

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
SAN FRANCISCO BRANCH OFFICE**

**E SOURCE COMPANIES, LLC**  
**Respondent**

**and**

**Case 27–CA–202883**

**SHARON COOKSEY, an Individual**  
**Charging Party**

*Angie Berens, Esq. and Todd Saveland, Esq.*, for the General Counsel.  
*Jeffrey W. Toppel Esq. (Jackson Lewis P.C.)*, for the Respondent.  
*Joan M. Bechtold, Esq. (Sweeney & Bechtold, LLC)*, for the Charging Party.

**DECISION**

**STATEMENT OF THE CASE**

**DICKIE MONTEMAYOR, Administrative Law Judge.** This case was tried before me on February 20, and 21, 2018, in Denver, Colorado. Sharon Cooksey filed a charge on July 21, 2017, alleging violations by E Source Companies, LLC (Respondent) of Section 8(a)(1) of the National Labor Relations Act (the Act). Respondent filed an answer denying that it violated the Act. The parties were given full opportunity to participate, to introduce relevant evidence, to examine and cross-examine witnesses, and to file briefs. I carefully observed the demeanor of witnesses as they testified and I rely on those observations here. I have studied the whole record, including the post hearing briefs and based upon the detailed findings and analysis below, I conclude that Respondent did violate the Act as alleged.

**FINDINGS OF FACT**

**I. JURISDICTION**

The complaint alleges, Respondent admits, and I find

1. (a) At all material times, Respondent has been a limited liability company with an office and place of business in Boulder, Colorado (Respondent's facility), and has been engaged in the business of the sale of research and consulting services for utilities and large energy users.

(b) In conducting its operations during the 12-month period ending December 31, 2016, Respondent provided services valued in excess of \$50,000 to utilities and large energy users located outside the State of Colorado.

(c) At all material times, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. At all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Mike Hildebrand-	Vice President of Sales
Chris Doyle-	Chief Operating Officer
Wayne Greenberg-	Chief Executive Officer
Judy Lindenmeyer-	Chief Financial Officer
Jessica Davis-	Human Resources Director

## II. ALLEGED UNFAIR LABOR PRACTICES

### A. Background

Respondent employs approximately 90 persons and is in the business of providing utility research, and consulting services to utilities. The services it provides includes customer research, “benchmarking,” best practices and assessment analyses. The Company provides its services via the selling of subscriptions of its products and other services to its various customers. To accomplish its subscriptions sales E Source had a dedicated sales department whose job it was to sell the Company’s products. The sales persons held the title of business development directors (BDDs). There were three BDDs who sold products, Sharon Cooksey, Christopher Schieffer, and Katie Ruiz. The BDDs were each assigned a sales territory. Cooksey was assigned the “Midwest,” Scheifer the “West” and Ruiz the “Northeast.” Cooksey had been in her position approximately 17 years and Schieffer approximately 19 years. Ruiz was placed into her position in early 2016. The BDDs were supported by member experience managers whose job it was to work on the engagement of the existing clients and provide services that would foster renewals. The BDDs were supervised by Mike Hildebrand, the vice president of business development (sometimes referred to as the vice president of sales). He held this position and reported directly to CEO Wayne Greenberg who was hired in 2014. Hildebrand was physically located in Wisconsin but routinely held weekly Monday morning meetings with the sales team via WebX videoconference.

### B. BDD Compensation

BDDs were paid a base salary plus commission. The details of the commission payments were set forth in a yearly Sales Commission Compensation Plan Structure document. The plan was typically presented to salespersons in the beginning of the year. It outlined the various aspects of sales commissions including; definitions of terms used, amounts of commissions, how

the amounts were calculated and how and when the commissions would be paid out to the employees. (GC Exh. 2.)

5 In January of 2016, Hildebrand met with each of the BDDs to discuss the implementation of a new plan with a compensation structure that was changing. The new plan designated as the 2016 Sales Compensation Plan was provided to Cooksey on January 27, 2016, and was effective from January 1 through December 31, 2016. The stated objective of the plan was “[t]o stimulate growth of E Source by rewarding individuals who effectively drive client satisfaction and retention, and support sales and promotion of various E Source products, tools and consulting, and expand the business relationships that we maintain with our clients in the markets we serve.” (GC Exh. 6.) The plan introduced a new tiered compensation system. Instead of receiving a flat commission for sales the new plan gradually increased the commission as the level of sales increased. For example, the rate for sales from \$1–3 million was .8 percent while the rate for \$3–5 million was 1.5 percent. The new plan also included higher sales goals. Cooksey’s annual goal climbed from \$3.4 to \$6.7 million. The plan also included “Rolling Quarterly Targets of \$3,581,000 for the second quarter, \$4,781,000 for the third and \$6,700,000 for the fourth quarter. (GC Exh. 6.)

### 20 *C. Cooksey’s Performance under the 2016 Plan*

The new plan created many challenges for the BDDs along with increased goals and commission compensation changes. The BDDs had ongoing discussions amongst themselves expressing their concerns about the new plan and expressed those same concerns in meetings with Hilderbrand. (Tr. 44.) Among the concerns expressed by Cooksey was that the new sales quotas were high, the commission structure was different and anticipated result would be that they would earn less money. These complaints were reiterated in meetings in May and June of 2016. (Tr. 51–56, 66–77.) In August of 2016 Cooksey met with the CEO Greenberg, shared with him a spreadsheet that outlined the difference i.e., reduction of her income under the new plan. He informed her that the plan was “broken” but the budgets were set and they would have meetings in November to design a new 2017 plan. (Tr. 56.)

35 All BDDs were given periodic performance evaluations to evaluate their performance. Each BDD received a mid-year evaluation and an end of year evaluation. The evaluation scale ranged from 1–5 with a rating of one designated as “not adequate” a rating of 3 “meets expectations,” 4 “exceeds expectations and 5 “distinguished performance.” (GC Exh. 13.) Cooksey was rated by Hilderbrand in 2016. In her mid- year evaluation she received an average rating of 3.5 or “meets expectations.” Hildebrand included the following remarks in the appraisal:

40 The 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 [sic] though. 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 Exh. 13.)

In her end of year rating she received a 3.4 a “meets expectations. The evaluation specifically mentioned her mentoring Ruiz who had just assumed the BDD position. Hildebrand in the category of “Collaboration and Teamwork” noted, “Sharon did a great job mentoring Katie this year and I really appreciate that.” (GC Exh. 13.) He also went on to state, “[w]hat hurt the achievement some of team collaboration was the complaining about the comp plan. She could have helped the team’s attitude in this touchy situation by taking a different, more positive approach.” (GC Exh. 13). Under the remarks section he set forth the following:

Sharon had a good year from a sales perspective, failing 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.<sup>1</sup> 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 Exh. 13.)

In February 2017, she submitted to Human Resources Director Jessica Davis what she described as a “side note” to be placed into her personnel file. The side note was in essence a three-page handwritten letter. In the letter Cooksey stated in part, “my 2016 was extremely negative and I feel contained inaccurate information related to commission discussions in a group meeting.” (GC Exh. 19.) She also referenced that Hilderbrand, “stated that I had a negative attitude toward the 2016 comp plan and that I should not mention the plan in the group meeting. The group meeting was just our group and he stated at the beginning of the meeting we could have an open, safe, discussion about the plan.” (GC Exh. 19.) She further noted that “I was the only BDD to hit any of my quarterly targets or come close to the annual target. I feel my year-end review for 2016 did not reflect the successes I had during the year.” (GC Exh. 19.)

#### ***D. Cooksey’s Termination***

Despite providing Cooksey with a “meets expectation” performance review, Hildebrand and Jessica Davis, the director of human resources on or about January 21, 2017, discussed the termination of both Cooksey and Schieffer. In an email, Hilderbrand wrote,

During the YE review I’m sure both Christopher and Sharon will ask me, “so am I getting fired?” as they’ve done that before. My response this time will be “it’s possible and leave it at that. Sound OK? I don’t want to say don’t know, because I do I’m sure Christopher’s performance will immediately hit the skids and I think we could/should terminate him anytime. I’m holding out hope for Sharon to

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<sup>1</sup> Another BDD, Schieffer also received evaluations which referenced “outward complaining” and specifically noted “there is one main thing that Christopher does that was and still is a detriment to his attitude; the open complaining about the comp plan.” (GC Exh. 31.)

straighten up and will talk to Wayne again about staggering/delaying her departure, but I don't think he is open to that. Please advise . . ." (R Exh. 2.)

Davis replied as follows:

I guess that's the best answer for now, since I don't want to give them a timeframe where they think they are safe, if they are really not safe. I talked to Wayne about Sharon and you're right . . . he's not open to keeping her around, because he's gotten complaints from customers about her. He said that they said, "she's an air head." Which speaks to your concern about her not having the in-depth knowledge of our products that she really needs to have in order to be a more effective sales person.<sup>2</sup> So I think we can keep her around until we find a suitable replacement. Which means we should probably stick to the plan of finding a Sr. BDD and hopefully two amazing BDDs and then decide on the time frame of the two terms. Chat with Wayne about it and then let me know if you want to term Christopher sooner." (R Exh. 2.)

On or about March 3, 2017, shortly after submitting her side note to Davis, Cooksey traveled to the Boulder office for what she thought was a team meeting. She was met by Hilderbrand and Human Resources Director Davis. She was told that she would be terminated by Hildebrand who stated, "the company, "decided to go with a fresh team with different skill sets." She was given a separation agreement and other documents. (Tr. 91–92.) Schiefer was also terminated that day. He was also told by Hildebrand that the company was "looking for people with a different skill set" and he would no longer be employed.

### *E. Analysis*

The concept of concerted activity has its basis in Section 7 of the Act. Section 7 of the Act in pertinent part states: "Employees shall have the right to self-organization to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid and protection." In order for the actions to be protected under the statute they must be both "concerted" and engaged in for the purpose of "mutual aid or protection." *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 153 (2014). In general, to find an employee's activity to be "concerted," the employee must be engaged with or on the authority of other employees and not solely by and on behalf of the employee herself. Whether an employee's activity is "concerted" depends on the manner in which the employee's actions may be linked to those of his coworkers. See *NLRB v. City Disposal Systems*, 465 U.S. 822, 831 (1984); *Meyers Industries*, 268 NLRB 493, 497 (1984) (*Meyers I*), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 948 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert.

<sup>2</sup> The reference to "air head," a gender stereotypical term intended to demean the intellectual capabilities of a woman, raises the question of whether other unlawful factors not specifically covered by the NLRA also motivated Respondent. See *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). I need not address the issue but, I did not overlook the fact that when Cooksey testified she did so in a manner that would suggest that her intellectual capabilities were not in any conceivable manner deficient. On the contrary, judging from my observations, she appeared to be a smart and intellectually capable person.

denied 487 U.S. 1205 (1988). The Supreme Court has observed, however, that “[t]here is no indication that Congress intended to limit [Section 7] protection to situations in which an employee’s activity and that of his fellow employees combine with one another in any particular way.” *NLRB v. City Disposal Systems*, 465 U.S. at 835. *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014).

The question of whether an employee has engaged in concerted activity is a factual one based on the totality of record evidence. See, e.g., *Ewing v. NLRB*, 861 F.2d 353 (2d Cir. 1988). The Board has found an individual employee’s activities to be concerted when they grew out of prior group activity. *Every Women’s Place*, 282 NLRB 413 (1986). The Board has found that “ostensibly individual activity may in fact be concerted activity if it directly involves the furtherance of rights which inure to the benefits of fellow employees.” *Anco Insulations, Inc.*, 247 NLRB 612 (1980). An employee’s activity will be concerted when he or she acts formally or informally on behalf of the group. *Oakes Machine Corp.*, 288 NLRB 456 (1988). Concerted activity has been found where an individual solicits other employees to engage in concerted or group action even where such solicitations are rejected. *El Gran Combo de Puerto Rico*, 284 NLRB 1115 (1987), *enfd.* 853 F.2d 966 (1st Cir. 1988).

### 1. Concerted activity

I find that considering the totality of the evidence, the actions of Cooksey fall within the umbrella of the Board’s broad definition of “concerted activity.” It is undisputed that after the 2016 plan was released she met with other employees and management officials to express concerns about the plan. It is also undisputed that her concerns related directly to common concerns regarding terms and conditions of her employment specifically relating to how BDDs would be compensated for their work. These concerns were reiterated throughout the year in various meetings both with other employees and management officials. In a text to coworkers in November of 2016, she characterized the discussions regarding the compensation plan as “[u]s vs. them!” (See Exh. 17.) The text messages emphasize the already apparent concerted nature of the activity. Although Cooksey’s actions did not necessarily produce a group protest per se they were clear examples of her advocating on her own behalf and on behalf of others. Her actions did result in other employees expressing mutual concerns. See *Salon/Spa at Boro*, 356 NLRB 444,453–454 fn. 31 (complaints that “did not produce . . . group protest to management” but “did produce some group activity [by causing] other employees to voice support for [the] complaints”). See also *Amelio’s*, 301 NLRB 182 fn. 4 (1991). In this case, Cooksey’s actions produced support from Schieffer and vice versa. See *World Mark by Wyndham*, 356 NLRB 765 (2011), holding that when a single employee protested a change in company dress code and a second employee joined the action “any doubt of the concerted nature of [the employees] action is removed by [a second employee joining that action].” Hildebrand himself recognized the concerted nature of her actions. In her mid-year appraisal he encouraged that she seek him “out directly vs. sharing concerns with others”. (GC Exh. 13.)

### 2. Protected activity under the Act

In order for concerted activity to be protected it must be undertaken “for the purpose of collective bargaining or other mutual aid or protection,” 29 U.S.C. § 157 (1976), and actions taken for mutual aid or protection include those intended to improve conditions of employment.

The concept of “mutual aid or protection” focuses on the goal of concerted activity; chiefly, whether the employee or employees involved are seeking to “improve terms and conditions of employment or otherwise improve their lot as employees.” *Eastex, Inc. v. NLRB*, 437 U.S. 556, 565 (1978). Under Section 7, both the concertedness element and the “mutual aid or protection” element are analyzed under an objective standard. An employee’s subjective motive for taking action is not relevant to whether that action was concerted. “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). Nor is motive relevant to whether activity is for “mutual aid or protection.” Rather, the analysis focuses on whether there is a link between the activity and matters concerning the workplace or employees’ interests as employees. The motives of the participants are irrelevant in terms of determining the scope of Section 7 protections; what is crucial is that the purpose of the conduct relate to collective bargaining, working conditions and hours, or other matters of “mutual aid or protection” of employees. The Board has long held, however, that for conversations between employees to be found “protected” concerted activity, they must look toward group activity and that mere “griping” is not protected. See *Mushroom Transportation Co. v. NLRB*, 330 F.2d 683 (3d. Cir. 1964).

If an employee’s action benefits others then this is proof that the action comes within the mutual aid or protection clause of Section 7. *Fresh & Easy Neighborhood Market*, *supra* at 7, citing *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), *affd. sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987). The Board has found a broad range of employee activities regarding the terms and conditions of employment fall within Section 7’s mutual aid and protection clause. *Fresh & Easy Neighborhood Market*, *supra*, at 7. See, e.g., *Dreis & Krump Mfg.*, 221 NLRB 309, 314 (1975) (employees’ complaints over supervisory handling of safety issue); *Tanner Motor Livery*, 148 NLRB 1402, 1404 (1964), *enfd. in relevant part* 349 F.2d 1 (9th Cir. 1965) (employees’ protest of racially discriminatory hiring practices); *Jhirmack Enterprises*, 283 NLRB 609, 609 fn. 2 (1987) (one employee’s communication to another in an attempt to protect the persons continued employment). Section 7 of the Act protects the rights of employees to engage in concerted activities for the purposes of mutual aid or protection. Section 8(a)(1) makes it unlawful for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7.

It is well settled that complaints about wages are protected activity. *Rogers Environmental Contracting, Inc.*, 325 NLRB 144 (1997). It is undisputed that Cooksey expressed her reservations about the compensation plan. That Cooksey’s action fall within the purview of mutual aid and protection is evident throughout the record. It is particularly highlighted in a text message she sent to other coworkers in September 2016. In it, she outlines a plan for the employees. The text referencing proposed amendments to the compensation plan stated, “Maureen an I just spoke and we agree that we should send mike a follow up email . . . not expecting 10.5 for new but that we should be compensated equally for renewals and new. New should be somewhere between what we have now and 10.5. No reason for Katie to be paid less . . . Same goes for Maureen. Same effort same compensation. I am going to send Mike my comparison of pay . . . this year vs. last as well.” (GC Exh. 15.) The email makes clear that her actions were concerted and were proposals designed to benefit others including Katie and Maureen, thus falling directly within the mutual aid and protection clause. See *Mexican Radio Corp.*, 366 NLRB No. 65 (2018) (holding that a group response to an email constituted protected

concerted activity). I therefore find that Cooksey engaged in both concerted and protected activity.

*a. Cooksey’s 2016 yearend appraisal*

5 The General Counsel argues that Cooksey’s 2016 yearend evaluation constituted an adverse employment action because it contained derogatory comments relating to her protected and concerted activity. The Board has held that a less favorable evaluation can constitute an adverse action. See *Parkview Hospital, Inc.* 343 NLRB 76 (2004); *Bell Halter, Inc.*, 276 NLRB 10 1208 (2001). The record establishes, as noted above, that Cooksey engaged in protected and concerted activity and that her appraisal contained derogatory information regarding that activity. Protected and concerted activity that Respondent characterized as “too frequent complaining on the comp plan” and “negativity” that “diminished team morale and momentum.” (GC 18).

15 Respondent asserted that the allegation should be dismissed in large part because Cooksey herself at trial characterized the overall evaluation as a “good review.” (Tr. 87.) I disagree with Respondent’s position that the allegation should be dismissed for a number of reasons. First, because it ignores evidence in the record in the form of a “side note” in which Cooksey, after receiving the review, characterized it as “extremely negative” and asserted that it 20 contained “inaccurate information related to commission discussions in a group meeting.” (GC Exh. 19). Secondly, a reasonable inference to be drawn from the evidence is that Hildebrand himself viewed the evaluation as negative as he himself asked Davis for advice regarding what to do if Cooksey asked during the yearend review whether she was getting fired. (GC Exh. 33.) Moreover Hilderbrand himself testified that her complaints lowered her numerical scores. (Tr. 25 288–290, 312.)

30 The derogatory language of the evaluation was on its face meant to chill her concerted and protected activity. It had the intended effect of deterring Cooksey and her coworkers from engaging in protected and concerted activity. I find that the derogatory language would dissuade a reasonable employee from engaging in protected and concerted activity. See *Burlington Northern and Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), where the Supreme Court in the context of the application of another statute prohibiting other forms of discrimination endorsed a reasonable employee standard in finding an adverse action. Applying this standard, I find that 35 the derogatory information in the appraisal constituted an adverse action. Moreover, as will be discussed below it was inextricably intertwined with her discharge which followed shortly afterward.<sup>3</sup>

40 To establish a violation under *Wright Line*, the General Counsel must first prove, by a preponderance of the evidence, that the employee’s protected activities were a substantial or motivating factor in the employer’s decision to take action against them. *Manno Electric, Inc.*, 321 NLRB 278, 280 (1996). The General Counsel makes a showing of discriminatory motivation by proving the employee’s protected activity, employer knowledge of that activity, and animus against the employee’s protected conduct. *Naomi Knitting Plant*, 328 NLRB 1279, 1281 (1999).

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<sup>3</sup> Such derogatory language does not only adversely impact current employment but could adversely impact future employment if an employer requires the submission of an employees’ prior final evaluation as a condition of employment.

Proof of an employer’s motive can be based upon direct evidence or can be inferred from circumstantial evidence, based on the record as a whole. *Ronin Shipbuilding, Inc.*, 330 NLRB 464 (2000); *Robert Orr/Sysco Food Services*, 343 NLRB 1183 (2004).

5 If the General Counsel is successful, the burden of persuasion then shifts to the employer to show that it would have taken the same action even in the absence of the employee’s protected activities. *Wright Line*, 251 NLRB at 1089; *Septix Waste, Inc.*, 346 NLRB 494, 496 (2006); *Willamette Industries*, 341 NLRB 560, 563 (2004).

10 Once the General Counsel has met its initial burden under *Wright Line*, an employer does not satisfy its burden merely by stating a legitimate reason for the action taken, but instead must persuade by a preponderance of the credible evidence that it would have taken the same action in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995); *Manno Electric, Inc.*, 321 NLRB at 280 fn. 12.

15 I find that General Counsel has proven by both direct and circumstantial evidence that the derogatory information in the evaluation was motivated by Cooksey’s protected and concerted activities. The derogatory information without question related directly to her protected and concerted activities. I also find that Respondent has failed to meet its burden that it would have taken the same action absent her protected activities. Respondent made no showing that it would have lowered her evaluation in each of the respective elements in the absence of her protected activities. I therefore find that Respondent violated Section 8(a)(1) if the Act.

25 ***b. The discharge of Cooksey***

Applying the aforementioned *Wright Line* analysis to the discharge of Cooksey, *Wright Line* requires that the General Counsel establish that protected conduct was a motivating factor in the employer’s decision. To make this showing General Counsel must prove the existence of protected activity, employer knowledge of the activity, and employer animus towards that activity. Once the General Counsel has met these elements, the burden shifts to the employer to demonstrate that the same adverse action would have taken place even in the absence of protected conduct. See *Rood Trucking*, 342 NLRB 895 (2001).

35 As noted above, the record establishes that Cooksey engaged in protected and concerted activity. There is no dispute as to whether Respondent was aware of that activity as Cooksey at times complained directly to management. Respondent itself chronicled the protected and concerted activity in the performance evaluation. Likewise, the information contained within the evaluation is evidence of animus toward that very protected activity. There is also other evidence of animus toward her protected activity relating directly to Cooksey’s discharge in Hildebrand’s reference that he was “holding out hope for Sharon to straighten up.” (R Exh. 2.) A reasonable inference to be drawn from this reference given the totality of the evidence regarding the employer’s reaction to Cooksey’s protected and concerted activities is that “straighten up” was a direct reference to Cooksey’s activities and Hildebrand’s efforts to discourage her from engaging in such. These facts establish, and I find, that the General Counsel has met its burden.

The burden therefore shifts to Respondent under the *Wright Line* analysis. It should be however noted at the outset that a finding of pretext defeats any attempt by the Respondent to show that it would have discharged Cooksey absent her protected and concerted activities because if pretext is established “Respondent fails by definition to show that it would have taken the same action for those reasons, absent protected conduct, and thus there is no need to perform the second part of the *Wright Line* analysis.” *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003). See also *Sanderson Farms, Inc.*, 340 NLRB 402 (2003).

Respondent’s position can be summarized as follows: Respondent asserted that Cooksey was terminated by Wayne Greenberg who was solely responsible for making the decision. (Tr. 350.) When asked directly why he made the ultimate decision he stated as follows:

Q. And why did you make the decision ultimately for a March layoff?

A. Because, again, the primary renewal season is for us November, December, January, February and we wanted to get through the renewal. And there's a long debate then and, you know, the literature ratchet. You have a vacant position or someone who's not performing in the position, and my judgment was because it was the renewal business we wanted to preserve during that period of time, that I felt that was the right move to make on behalf of the company.

As a threshold matter, in order for the Respondent to meet its burden it must first set forth reasonably clear and specific reasons for taking its actions such that General Counsel has a full and fair opportunity to establish pretext. Greenberg’s response regarding the ultimate question fails to even meet the initial threshold requirement. Given the meandering and vagueness of the answer without any direct reference to Cooksey (when at least one other besides Cooksey was also terminated) leads to the conclusion that Respondent failed to reach the initial threshold requirement of setting forth reasonably clear and specific reasons to support its defenses. Thus Respondent failed to meet its burden. Moreover, after having observed the testimony and demeanor of Greenberg (a person with formal legal training) firsthand and having directly listened to his testimony, I found it to be self-serving, conveniently and purposely tailored to maneuver around unfavorable evidence which he knew existed in the record. His testimony was in many respects not credible and in and of itself served to support a finding of pretext.

Attempting to glean from Greenberg’s vague assertions a reason for the termination of Cooksey and extrapolating from these vague assertions that Cooksey was fired for “not performing in the position” the only conclusion to be drawn is that these assertions are pretext. Pretext can be established in a variety of ways including but not limited to weaknesses or implausibilities, inconsistencies, incoherencies, procedural irregularities and employers shifting explanations for its actions such that a reasonable fact finder could find them unworthy of credence. The suggestion that Cooksey was “not performing” is contradicted by Respondent’s own records. Indeed, Cooksey’s mid-year and year end evaluations for the time period immediately prior to her termination rate her overall as “meets expectations.” In fact, she did not receive a “below expectations” in any of the rating categories for both the mid-year and end of year ratings. (GC Exh. 13, 18.) Respondent’s own business records refute the inconsistent notion that she was “not performing in the position” but “meeting expectations.” This glaring inconsistency in and of itself is strong evidence of pretext.

Other evidence of pretext lay in the shifting explanations given for Cooksey’s termination. At the time of her termination there was no mention whatsoever of her “not performing in the position.” She was told Respondent decided to go “with a fresh new team with different skill sets.” These shifting reasons for its actions are further evidence of pretext.

In other testimony, Greenberg implied that Cooksey was discharged for missing her sales goals, that he never saw any of the performance appraisals prior to the termination, the only documents he considered were the Company’s “finances,” that he never considered Cooksey’s participation in meetings, and additionally asserted he made the decision in early August or September. (Tr. 352–354.)

Strong evidence of pretext centers around his suggestion that Cooksey was terminated for not meeting sales goals. Cooksey’s mid-year evaluations contain language that directly contradicts Greenberg’s assertions. The mid-year evaluation states that she was “having a good sales year and exceeding targets.” (GC Exh. 13.) The notion that he made the decision to terminate Cooksey in early August or September because of the missed sales targets is simply not credible given she was told at the mid-year that she was “exceeding targets.” The evidence established that Cooksey was the highest performing employee as it related to sales. Although Cooksey did not meet the ultimate target neither did any other BDD. In fact, Ruiz missed her targets for 10 out of the 12 months during 2016. Interestingly, Ruiz met the target in June because another person’s sales were credited to her. (GC Exh. 34.) At the end of 2016, Ruiz missed her target by nearly double that of Cooksey yet she was not terminated. Immediately prior to her termination in January and February Cooksey in fact exceeded her monthly sales goals and received \$500-bonuses for her efforts. (GC Exh. 20, 21.)

Greenberg, seemingly recognizing the implausibility of his own assertions, when asked if he considered laying Ruiz off in July testified as follows:

Q. And did you consider Katie Ruiz at that point in time?

A We didn't because Katie was brand new to the role. She also had five years of experience in the research realm and we knew she brought that substantive expertise that we wanted the sales team to have. She knew and understood our products intimately, and she'd only had nine months in the job. So yeah, she wasn't doing great either, but she was brand new and she had the background that we really wanted.

It is important to point out that Greenberg’s rationale for not terminating Ruiz in July does not speak to the issue of why she was not terminated in March when Cooksey was in fact terminated. Nevertheless, Greenberg’s testimony appeared as a failed attempt to mask the obvious. Despite Cooksey’s plainly superior qualifications and approximately 17 years of sales experience with the Company, and her superior sales numbers it was Cooksey and not Ruiz who was terminated. This is true despite that the fact that it was Cooksey who actually mentored Ruiz and trained her for the position she held. This in and of itself is sufficient to establish pretext.

Other evidence of pretext is found in the implication that Cooksey was terminated because of the lack of sales growth. As noted above, she was the highest performing sales

person reaching over \$5 million in sales with a year over year growth rate of 18.41 percent. (GC Exh. 34.) This was not an isolated event. In 2014, she had a year over year sales growth rate of 48.31 percent and in 2015 a year over year growth rate of 49.42 percent. (GC Exh. 34.) Ruiz on the other hand hadn't been in the position long enough to show any growth rate but it is clear that during that year she underperformed both Scheifer and Cooksey. Her actual sales were nearly one half of what Cooksey had sold. (GC Exh. 34.)

I find other evidence of the pretext in the timing of the termination. It is undisputed that in January Hildebrand in his email said he was holding out hope for "Sharon to straighten up." (R. Exh. 2.) It is also undisputed that Cooksey after receiving her evaluation complained about the reference to her protected activity in her "side note" in February of 2017. It is undisputed that Cooksey was terminated in early March. The timeline of events suggests that Cooksey in protesting the evaluation remarks relating to her protected and concerted activity did not "straighten up" which triggered her termination. It is important to point out that Schieffer whose evaluation characterized his "open complaining about the comp plan" as "tiring for many and negatively affects the morale of the entire team" was also terminated. (GC Exh. 31.)

I also find unworthy of credence the assertion the Greenberg made the decision independently without reliance upon performance appraisals and only considered "financials." In the first instance, had the decision been based purely on "financials" Cooksey would presumably not have been the one terminated since she without question had the best contribution to "financials" of the entire group.

Nor is Greenberg's implication that he didn't consult with Hildebrand worthy of credence. Greenberg himself testified that he talked to Hildebrand regularly. He testified as follows:

Q. And how often would you talk to Mr. Hildebrand?

A. On a scheduled basis, once a week, and on an irregular basis, a couple of additional times a week. We were in a lot of contact. (Tr. 342.)

Given the above, I don't find credible the assertion that he didn't see or rely on the evaluations. Assuming for the sake of argument that he didn't see the evaluations given his regular contact with Hildebrand it is reasonable to assume that he knew what was in them especially the negative information and/or discussed with Hildebrand the issue of the complaints by employees about the comp plan. In a similar vein, I find unworthy of credence the notion that his alleged "unilateral" decision was not influenced by the negatives that Hildebrand was no doubt presenting to him. See *Coastal Sunbelt Produce, Inc.*, 362 NLRB No. 126 (2015).

It is also important to point out that Respondent has the burden of proof. In this record there is no documentary evidence of record to corroborate many of Greenberg's basic assertions such as who was involved in the termination, what was relied upon, when the termination decision took place. The record is devoid of even a single document, be it email, memo or other which would corroborate basic facts about which he testified. This is true despite his routine and repeated contact with Hildebrand. Thus, many critical aspects of the case rest directly upon his credibility. As noted above, and to reiterate, his testimony was self-serving, not credible in many important respects and in and of itself served to establish pretext.

My finding of pretext defeats any attempt by the Respondent to show that it would have discharged Cooksey absent her engaging in protected activity. *Rood Trucking Co.*, 342 NLRB 895, 898 (2004). The finding of pretext along with the totality of the evidence including but not limited to the timeline discussed above, reinforces my conclusion that the discharge resulted from unlawful motivation. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.3d 466, 470 (9th Cir. 1966) I therefore find that Cooksey’s discharge was in direct violation of Section 8(a)(1) of the Act.

### CONCLUSIONS OF LAW

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

2. By discharging Charging Party for engaging in protected and concerted activities Respondent violated the Section 8(a)(1) of the Act as alleged in the complaint.

3. The Respondent has also violated Section 8(a)(1) by issuing a negative performance review with derogatory information concerning her protected and concerted activities

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

### REMEDY

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

Respondent shall make Cooksey whole in all respects. 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). Respondent shall file a report with the Regional Director for Region 27, within 21 days of the date the amount of back pay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s). *AdvoServ of New Jersey*, 363 NLRB No. 143 (2016). Respondent shall also compensate the discriminatee for the adverse tax consequences, if any, of receiving one or more lump-sum back pay awards covering periods longer than 1 year, *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014). In addition Respondent shall compensate Cooksey for her search-for-work expenses regardless of whether those expenses exceed her 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) as more fully set forth in *King Soopers*, 364 NLRB No. 93 (2016), *affd. King Soopers v. NLRB*, 893 F.3d 23 (10th Cir. 2017).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

**ORDER**

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The Respondent, E Source Companies LLC, Boulder Colorado its officers, agents, successors, and assigns, shall

1. Cease and desist from

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(a) Terminating any employee for engaging in protected concerted activities, including but not limited to expressions of concern regarding policies relating to wages or other terms and conditions of employment that are protected under the Act.

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(b) Issuing negative performance evaluations with derogatory language aimed at dissuading or otherwise chilling and/or restricting the exercise of employees Section 7 rights.

(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.

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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 Sharon Cooksey full reinstatement to her former position 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.

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(b) Make Sharon Cooksey whole for any loss of earnings and other benefits suffered as a result of the unlawful discrimination against her, in the manner set forth in the remedy section of the decision. Compensate Sharon Cooksey for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and shall file a report with the Social Security Administration allocating the backpay award to the appropriate calendar year(s).

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(c) Rescind and expunge the negative and derogatory information relating to her concerted and protected activity from her employment records.

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(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful termination of Sharon Cooksey and thereafter notify her in writing that this has been done and that the materials removed will not be used as a basis for any future personnel action against her and/or referred to in response to any inquiry whatsoever including but not limited to any inquiry from any employer, employment agency, unemployment insurance office, or reference seeker or otherwise used against her in any way.

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<sup>4</sup> 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.

(e) Preserve and 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.

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(f) Within 14 days after service by the Region, post at its facility in Boulder, Colorado and its remote locations, copies of the attached notice marked “Appendix.”<sup>5</sup> Copies of the notice, on forms provided by the Regional Director after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In addition to physical posting of paper notices, 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. 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 July 21, 2017.

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

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Dated, Washington, D.C. June 4, 2018

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**Dickie Montemayor**  
**Administrative Law Judge**

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<sup>5</sup> 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.”

## APPENDIX

### NOTICE TO EMPLOYEES

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

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

#### FEDERAL LAW GIVES YOU THE RIGHT TO

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

**YOU HAVE THE RIGHT** to discuss wages, hours, and working conditions with other employees and we will not do anything to interfere with your exercise of that right.

**WE WILL NOT** prohibit you or otherwise interfere with or restrain you from exercising your rights under Section 7 of the Act by discussing your terms and conditions of employment with your coworkers.

**WE WILL NOT** discharge you because you engaged in protected concerted activities, including discussing compensation or other terms and conditions of employment.

**WE WILL NOT** issue negative performance evaluations with derogatory information that penalizes and or attempts to dissuade or restrict the exercise of your rights under Section 7 of the Act.

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

**WE WILL** make Sharon Cooksey whole for any loss of earnings or benefits and will pay Sharon Cooksey for the wages and other benefits she lost because we unlawfully discharged her, with interest compounded daily.

**WE WILL** remove from our files all references to the discharge and negative performance evaluation of Sharon Cooksey and she will be offered full reinstatement to her former job and if that job no longer exists to a substantially equivalent position, without prejudice to her seniority or other rights or privileges enjoyed.

**WE WILL** within 14 days Notify Sharon Cooksey that all references to the discharge and the negative performance evaluation have been removed from any employment file.

**E SOURCE COMPANIES, LLC**

(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlr.gov](http://www.nlr.gov).

**Byron Rogers Federal Office Building  
1961 Stout Street, Suite 13-103,  
Denver, CO 80294.  
(303) 844-3551 Hours: 8:30am - 5:00pm MT.**

The Administrative Law Judge's decision can be found at <https://www.nlr.gov/case/27-CA-202883> 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.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

**THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF THIS POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, (720) 598-7398.**