Respondent’s theory of defense. In this regard, he testified that it wasn’t the complaining, but the manner in which Cooksey complained; that it was in an unconstructive and argumentative manner that was detrimental to the team morale; and that it was the too frequent negativity, not the too frequent complaining that was the problem. (Tr. 256-258, 294). This is in direct contradiction to the written comments and his testimony should not be credited. Nonetheless, there is nothing in the record that shows that Cooksey’s comments were “so opprobrious” as to lose protection of the Act. *Atlantic Steel*, 245 NLRB 814 (1979).

the meeting with Greenberg, Doyle and Lindenmeyer in November, contains a much different narrative.

Based on the foregoing, the ALJ is urged to conclude that Cooksey received a more negative review than she would have absent her protected concerted activity in violation of Section 8(a)(1) of the Act.

C. COOKSEY WAS DISCHARGED BECAUSE SHE ENGAGED IN PROTECTED CONCERTED ACTIVITY.

A *Wright Line* analysis, as discussed above, is likewise applied in making the determination that Cooksey's discharge was unlawful.

1. General Counsel has established a prima facie case regarding Cooksey's Discharge.

General Counsel has made out a prima facie case that Cooksey's protected concerted activity was a motivating factor in Cooksey's discharge. As discussed in detail above, Cooksey was definitely engaged in protected concerted activity. Greenberg had substantial knowledge of the protected concerted activity. He regularly met with Hildebrand regarding the BDDs, both Cooksey and Schieffer met with him separately in August and expressed their discontent with the plan, and he was present at the meeting on November 10, 2016 at which both Cooksey and Schieffer expressed their concerns over the compensation plan and offered their suggestions.

Regarding animus, it has been clearly established that Hildebrand was aware of, and held animus regarding Cooksey's protected concerted activity. While Greenberg did not personally express any outright animus, Hildebrand is an admitted supervisor of Respondent who clearly did harbor animus, and he and Greenberg met and discussed specifics regarding the sales team and potential layoffs on an ongoing basis. When one agent of Respondent harbors animus, and it

appears he or she may have influenced the agent who ultimately made a decision, that animus can be imputed to the decision-maker. See *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126, 2 n.9 (2015).¹² As discussed below, it is not believable that Greenberg was insulated from the situation and made the decision to fire Cooksey on his own.

Further, animus may be inferred from circumstantial evidence, such as timing, disparate treatment or shifting explanations for the conduct. *Village Red Restaurant Corp. d/b/a Waverly Restaurant*, 366 NLRB No. 42, 10 (2018); *Camaco Lorain Manufacturing Plant*, 356 NLRB 1182, 1185 (2011). Evidence of pretext can also support a finding of animus. *Relco Locomotives, Inc.*, 358 NLRB 229, 229 (2012), *enfd.* 734 F.3d 764 (8th Cir. 2013). As stated by the Board in *Relco Locomotives*:

In affirming the judge's findings that the Respondent's discharges of employees Smith and Dixon were unlawful, we emphasize that the credited evidence establishes that the Respondent's asserted reasons for both discharges—safety violations and absenteeism for Smith and insubordination for Dixon—were pretexts designed to mask the Respondent's true motivation, the employees' union activity. This evidence provides strong support for the General Counsel's required initial showing under *Wright Line*, *supra*, as well as precluding any *Wright Line* defense.

Relco Locomotives, Inc., 358 NLRB at 229. See also *Lucky Cab Co.*, 360 NLRB 271, 274 (2014).

A number of these elements are present in the instant case. As for timing, Cooksey was fired in March 2017, after consistently complaining about the 2016 compensation plan and making suggestions on how to correct it in 2017. These complaints were brought to the attention of the entire upper management team at the meeting in November 2016. While her 2016 mid-year review was positive, Cooksey received negative comments in her review regarding

¹² In *Coastal Sunbelt*, the ALJ discredited Respondent's testimony indicating that the CEO had unilaterally made the decision to terminate an employee who was engaged in protected concerted activity, apart from the supervisor who had been proven to have held animus, and this indicated pretext. *Coastal Sunbelt*, 362 NLRB No. 126 at 36-37.

protected concerted activity in January 2017. Thereafter, Hildebrand sent an email to Director of Human Resources Davis on January 23, 2017 regarding the fact that he was still trying to save Cooksey's job, and that he thought maybe Cooksey would "straighten up." They hoped against hope that one of their top performers would refrain from engaging in further protected concerted activity. There is no dispute that Cooksey actually exceeded her January and February 2017 sales targets, yet was nonetheless fired. If the real "straightening up" had to do with sales, this would not be a logical move. Unless there was an ulterior motive, as is present here, an employer would not fire an employee who just exceeded her goals, achieved monthly bonuses and was selling more than the other BDDs.

While Greenberg personally expressed no outright animus, as a self-described "hands-on" CEO of a small company, he knew what was going on and an inference can be made that he must have discussed issues other than just sales numbers with Hildebrand during his frequent discussions with him each week. The complaining about the compensation plan was forthright in Hildebrand's mind as evidenced by Cooksey's 2016 year-end review. It is unlikely that this would not have come up during his discussions with Greenberg. Greenberg denied consulting with Hildebrand on the terminations. He incredibly testified that he only informed Hildebrand of his decision to terminate Cooksey and Schieffer, while admitting that Hildebrand gave him input. (Tr. 358). This sounds exactly like "consulting." Further, Greenberg admittedly considered Hildebrand's input at least at the time he was thinking of including Cooksey and Schieffer in the October 2016 layoff, as he did not execute the plan at that time. It would therefore follow that Hildebrand, as the BDDs' direct supervisor, had some influence on Greenberg's final decision, particularly when that decision involved the termination of a long-time high achieving employee. In addition, if Hildebrand was so concerned with retaining Cooksey, it is odd that he would

include negative comments that could be looked at in making an adverse employment decision in her year-end review.

In further support of animus, there is also evidence of disparate treatment. The record evidence shows that Cooksey outperformed Katie Ruiz, who failed to meet her sales targets by a much greater margin, but did not complain about the compensation plan, and was retained by Respondent.

Finally, as outlined below, there is a showing of pretext in this case, which itself can serve as an indicator of animus.

2. Cooksey's discharge was motivated by her protected concerted activity.

Respondent cannot show that it would have fired Cooksey in absence of the protected conduct. As discussed above, an employer cannot simply present a legitimate reason for its action, but must persuade the ALJ by a preponderance of the credible evidence that it would have taken the same action even in the absence of the protected conduct. *Bruce Packing Co.*, 357 NLRB 1084, 1086-1087 (2011), *enfd.* in pertinent part 795 F.3d 18 (D.C. Cir. 2015). If the evidence establishes that the proffered reasons for the employer's action are pretextual, the employer fails by definition to show that it would have taken the same action absent the protected conduct. *Metropolitan Transportation Services*, 351 NLRB 657, 659 (2007); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

The credible record evidence supports a finding that Respondent's purported reason for firing Cooksey was pretextual, and Respondent's decision was motivated by the fact that she was engaged in protected concerted activity. Respondent's case consisted of the testimony of Hildebrand and Greenberg. As noted above, much of Hildebrand's testimony was not credible in regard to the performance reviews.

Greenberg's testimony is inherently incredible on a number of fronts. Greenberg claims that he was considering laying off Cooksey and Schieffer back in August of 2016 (taking effect in October 2016) because they had not achieved enough sales growth. As already discussed, the timing of the alleged decision to terminate Cooksey based upon her sales numbers does not make sense. Cooksey's 2016 mid-year review indicates that she was "having a good sales year and exceeding the targets." Likewise, GC 34 reflects that she was ahead of her sales targets at the end of July 2016. The first time her sales dipped below target was in August 2016. The sales numbers for each month would not be available until after the month closed. Therefore, when Greenberg supposedly made this decision, he did not have sufficient data to make this determination. If he made the decision in August, it would have been based on her July sales, which were above target. If he made the decision in September, the only data he had available would be from August. This consisted of one month where Cooksey failed to achieve her target. It would seem like a rather rash decision to terminate a 17-year highly successful employee based upon one month of sales performance, particularly when the goal was admittedly far above goals from previous years.¹³

It is also telling that Respondent produced no documentation that Cooksey's lay-off was decided upon in August or September. It is implausible that such an event was being considered for months, yet there is nothing memorializing it. This is particularly so given the fact that Respondent's managers were not centrally located, but scattered around the country. The only documentary evidence introduced on the pre-determination of firing Cooksey and Schieffer consists of a series of emails between Hildebrand and HR Director Davis on January 21 and 23,

¹³ To the extent Respondent attempted to make it appear that Cooksey did not meet her 2015 goal, the record evidence is clear that she did. The credible evidence supports a finding that her goal was \$4,002,409, not higher. (Tr. 127-129; GC 23).

2017.¹⁴ (R. 2). It is simply not plausible that there would be absolutely no documentation from the time period of August or September 2016 until almost the end of January 2017 regarding the terminations.

Greenberg's assertion that it was 100% his decision to terminate Cooksey based solely on sales is simply not credible, and was self-serving testimony to bolster Respondent's defense. A CEO does not operate in a vacuum. While he has the ultimate say-so, he undoubtedly consults with and considers the input of day-to-day supervisors in making a large decision like terminating a 17-year employee with an excellent track record. As discussed above, Greenberg admits to constant discussions with Hildebrand regarding the BDDs, and meetings with the executive management team in his testimony. Greenberg admittedly consulted with Hildebrand and took his advice when deciding to keep Cooksey and Schieffer on past October 2016. Thereafter, Hildebrand (Cooksey's supposed advocate), gave Cooksey a negative performance review in January 2017. Then, suddenly on March 3, 2017, Greenberg decided "solely" on the failure to meet her sales goals, and without any consideration of Hildebrand's input, to terminate Schieffer's employment. This is a simply an unbelievable scenario. Based upon the inconsistencies, the ALJ is urged to credit the testimony of Cooksey and Schieffer over that of Greenberg and Hildebrand.

As a "hands on" CEO, Greenberg testified that he reviewed the performance of the individual BDDs weekly. Yet, he did not know that Cooksey had surpassed her sales goals for January and February 2017, immediately prior to being terminated. If she was terminated based solely on her allegedly poor sales performance, one would think Greenberg would be interested

¹⁴ The emails discuss what Hildebrand should say if Cooksey and Schieffer asked if they were getting fired. In that email, Davis says Greenberg wasn't open to keeping her around because he's gotten complaints from customers about her that "she's an airhead." This is another example of a complaint that was never brought to Cooksey's attention nor documented, and is contrary to Greenberg's testimony that she was terminated only based on sales data as represented in GC 34.

in seeing how she was doing prior to actually terminating her.¹⁵ Further, Greenberg testified that he received a complaint about Cooksey in September 2016, and the customer threatened to take away her business if Cooksey continued on the account. However, Cooksey did continue on the account, the customer did not leave, and most importantly, Cooksey was never told about the complaint, nor is it documented. In the later January email between Hildebrand and Davis, Davis concurs that Greenberg would not want to keep Cooksey around because he had received complaints about her. If this is so, Greenberg's assertion that Cooksey was fired *only* for missing her sales target cannot be believed. Additionally, Greenberg testified that he believed the BDDs could achieve the high numbers in the 2016 compensation plan. However, Cooksey and Schieffer both credibly testified that he admitted to them that the plan was broken. By Hildebrand's own account, they were "stretch goals" far above those of prior years. (Tr. 244). In fact, Cooksey's goal (as well the other BDDs goals) was reduced by roughly a million dollars in 2017 because it was so unrealistic in 2016.¹⁶ (Tr. 88, GC 20). Moreover, there cannot be a serious argument that the 2016 plan, by drastically cutting commissions, especially on new business, would in any way serve to "motivate" new sales. The plan was setting up for failure. In the end, it was a failure, and Greenberg knew it.

Not only did Greenberg not consider Cooksey's stellar performance at the beginning of 2017, but he also testified to being unaware of big sales Cooksey made of new products in 2016.¹⁷ Again, it does not make sense that an employer would make a decision to lay off an

¹⁵ Greenberg's testimony regarding the TVA conference further demonstrates his lack of credibility. He testified that Cooksey was "disengaged" and sitting outside in the break area. Cooksey explained that there were sessions that were only for TVA employees, and that she had told Greenberg that she would be working – checking voicemails and emails and trying to go after some sales – while she was there. He told her to "go get 'em." He denies all of this. He thanked her for being there, and said nothing about her being disengaged. Greenberg also claimed Cooksey told him that she was going to retire within the year, which Cooksey credibly denied.

¹⁶ Accordingly, had her 2016 goal been more realistic like under 2017 plan, she would have achieved it.

¹⁷ Though Respondent claims Cooksey was terminated for failure to hit her sales numbers, Hildebrand claims part of the problem was her unwillingness to learn about and push new products and services. (Tr. 250-251).

employee in August or September 2016, then not monitor her performance thereafter to see if there was improvement, and then fire her in March 2017 with no immediate replacement lined up. Even Hildebrand and Davis's emails from January 23, 2017 indicated they were going to keep her until a suitable replacement was found. Yet, when she left no one immediately replaced her or even bothered to cancel her already scheduled appointments. (Tr. 368-369). This does not make sense from a business standpoint. If her termination was being contemplated for 6 or 7 months, it is logical to expect in that time Respondent would have planned for her departure. Finally, while Cooksey was alleged terminated for her sales performance, her eventual replacement did not even have sales experience. (Tr. 95).

Perhaps the strongest indicator that Respondent's defense is pretextual is shown by the credible evidence indicating that Cooksey was never notified that her sales numbers were a problem, even upon her termination. (Tr. 92). It is unbelievable that no one from the Respondent's organization ever indicated to Cooksey that her sales were insufficient or that she needed to improve her numbers.¹⁸ Notably, when she was terminated, Cooksey's sales were not even mentioned to her as a reason. All Hildebrand told her was that they had decided "to go with a fresh new team with different skill sets."¹⁹

It is undisputed that Cooksey was Respondent's highest selling BDD in 2016, despite not meeting ridiculously high goals that were set for the BDDs that year. Her reviews recognize this fact. Less than two months before she was fired, her performance review says that she "had a good year from a sales perspective, falling short of goal, but still selling more new and

¹⁸ While Hildebrand vaguely testified that he discussed the issue of meeting the numbers with Cooksey, but gave no specifics. He did, however, offer specifics regarding the (false) fact that Cooksey said she made \$200,000 in a team meeting, as well as other elements of the review. (Tr. 251, 257-258).

¹⁹ To the extent Hildebrand testified that he used a script when firing her or didn't recall if he mentioned sales, he should be discredited. Cooksey's testimony, as well as Schieffer's clearly indicates that this was the only thing said to them when they were terminated.

consulting that any of the other two BDDS. Congratulations!” This hardly sounds like the evaluation of an employee who is in danger of losing her job for poor sales performance. Rather, the only negatives mentioned throughout are those regarding her complaints about the compensation plan. It is just not believable based on these comments that it did not factor into the decision, despite Greenberg’s denials. Overall, Cooksey was rated as a 3.4 on her 2016 year-end review. Such a rating does not mesh with the assertion that she was performing unacceptably. As a salesperson, it is logical that if her sales were terrible enough to lead to her termination, her rating would be lower.

Further, the emails between HR Director Davis and Hildebrand seem to indicate that Greenberg and Hildebrand were regularly discussing the decision to terminate Cooksey and Schieffer. Hildebrand went so far as to say he was holding out hope that Cooksey would “straighten up,” and that he would talk to Greenberg about staggering/delaying her departure. If her problem was “sales” only, she would have already have “straightened up” by exceeding her sales goals in the month of January 2017 when the email was sent. Greenberg testified that each week he received reports for each BDD, including every account, every territory, renewals, new business, and where they are against the goal. Yet, he did not take into account that Cooksey exceeded her goals just prior to being terminated, and did not consider that in his decision to terminate her when Hildebrand tried to persuade him to keep her about a week or 10 days prior to March 3, according to his testimony. (Tr. 355).

Finally, Greenberg reached back and testified that Cooksey missed her 2015 sales goal by \$1.25 million. While GC 34, created by Respondent, reflects her 2015 goal as \$5,482,985, her year-end review indicates her goal was actually \$4,002,409, which she exceeded, as does her amended compensation plan dated June 29, 2015. (GC 4, GC 12). In fact, when they met on

her 2015 year-end review, COO Doyle, who was supervising her at the time told her that she had a “really good year.” Again, this doesn’t sound like a person who is in danger of losing her job over sales. In addition, GC 34 shows that she achieved 49.42% growth in 2015. This can be contrasted with the other 2 BDDs who were initially laid off in for poor performance in 2015, and are comparators. (Tr. 337). This would be Chuck Ray and Gavin Sullivan. They only sold half of what Cooksey and Schieffer sold, around two million, and their growth was -23.89% and -47.95%, respectively.²⁰ Accordingly, Greenberg’s testimony in this respect is likewise not credible.

There is no dispute that none of the BDDs met their goals in 2016, or that Cooksey came closest to hitting hers, yet was still terminated. To be clear, Cooksey missed her target by one million dollars, or 16.23%, while Ruiz missed hers by over 2 million dollars, or 37.68% and was not fired. (GC 34). Cooksey’s business grew by 18.41% in 2016 and she had higher sales than any of the other BDDs, reaching over 5 million dollars. (GC 34, p. 1, 4). Schieffer was behind her with \$4,273,091, and Ruiz had \$2,601,382. (GC 34, p. 2-4). Cooksey and Schieffer were extremely vocal regarding their dislike of the compensation plan and were fired, while Ruiz, who did not complain to Respondent, was not. The “failed” 2016 compensation plan merely provided Respondent with an opportunity to terminate two long term employees for protected concerted activity by citing failure to meet the unachievable goals. Thus, the only logical conclusion based on the credible evidence is that Cooksey was terminated for engaging in protected concerted activity in violation of the Act, and General Counsel urges the ALJ to make such a finding.

²⁰ While Greenberg testified that these two were laid off in the summer of 2015, that is clearly not the case if GC 34 is correct. It appears they worked that entire year.

V. CONCLUSION

Based on the foregoing, Counsel for the General Counsel submits that Respondent has violated Section 8(a)(1) of the Act by giving Charging Party Cooksey a negative performance review and terminating her in retaliation for engaging in protected concerted activity. Counsel for the General Counsel therefore requests that the ALJ make appropriate findings of fact, conclusions of law, and such recommendations to the Board as will properly remedy Respondent's unfair labor practices.

Respectfully submitted this 6th day of April, 2018,

A handwritten signature in black ink that reads "Angie Berens". The signature is written in a cursive style and is positioned above a horizontal line.

Angie Berens
Todd Saveland
Counsel for the General Counsel
National Labor Relations Board
Region 27
1961 Stout St., Suite 13-103
Denver, Colorado 80294
(720)598-7399

VI. PROPOSED NOTICE TO EMPLOYEES

(To be printed and posted on official Board notice form)

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 do anything to prevent you from exercising the above rights.

YOU HAVE THE RIGHT to discuss wages, hours and working conditions with other employees and to freely bring these issues to us, and **WE WILL NOT** do anything to interfere with your exercise of those rights.

WE WILL NOT give you a negative performance review because you exercise your right to discuss wages, hours and working conditions with other employees, or raise these issues to us.

WE WILL NOT fire you because you exercise your right to discuss wages, hours and working conditions with other employees, or because you exercise your right to bring issues and complaints to us on behalf of yourself and other employees..

WE WILL remove from our files, Sharon Cooksey's January 2017 negative performance review, and any references to it, and we **WILL** notify her in writing that this has been done and that the review will not be used against her in any way.

WE WILL offer Sharon Cooksey her job back along with her seniority and all other rights or privileges.

WE WILL pay Sharon Cooksey for the wages and other benefits she lost because we fired her.

WE WILL remove from our files all references to the discharge of Sharon Cooksey and **WE WILL** notify her in writing that this has been done and that the discharge will not be used against her in any way.

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

CERTIFICATE OF SERVICE

I hereby certify that I served the attached **Counsel for the General Counsel's Post-Hearing Brief** on the parties listed below, by method of service indicated, on the 6th day of April 2018, on the following parties:

Jeffrey W. Toppel, Attorney at Law
Jackson Lewis, PC
2398 East Camelback Road, Suite 1060
Phoenix, AZ 85016-9009
Email: toppelj@jacksonlewis.com

E Source Companies, LLC
1745 38th Street
Boulder, CO 80301
Regular Mail

Sharon Cooksey
c/o Sweeney & Bechtold, LLC
650 South Cherry Street, Suite 700
Denver, CO 80246
Email: jmbechtold@sweeneybechtold.com

Joan M. Bechtold, Attorney at Law
Sweeney & Bechtold
650 South Cherry Street, Suite 700
Denver, CO 80246-1801
Email: jmbechtold@sweeneybechtold.com

Donna L. Brown
Designated Agent of NLRB

Name

/s/ *Donna L. Brown*

Signature