

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

GUBAGOO, INC.

and

Case 28-CA-203713

DANIEL BARTOLO, an Individual

Sara S. Demirok, Esq.,
for the General Counsel.

Jeffrey W. Toppel, Esq.,
Jackson Lewis, P.C.
for the Respondent.

DECISION

STATEMENT OF THE CASE

ELEANOR LAWS Administrative Law Judge. This case was tried in Phoenix, Arizona, on March 13, 2018. Daniel Bartolo (Charging Party or Bartolo) filed the initial charge on August 3, 2017, and an amended charge on November 3, 2017.¹ The General Counsel issued the complaint on November 30.

The complaint alleges the Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by maintaining a confidentiality provision that interferes with, restrains, and coerces employees in the exercise of the right guaranteed by Section 7 of the Act, and by threatening Bartolo that contacting the National Labor Relations Board (the Board) would be futile and would result in him being blackballed in the industry. The complaint further alleges that the Respondent violated Section 8(a)(4) and (1) of the Act by terminating Bartolo's employment.

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

¹ All dates are in 2017 unless otherwise indicated.

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a Florida corporation engaged in the sale of live chat, text, and call monitoring solutions for automotive dealers, annually performs services valued in excess of \$50,000 in States other than the State of Florida. The Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

My findings of fact regarding the alleged unfair labor practices consist of evidence I have credited. Alleged facts which I have discredited are discussed below in my analysis of witness credibility.

A. Background and the Respondent's Operations

Gubagoo produces and sells chat platforms that customer automobile dealerships integrate into their websites. When a customer of an automobile dealership using Gubagoo's chat platform has a question, Gubagoo operators respond.²

Sales directors, who work remotely and are responsible for their assigned territory, sell Gubagoo's chat platform to automotive dealers.³ This entails identifying dealerships in their areas, contacting them, and setting up appointments to demonstrate (demo) the Respondent's product by videoconference using a PowerPoint presentation. The goal of the demo is to complete a sale. The sales directors record their activity into a customer relationship management (CRM) system called BIG.

During all relevant times, Pete Orlando has been Gubagoo's Vice President of Sales, reporting to Brad Title, its Chief Executive Officer (CEO) and owner. On July 19 or 19, Aaron Sheeks was hired as the Respondent's National Sales Director.

B. Charging Party Bartolo's Hiring and Training

Charging Party Bartolo was hired in late March 2017 as a regional sales director for the west, based in Arizona. His sales territory included Arizona, New Mexico, Washington, Oregon, Idaho, Colorado, North Dakota, and South Dakota. He reported to Orlando, who hired and trained him.

From April 3–7, Orlando trained Bartolo and three other new hires in Daytona, Florida. The training involved learning about Gubagoo's product and how to present it to a dealer. Bartolo and the other new hires learned a 70-slide PowerPoint presentation sales directors pitch to automotive dealers.⁴

² Gubagoo also sells other products, but this decision concerns the chat platform.

³ The titles sales manager and sales director are interchangeable.

⁴ Bartolo struggled to understand the PowerPoint, and lagged behind the other trainees. He

On the first day of the training, Orlando informed the new sales directors of their performance expectations. He instructed them to schedule at least 10 demos per week and complete at least 5.⁵ Sales directors were also instructed to make 40–50 calls to dealerships per day. Orlando reiterated these expectations throughout the week. After the in-person training in Florida, Orlando continued training the new hires using webinars throughout April. Training on how to use BIG occurred throughout April, and sales directors were provided with a user manual.

C. Bartolo's Performance in May and June

Following completion of the training period, Orlando had concerns about Bartolo's ability to perform his job. During May, Orlando believed Bartolo was behind in his knowledge of the product he was selling, so Orlando participated in the demos Bartolo conducted.

Bartolo had three sales in May and logged 29 calls.⁶ (R Exh. 3; Tr. 113.) Orlando was concerned because this was below expectations, and the completed sales were the result of Orlando jumping in during the presentation, completing the presentation, and closing the deal.

The sales directors were expected to complete about 10 sales in June. Bartolo sold two chat contracts and logged 86 calls.⁷ (R Exh. 3; Tr. 114.) In addition to Bartolo's low numbers, he continued to require more attention and guidance from Orlando than the other trainees. At this point, Orlando recommended Bartolo's termination to Title. Title told Orlando not to fire Bartolo because there was an upcoming sales meeting in July.

On June 30, Bartolo sent Orlando an email with "Sorry" in the subject line. He stated that he was only going to end up with four contracts sold, and said he would understand if Orlando was going to fire him for not hitting his number. (R Exh. 1.) On July 14, Bartolo texted Orlando, stating, "I let u down, if your (sic) gonna fire me I understand." (R Exh. 2.)

admittedly had trouble grasping the training concept. (Tr. 88.)

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

⁵ The five demos completed reflects a 50-percent show rate for scheduled demos. These expectations did not apply for the period the employees were in training.

⁶ Bartolo testified he thought he had six sales in May. His testimony was equivocal, and is outweighed by objective evidence and Orlando's testimony. Bartolo also expressed belief that some of his sales had been removed from the system. There is no evidence to support this assertion other than Bartolo's own equivocal and self-serving testimony that he believed he had more sales. The weight of the evidence therefore shows Bartolo had three sales in May. The period for calls logged is calculated from April 30–May 27.

⁷ Bartolo testified he did not know how many sales he had in June, but he thought he had three or four. (Tr. 45, 49.) The period for calls logged is calculated from May 28–July 1.

D. Bartolo's Training, Performance, and Termination in July

During the first week in July, Bartolo logged no calls in BIG. He logged 27 calls the second week.

From July 18–21, Gubagoo held a training in Florida to teach employees a new PowerPoint the sales team would be presenting to dealerships. About 60 total employees attended, including 12 sales directors. Title, Orlando, and the newly-hired Sheeks also attended. During a breakout meeting with the sales employees, Title informed them they needed to increase their sales.⁸ Title's delivery was harsh, and he stressed the need to perform better and be more strategic with the dealerships. In front of the group, Title pointed out the low numbers of employee named Jason Jones, who had been with Gubagoo for many years.⁹ The employees were instructed to make calls the following Saturday because numbers were low.

The training in Florida ended on Friday July 21 at 5 p.m.. Bartolo left the training at 2 or 3 p.m., having told Orlando he was attending his parents' 50th wedding anniversary. Gubagoo changed Bartolo's plane ticket to allow him to go home early. On Saturday, Bartolo attended a lunch for his parents' 50th wedding anniversary in Phoenix. After the lunch, Bartolo's parents drove to Sedona. Bartolo did not make calls on Saturday.

Beginning on July 24 at 8 a.m. Eastern Time, 5 a.m. Pacific Time, and continuing for the week, sales directors attended mandatory training via webinar to get certified on the new PowerPoint. Orlando and Sheeks ran the trainings, which lasted about an hour or two each morning. During the trainings, each employee pitched three or four slides per day, and the other employees gave feedback about what they liked and what they did not like.

At 10:04 a.m. on July 24, Orlando sent an email to the sales team asking who had made calls on Saturday, and instructing them to make sure any calls were logged into BIG.¹⁰ At 11:46 a.m., Bartolo sent an email to Orlando, with Sheets cc'd, stating:

I must have had a mis understanding from our conversation in Florida. I had my parents 50th wedding anniversary this weekend. I literally drove to it after I landed late on Friday. It was impossible to make dials. I did go door knocking on Sunday to a few dealers on Sunday. I also thought you said this month was a wash and to work w Aaron and focus on next month.

⁸ Bartolo perceived Title as rude and abrasive during this meeting, and thought he was targeting employees with low numbers. In his affidavit, however, Bartolo stated, "He was yelling during his presentation about how everybody was doing horribly and he should fire everyone." (Tr. 76–77.)

⁹ Bartolo, who was the lowest performer, was not specifically mentioned in front of the group.

¹⁰ Bartolo testified that Title was present for the July 24 webinar and started things off by asking who had made calls on Saturday, and stating that the two employees who did not make calls would be placed on a performance improvement plan (PIP). This testimony does not square with Orlando's email later that morning to the sales team asking who made calls on Saturday and instructing employees to ensure the calls were recorded in BIG, and it is therefore discredited.

GC Exh. 3 was printed from Orlando's email, so the time reflected is presumably Eastern Time, as is the case with other exhibits printed from Orlando's email.

(R Exh. 5.)¹¹

At 2:40 p.m., Orlando sent Bartolo an email notifying him that he was on a performance improvement plan (PIP) because he had no sales for the month of July. Under the PIP, Bartolo was instructed to: (1) make two sales from July 24–28; (2) schedule and complete a minimum of five demos per week; (3) log 50 calls each day; and (4) sell 10 billable chat deals in August. Bartolo was warned that failure to meet the PIP’s requirements could result in termination. Bartolo responded at 2:50 p.m., acknowledging his lack of sales. He further stated, “I also feel I’m being targeted which caused a very hostile environment today based on the the (sic) conversations I had in Florida.” (GC Exh. 3.) Jason Jones, another sales director who did not make calls on Saturday, was also placed on a PIP. (R Exh. 8.)

On Tuesday July 25, Bartolo overslept and missed the webinar. He was late to the webinar on Wednesday July 26.¹² No other employees missed any of the webinars. From July 23–27, Bartolo logged 164 calls. (R Exh. 6.) This was a large spike in his call volume, which had previously ranged from 0–37. Bartolo had no sales for the month of July, and he completed a total of 13 demos during his employment.¹³ (R Exh. 3.)

On July 27, just after 9 a.m. Orlando terminated Bartolo’s employment.¹⁴ Bartolo called Sheeks and informed him that he was being terminated. Sheeks said he did not know Bartolo had been fired and stated it was not his doing.

Orlando terminated Bartolo’s employment because after just having attended a training that stressed the importance of improving performance, Bartolo did not make calls on Saturday, he missed the webinar on July 25 and was late on July 26, he had only two demos scheduled, one of which was given to him, and had not completed any demos for July.¹⁵ He also suspected Bartolo was not honest about the number of calls he made the week of July 24, stating, “It’s impossible to make 164 calls and not be connecting with dealers and setting appointments for them.”¹⁶ (Tr. 138.) Considering the big picture, Orlando determined that Bartolo would not be

¹¹ R Exh. 5 was printed from Sheeks’ email, so the time reflected is presumably Central Time.

¹² Bartolo said he was late on Tuesday, July 25. For reasons discussed herein, I credit Orlando’s testimony that Bartolo missed the July 25 webinar and was late for the July 26 webinar. The General Counsel argues that I should draw an adverse inference because Sheeks, who could have corroborated Orlando’s testimony, did not testify. I decline to draw such an inference for the reasons set forth below in the credibility section of this decision. Moreover, the General Counsel could have called witnesses to corroborate that Bartolo was actually present for the webinar, but did not do so. In addition, Sheeks ostensibly sent a text to Bartolo asking why he was not on the call, and Bartolo responded that he had overslept. (Tr. 32.) This text exchange, however, is not in the record. With regard to July 26, Bartolo did not specify when or whether he joined the 5 a.m. webinar, only that he worked that day and had conference calls.

¹³ Bartolo testified he conducted more than 13, but had trouble logging them into Gubagoo’s system.

¹⁴ The phone records show a call from Orlando to Bartolo at 9:03 a.m., lasting a minute. Presumably Orlando left a message and Bartolo returned the call at 9:04 a.m. (GC Exh. 6.)

¹⁵ In his affidavit, Orlando stated that Bartolo had not scheduled any demos or completed any demos. At the hearing, he testified this was a mistake and he had thought Bartolo had not scheduled any demos. Even so, he testified that this made no difference, as scheduling only two demos was unacceptable.

¹⁶ Each of these 164 calls shows a duration of “0” minutes.

successful as a sales director for the Respondent. He did not discuss his decision to terminate Bartolo with Sheeks or Title. Orlando had not heard that Bartolo had threatened to contact with the “Labor Board” if he was terminated.

E. The Confidentiality Provision

Since at least February 4, 2017, Respondent has required its sales directors to sign, as a condition of their employment, Private & Confidential Employment Agreements, which include the following provision:

11. Confidentiality

(a)[...] Confidential Information includes, without limitation,[...] employee[...] lists and personnel information of employees; numbers and location of sales representatives [. . .]¹⁷

The full provision regarding “confidential information” in the employment agreement states:

You acknowledge that the business of the Company and its Affiliates (as defined below) and its continued success depend upon the use and protection of a large body of confidential and proprietary information, and that you hold a position of trust and confidence with the Company, by virtue of which you have and will necessarily receive and have access to highly valuable, confidential and proprietary information related to the business of the Company of independent economic value (actual or potential) not known to the public in general, which if used or disclosed in violation of this Agreement would cause the Company substantial loss and damages that could not be readily calculated and for which no remedy at law would be adequate. All of such confidential and proprietary information now existing or to be developed in the future will be referred to in this Agreement as “Confidential Information.” Confidential Information includes, without limitation, the Company's existing and potential patents, products and inventions, trade secrets, software, computer programs, computer-stored and/or computer generated information, data compilations, source codes, systems, business methods and other intellectual property; confidential reports; product price lists and terms; customer and prospective customer lists, including, without limitation, customer and prospect names, contact information, and needs and preferences of customers and prospects; financial information (including the revenues, costs or profits associated with any products); development, transition and transformation plans; strategic, acquisition, marketing and expansion plans, including plans regarding planned and potential acquisitions and sales; financial and business plans, procedures, and manuals; employee and contractor lists and personnel information of employees; numbers and location of sales representatives, resellers and distributors; new and existing programs and services (and those under development); costs of providing service, support and equipment and equipment maintenance costs.

(GC Exh. 2.)

¹⁷ The original complaint had additional allegations regarding work rules, but the complaint was amended to narrow the rules allegations. (GC Exh. (h)).

III. DECISION AND ANALYSIS

A. Credibility

A credibility determination may rest on various factors, including “the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole.” *Hills & Dales General Hospital*, 360 NLRB 611, 617 (2014), citing *Double D Construction Group, Inc.*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, 335 NLRB 622, 623 (2001). In making credibility resolutions, it is well established that the trier of fact may believe some, but not all, of a witness’s testimony. *NLRB v. Universal Camera Corp.*, 179 F.2d 749 (2d Cir. 1950).

In evaluating the different versions of events, I have fully reviewed the entire record and carefully observed the demeanor of all the witnesses. I have considered the apparent interests of the witnesses; the inherent probabilities in light of other events; corroboration or the lack of it; and consistencies or inconsistencies within the testimony of each witness. See, e.g., *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962). Testimony in contradiction to my factual findings has been carefully considered but discredited.

The General Counsel requests that I draw an adverse inference based on Sheeks’ failure to appear at the hearing. Sheeks was scheduled to testify, and had purchased a roundtrip plane ticket from Milwaukee to Phoenix, departing March 11 and returning March 14, 2018. Due to a family illness, Sheeks was unable to travel, and on March 12, 2018, the day before the trial, the Respondent filed an emergency motion to allow him to testify by video.¹⁸ (GC Exh. 1(i)). The General Counsel opposed the motion. At the hearing, I stated I would have permitted Sheeks to testify by video if he could get to Chicago or Milwaukee. Counsel for the Respondent stated that he was unable to travel to either location, and opted to proceed with the hearing. Under the circumstances, I decline to draw an adverse inference. See *Electric Hose & Rubber Co.*, 262 NLRB 186, 207 (1982) (adverse inference appropriate where the respondent offered no explanation as to why its supervisors did not testify at the hearing).

There were two witnesses, Bartolo and Orlando. Between the two, I find Orlando was a more credible witness. Orlando testified with a more forthright and open demeanor overall, and his testimony was generally consistent. He was more certain of when the events at issue occurred and how they played out. By contrast, Bartolo materially changed his testimony when confronted with inconsistent objective evidence, and he was at times evasive. Certain aspects of his testimony were also inherently improbable or implausible.

Some examples of Bartolo’s problematic testimony appear above, in footnotes in the statement of facts, and need not be reiterated here. Most glaringly, Bartolo initially testified he never told Orlando that he would understand if Gubagoo terminated him due to his poor performance numbers. When presented with his June 30 email to Orlando contradicting this testimony, he admitted he made such a statement, but seemed to try to rehabilitate himself by

¹⁸ Sheeks’ wife contracted pneumonia, and his young children were also ill.

asserting that he had not specifically been asked if he made such a statement in the month of June:

Q. In fact, isn't it true that you told your supervisor, Peter Orlando, that you understood if Gubagoo terminated you for your low performance numbers?

A. No.

Q. You never said that to Mr. --

A. No.

MR. TOPPEL: May I approach?

JUDGE LAWS: Yes.

(Respondent's Exhibit 1 marked for identification.)

Q. BY MR. TOPPEL: Mr. Bartolo, I'm showing you an email that's been marked Respondent's Exhibit 1. If you could take a look at that.

A. Okay.

Q. And is that your -- an email from you?

A. Yes, it is.

Q. And what's the date of that email?

A. It would be in June.

Q. Who's that email to?

A. That would be to Peter Orlando.

Q. And if you could take a look at that email, it says, the subject line is "Sorry."

Is that an email that you wrote?

A. Yes, it is.

Q. And do you know why you said sorry?

A. Yes, I do.

Q. And why is that?

A. Because I didn't make my sales quota for June.

Q. And if we look at that, it says, I'm only going to end up with four total

contracts sold. Do you see that?

A. Yes, I do.

Q. Did you end up with four total contracts sold in June?

A. I don't recall.

Q. You believe you did?

A. I believe I had three or four.

Q. And it says below that you wrote, "If your gonna fire me for not hitting my number I understand." Do you see that?

A. Yes, I do. This was for the month of June, so sir.

Q. So you did tell Mr. Orlando that "If your gonna fire me for not hitting my number I understand." Is that correct?

A. Yes, in the month of June, I did, yes.

(Tr. 47–49.) This is unconvincing, especially considering the lead-in question was in reference to the month of June, and Bartolo specifically responded that he *never* made such a statement. In addition, Bartolo contradicted his initial testimony that he never told Orlando he would understand if he fired him in the July 14 text message he sent to Orlando, which stated, "I let u down, if your (sic) gonna fire me I understand." (R Exh. 2.)

I likewise discredit Bartolo's descriptions of Orlando's assurances that everything would be fine following Title's meeting addressing his concerns about the sales team's performance at the July sales conference in Florida. While it is fathomable that Orlando tried to provide some sort of positive encouragement, I do not believe that Orlando conveyed that Bartolo was doing a good job or that his job was secure.¹⁹ His performance was objectively and admittedly below par, and Orlando had already wanted to terminate him. For Orlando to offer Bartolo job security assurances at this point makes no sense, particularly considering Orlando in fact placed Bartolo on a PIP the following Monday. For similar reasons, I believe Orlando's testimony that he never told Bartolo that July was a "wash." On the heels of an intense meeting where sales directors were berated for poor performance and told to improve, and to make calls on Saturday July 22, such a comment makes no sense.

Next, Bartolo testified that he was not able to make calls on Saturday July 22 because of his parents' wedding anniversary celebration. When asked why he could not make calls after his parents departed following the anniversary lunch, Bartolo responded that he thought the

¹⁹ The June email and July text Bartolo sent to Orlando stating he would understand if Orlando wanted to fire him for his poor performance apparently did not engender in-kind assurances from Orlando.

instruction was to make calls only in the morning. He then testified that he was taking care of his parents' dog in the afternoon. Orlando's testimony that the instruction was to make calls on Saturday, without specifying Saturday morning, is more plausible, and is supported by his email to the sales team asking who had made calls on Saturday. I therefore find Bartolo fabricated his testimony that Orlando's instruction was to make calls only during the morning hours on Saturday in order to provide an excuse for his failure to make any calls on Saturday.

Bartolo's testimony about his July 25 conversation with Sheeks following his placement on the PIP also does not add up. According to Bartolo, he and Sheeks spoke by videoconference after Bartolo was late to the Tuesday webinar, and they discussed the PIP, the demos Bartolo had set up for the week, and Bartolo being late to the videoconference. Bartolo recalled Sheeks ending the call as follows: "He said, I'm not going to fire you because you're doing a good job, and that was pretty much it." (Tr. 33.) First of all, Orlando, not Sheeks, was Bartolo's supervisor, and there is no evidence whatsoever that Sheeks, who had been employed with Gubagoo for about a week at this point, had any authority to fire Bartolo.²⁰ Moreover, as noted above, Bartolo's performance was not up to par, so a comment that he was doing a good job after just being placed on a PIP and missing the webinar that day defies basic common sense.

Bartolo testified that he emailed Orlando and Sheeks on July 25, stating:

After thinking about what was required and what was going on, I emailed Pete and Aaron, that I felt like I was being targeted, felt like this was extremely unfair based on everything that happened in Florida. And I informed them if I got fired for something I didn't do, and the way I'm being targeted would be unlawful termination, that I would be contacting the Labor Board.

(Tr. 34.) I do not credit this testimony, and I believe Orlando's testimony that he did not receive such an email. (Tr. 130.) Fundamentally, Bartolo's alleged threat makes no sense. What was he accused of doing that he did not do? The opposite is true—he was under pressure due to his inaction.

The sequence likewise does not make sense. Bartolo had emailed Orlando the previous day, copying Sheeks and Title, saying he felt targeted and that he was in a hostile environment based on the conversations he had in Florida. This is the email Orlando admittedly received. Essentially, Bartolo claims to have reiterated this email with an added threat of legal action. According to Bartolo, he had just been told by Sheeks that he was not going to be fired and that he was doing a good job. An email saying the same thing as the previous day's email with an added threat of legal action on the heels of a supposedly reassuring conversation seems odd. Moreover, common sense dictates that if Bartolo was fearful of being fired and had threatened legal action, he would have memorialized it. He could have easily printed the email or sent a copy to himself. That he did not do so, coupled with the other problems with Bartolo's credibility, leads me to conclude there was no second email.

²⁰ Orlando, not Sheeks, issued the PIP. The PIP does not indicate in any manner that Sheeks would be overseeing Bartolo's progress toward meeting its objectives.

For similar reasons, I do not find Bartolo’s testimony about his conversation with Sheeks later that same day to be credible. If Bartolo is to be believed, Sheeks called Bartolo on the phone, after already having had a video conference with him earlier that day to discuss the PIP and other performance issues, and after assuring him he would not be terminated, in an effort to find out what was wrong.²¹ Bartolo said he responded as follows:

I explained to him that I didn't like the way I was being treated, you know, that Pete was being unfair based on what happened in Florida. I let him know that I was very frustrated because of everything that was required, and that if I get fired, I would be contacting the National Labor Board.

According to Bartolo, Sheeks responded that the Board could not do anything because Bartolo had signed an agreement saying he could be terminated at any time, and Arizona is a right-to-work state. Bartolo then testified:

I informed Aaron there's still regulations that they have to follow- that you have to follow and that they were being unfair, and that if you do contact the Labor Board, that we'll make sure you won't get a job in the auto industry again. And I said, are you going to call my friends at the car dealerships? Then he goes, calm down. We don't need to go -- calm down. We don't need to go there. Stay focused, stay on the task at hand, you're doing a job, and we'll get through this and you have nothing to worry about.

(Tr. 35.)²²

As noted by the Respondent, it seems unlikely that after working at Gubagoo from a remote location in Illinois for about a week, and having spent most of that week at the July conference in Florida, Sheeks would have viewed Bartolo’s work agreement. Even assuming he had or that was operating on a generalized knowledge of the terms of the sales directors’ employment, the comment about Arizona being a right-to-work state simply makes no sense. Right-to-work laws, which prohibit union security clauses between companies and unions, have nothing to do with whether Bartolo could be terminated. Moreover, it is highly implausible that Sheeks told Bartolo, who had just been put on a PIP and then missed a meeting, that he had nothing to worry about, particularly considering he was not Bartolo’s supervisor. Though Sheeks did not testify at the hearing, Bartolo’s testimony is just too riddled with inconsistencies, implausibilities, and fabrications to be credited. In sum, I do not believe Bartolo’s testimony that Sheeks told him the Board could not do anything for him or that representatives of Gubagoo would make sure he would not get a job in the auto industry again if he contacted the Board.²³

²¹ Bartolo estimated the call was maybe minutes or an hour after the email. The General Counsel subpoenaed Sheeks’ phone records from July 4–August 3 (GC Exh. 8), yet there is no objective evidence of a phone call to Bartolo on July 25.

²² While inartfully phrased and not technically ascribing the comments to Sheeks, I will construe Bartolo’s testimony about the consequences of contacting the Labor Board as having allegedly come from Sheeks.

²³ I recognize that Bartolo’s testimony is unrefuted. That fact, however, does not mean his testimony is credible. “It is the prerogative of a jury or other trier of fact to disbelieve uncontradicted testimony unless other evidence shows that the testimony must be true.” *EEOC v. G–K–G, Inc.*, 39 F.3d 740, 746 (7th Cir.1994).

B. *Alleged Threats*

Paragraph 4(b) of the complaint alleges the Respondent violated Section 8(a)(1) of the Act by threatening Bartolo that filing charges with the Board would be futile and threatening him that he would be blackballed in the industry if he contacted the Board. The General Counsel bears the burden to prove this allegation by preponderant evidence.

Under Section 8(a)(1), it is an unfair labor practice for an employer to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7 of the Act. The rights guaranteed in Section 7 include the right “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 or protection . . .”

As detailed directly above, I do not find Bartolo’s testimony credible that the alleged threats were made, and the record does not contain other evidence tending to show Bartolo’s testimony must be true. I therefore find the General Counsel has not met the burden to prove this allegation, and I recommend its dismissal.

C. *Bartolo’s Termination*

Complaint paragraph 5 alleges that the Respondent discharged Bartolo because he threatened to file charges with the Board, in violation of Section 8(a)(4) and (1). It is the General Counsel’s burden to prove this allegation by preponderant evidence.

Under Section 8(a)(4), it is unlawful for an employer “to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.” The Board has held that threats to file Board charges are also protected under Section 8(a)(4). See *First National Bank & Trust Co.*, 209 NLRB 95, 95 (1974).

In analyzing this allegation, I follow the procedure set forth by the Board in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983). See *American Gardens Management Co.*, 338 NLRB 644 (2002) (Board applies *Wright Line* to allegations under Sec. 8(a)(4)). To prove a violation under *Wright Line*, the General Counsel must make “a *prima facie* showing sufficient to support the inference that protected conduct was a ‘motivating factor’ in the employer’s decision.” 251 NLRB at 1089. If this is accomplished, the burden shifts to the employer “to demonstrate that the same action would have taken place even in the absence of the protected conduct.” *Id.*

As stated above, I do credit Bartolo’s testimony that he told Sheeks he would contact the Board if he was fired. Assuming Bartolo did threaten to contact the Board, I find the General Counsel has not established that Orlando knew this, or that Sheeks was involved in Orlando’s decision to terminate Bartolo’s employment. The General Counsel asserts that the fact that Orlando did not run the decision by Title is evidence that Orlando’s denial of knowledge that

Bartolo threatened to contact the Board should not be credited. I disagree, and do not find failure to run his decision by Title supports such an inference.²⁴

The General Counsel also asserts that Orlando contradicted himself by initially stating he did not discuss Bartolo's performance issues with anyone leading up to his discharge, but then stating that he continuously talked to Title about all the employees. The General Counsel cites to the following testimony:

Q. Did you talk to anyone about Dan's performance the night before?

A. No.

Q. You didn't talk to anybody about Dan's performance?

A. I didn't. You know, I've been talking about Dan's performance for a long time to Brad. It wasn't like the first time. I haven't -- I mean I've constantly talked to Brad about all our people. We have constant conversations around them. But I don't recall having any conversation with Brad or Aaron on, oh, gosh, I think I should fire Dan today. It wasn't anything like that.

(Tr. 137.) I do not find this testimony to be contradictory. The General Counsel also cites to the following testimony concerning Bartolo missing the July 25 webinar to argue Orlando should not be credited:

Q. Okay. And you were so upset about it you didn't have a conversation with Aaron about it either?

A. No, Aaron and I definitely had a conversation about him missing the meeting, yeah.

Q. Okay. When it came to Daniel's performance that week, you did talk to Aaron Sheeks?

A. His performance, his numbers. I mean I talked to Aaron Sheeks -- you know, I'm going to have to say I mean I really don't recall. I mean I know that I've had conversations with him about him missing the meeting, yeah. In terms of his overall numbers, Aaron already knew where he was at. So we didn't have that discussion.

This exchange strikes me as Orlando thinking out loud about what he and Sheeks discussed. In any event, whether or not Sheeks and Orlando discussed Bartolo's numbers, or whether Orlando remembers this conversation or not, does not materially bear upon whether Sheeks told Orlando that Bartolo threatened to contact the Board.

The General Counsel further asserts that the high volume of calls between Sheeks and Orlando on July 25 and 27, and the fact that Orlando called Title after speaking with Sheeks the evening of July 25, is evidence that Orlando knew Bartolo told Sheeks he would contact the Board if he was fired. The General Counsel points out that eight phone calls were made between Sheeks and Orlando on July 25, all but one in the afternoon. While this is true, the records for July 24 are similar, with seven calls between Sheeks and Orlando, totaling 68 minutes. The calls

²⁴ The General Counsel asserts I should draw an adverse inference because Title did not testify. Because the evidence shows Orlando made the decision to terminate Bartolo's employment without Title's input, such an inference is not warranted.

on July 25 totaled 35 minutes. The fact that most of the calls on July 25 were in the afternoon is not telling, as there is no evidence regarding what time Bartolo ostensibly sent the email or called Sheeks. Finally, the fact that Orlando called Title after one of the calls with Sheeks does not lead me to infer that they discussed Bartolo, and it is not the only date that Orlando had conversations with Sheeks and Title in close temporal proximity. (GC Exhs. 6–8.)

The General Counsel also points to phone records showing more several more calls between Orlando, Sheeks, and Title the morning of July 27. As with the July 25 records, the evidence does not show call activity that is materially different on July 27 than on other dates. I find, therefore, that the telephone records do not prove that Sheeks told Orlando that Bartolo threatened to contact the Board.

Based on the foregoing, I find the General Counsel has not met the initial *Wright Line* burden. Assuming this burden was met, I find the Respondent has shown Bartolo would have been discharged even absent any protected activity.

The Respondent asserts that Bartolo was terminated because he performed poorly, leading to his PIP, and he missed a mandatory meeting the day after he received the PIP and was late to another mandatory meeting the following day. The General Counsel asserts these reasons are pretext to mask unlawful motivation.

Unlawful employer motivation may be established by circumstantial evidence, including among other things: (1) the timing of the employer's action in relationship to the employee's protected activity; (2) the presence of other unfair labor practices, (3) statements and actions showing the employer's general and specific animus; (4) the disparate treatment of the discriminatees; (5) departure from past practice; and (6) evidence that an employer's proffered explanation for the adverse action is a pretext. See *Golden Day Schools v. NLRB*, 644 F.2d 834, 838 (9th Cir. 1981); *NLRB v. Rain-Ware, Inc.*, 732 F.2d 1349, 1354 (7th Cir. 1984) (timing); *Mid-Mountain Foods, Inc.*, 332 NLRB 251, 260 (2000), *enfd. mem.* 11 Fed.Appx. 372 (4th Cir. 2001); *Richardson Bros. South*, 312 NLRB 534 (1993) (other unfair labor practices); *NLRB v. Vemco, Inc.*, 989 F.2d 1468, 1473–1474 (6th Cir. 1993); *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999) (statements); *Naomi Knitting Plant*, 328 NLRB 1279, 1283 (1999) (disparate treatment); *JAMCO*, 294 NLRB 896, 905 (1989), *affd. mem.* 927 F.2d 614 (11th Cir. 1991), *cert. denied* 502 U.S. 814 (1991) (departure from past practice); *Wright Line*, 251 NLRB at 1089; *Roadway Express*, 327 NLRB 25, 26 (1998) (disparate treatment).

The General Counsel argues that Bartolo was treated differently than Jones, the other employee who was placed on a PIP. Jones did not miss a mandatory meeting and show up late for another mandatory meeting right after being placed on his PIP, however. In this context, whether Jones was meeting the requirements of his PIP when Bartolo was discharged is immaterial. In addition, Jones had worked for the Respondent for many years, while Bartolo had been employed for about four months.

As for timing, the General Counsel points out that Bartolo was discharged less than 48 hours after engaging in protected activity, and was not permitted to complete his PIP. While timing can be strong motivation of retaliatory motivation, I do not find it to be so in this case. While Bartolo was discharged in close proximity to his alleged protected activity, the temporal

proximity between missing a meeting and being late for a meeting is even closer. Drawing an inference of unlawful motivation based on timing under the circumstances here would give employees license to engage in protected activity and then immediately engage in poor performance or misconduct under a cloak of protection. I likewise do not infer unlawful motivation based on the Respondent’s failure to let Bartolo complete the requirements of his PIP. Again, such a supposition permits employees to engage in poor performance or misconduct during the pendency of a PIP and then cry foul when the employer cuts the PIP short.

The General Counsel asserts that Orlando’s reasons for terminating Bartolo are not credible because he offered shifting explanations and he exaggerated certain aspects of his testimony. In his affidavit to the Board agent during the investigation into Bartolo’s charges, Orlando exaggerated when he said Bartolo had logged hundreds of calls in a day and had not scheduled or completed any demos. In fact, Bartolo had logged 164 calls in four days and scheduled two demos, one of which had been scheduled by someone else on his behalf. This discrepancy, however, does not cast doubt on the evidence that Bartolo was a poor performer who, immediately after being placed on a PIP, missed a meeting and was late to another. I credit Orlando’s testimony that the specific events the week of July 24, coupled with the big picture showing consistently poor performance, served as the basis for his decision to terminate Bartolo. I also credit Orlando’s testimony that he believed Bartolo had fabricated some of the calls on his call log for July 23–27.

Based on the foregoing, I recommend dismissal of complaint allegation 5.

D. The Confidentiality Rule

The amended complaint paragraph 4(a) alleges that Respondent violated Section 8(a)(1) by requiring its employees to sign, as a condition of their employment, Private & Confidential Employment Agreements, which include the following provision:

11. Confidentiality

(a)[. . .] Confidential Information includes, without limitation,[. . .] employee[. . .] lists and personnel information of employees; numbers and location of sales representatives [. . .] .

On December 14, 2017, the Board issued *Boeing Co.*, 365 NLRB No. 154 (2017), which reversed part of the Board’s longstanding paradigm, set forth in *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004), for evaluating workplace rules.²⁵ Under *Lutheran Heritage*, the first inquiry is whether the rule explicitly restricts activities protected by Section 7. If it does, the rule is unlawful.²⁶ For facially neutral rules, a violation was previously “dependent upon a showing of one of the following: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights.” *Lutheran Heritage* at 647. See also *U-Haul Co. of California*, 347 NLRB 375, 377 (2006), *enfd.* 255 Fed.Appx. 527 (D.C. Cir. 2007)(applying *Lutheran Heritage* to determine if arbitration policy violated the Act). *Boeing*

²⁵ *Boeing* was given retroactive application.

²⁶ This part of *Lutheran Heritage* was not reversed by *Boeing*.

overruled *Lutheran Heritage* with respect to the first prong of the facially-neutral paradigm, and the Board no longer will find certain work rules unlawful merely upon a showing that employees would reasonably construe the rule’s language to prohibit or interfere with Section 7 activity.

Instead, when faced with a work rule that would, reasonably read, potentially interfere with NLRA rights, the Board will conduct a balancing test that considers: (1) the nature and extent of the potential interference with Section 7 rights; and (2) legitimate employer justifications for the rule. *Boeing*, slip op. at 3.

After applying the balancing test, the Board will place it into one of three categories, as described in *Boeing*.²⁷

- *Category 1* will include rules that the Board designates as lawful to maintain, either because (i) the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or (ii) the potential adverse impact on protected rights is outweighed by justifications associated with the rule. Examples of Category 1 rules are the no-camera requirement in this case, the “harmonious interactions and relationships” rule that was at issue in *William Beaumont Hospital*, and other rules requiring employees to abide by basic standards of civility.
- *Category 2* will include rules that warrant individualized scrutiny in each case as to whether the rule would prohibit or interfere with NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
- *Category 3* will include rules that the Board will designate as unlawful to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.

Id. slip op. at 3–4 (footnote omitted).

The nature and extent of Section 7 rights the confidentiality agreement would prohibit or limit is significant. Personnel information obviously includes wages and benefits, and it is a fundamental guarantee of the Act that employees must be free to discuss wages and benefits with each other. There is no provision exempting discussions about wages or benefits from the definition of “confidential information” or “personnel information.” I find, therefore, that the rule would preclude or impede employees from discussing or disclosing information about fellow employees’ wages and benefits.

The General Counsel argues that the confidentiality provision negatively impacts potential organizing activity, as it includes employee lists and numbers and locations of sales representatives as confidential information. “[T]he applicable rule is that employees are entitled

²⁷ The categorization must come after the balancing test, as the Board stated, “The above three categories will represent a classification of *results* from the Board’s application of the new test.” Id. slip op. at 4.

to use for organizational purposes information and knowledge that comes to their attention in the normal course of their work activity but are not entitled to their employer's private or confidential records.” *Ridgeley Mfg. Co.*, 207 NLRB 193, 196–197 (1973), *enfd.* 510 F.2d 185 (D.C. Cir. 1975); see also *W.R. Grace & Co.*, 240 NLRB 813, 820 (1979). Accordingly, employee lists, including those with addresses and contact information of employees, that are available in the ordinary course of employment may be shared with union officials for organizing purposes. The confidentiality provision would preclude this activity.

Organizing and discussing wages are central to the Act, and the confidentiality rule impedes both activities. The only business justification comes from the rule itself. It asserts that employees have access to:

highly valuable, confidential and proprietary information related to the business of the Company of independent economic value (actual or potential) not known to the public in general, which if used or disclosed in violation of this Agreement would cause the Company substantial loss and damages that could not be readily calculated and for which no remedy at law would be adequate.

(GC Exh. 2.) This business justification does not bear any real nexus to the prohibitions from disclosing wage information (by virtue of not excluding it from personnel information), and from disseminating employee information for organizing purposes. It is difficult to see how such activity would cause the Respondent “substantial loss and damages that could not be readily calculated and for which no remedy at law would be adequate.”

Based on the foregoing, I find the rule falls into category 3, as it impedes organizing activity and protected discussions about wages and benefits, and the adverse impact is not outweighed by business justifications.

CONCLUSIONS OF LAW

1. By maintaining in its employment agreement with employees a confidentiality provision that interferes with employees’ exercise of the rights under Section 7 of the Act, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and Section 2(6) and (7) of the Act.
2. The Respondent did not otherwise engage in any other unfair labor practices alleged in the complaint.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act.

Having maintained in its “Private and Confidential Employment Agreement” with employees, as a condition of employment, a confidentiality provision that interferes with employees’ exercise of the rights under Section 7 of the Act, the Respondent will be ordered to

cease and desist from this action, and to rescind or modify the provision.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁸

ORDER

The Respondent, Gubagoo, Inc., Boca Raton, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from
 - (a) Maintaining in its “Private and Confidential Employment Agreement” with employees, as a condition of employment, a confidentiality provision that interferes with employees’ exercise of the rights under Section 7 of the Act.
 - (b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their rights guaranteed them by Section 7 of the Act.
2. Take the following affirmative action necessary to effectuate the policies of the Act
 - (a) Rescind or modify the confidentiality provision so that it will not interfere with rights guaranteed to employees under Section 7 of the Act.
 - (b) Furnish all current employees who signed employment agreements containing the confidentiality provision with notification that the unlawful portions of the confidentiality provision have been rescinded or modified.
 - (c) Within 14 days after service by the Region, post at its Boca Raton, Florida facility and all other facilities where the MAA has been maintained, copies of the attached notice marked “Appendix.”²⁹ Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent’s authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In

²⁸ 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.

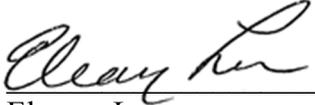
²⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

the 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 February 4, 2017.

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

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

Dated, Washington, D.C. June 8, 2018


Eleanor Laws
Administrative Law Judge

APPENDIX

NOTICE TO EMPLOYEES

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

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

FEDERAL LAW GIVES YOU THE RIGHT TO

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

WE WILL NOT do anything to prevent you from exercising the above rights.

WE WILL NOT maintain, in our “Private & Confidential Employment Agreement,” or anywhere else, a confidentiality provision that prevents or interferes with disclosure of information about our employees or your and your coworkers’ wages and other working conditions in furtherance of your rights under the National Labor Relations Act.

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

WE WILL rescind the confidentiality provision; and **WE WILL** furnish all former or current employees whom we solicited or required to sign Private & Confidential Employment Agreements incorporating the above rule with inserts stating that the provision has been rescinded or modified.

Gubagoo, Inc.

(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.

2600 North Central Avenue, Suite 1800, Phoenix, AZ 85004-3099
(602) 640-2160, Hours: 8:15 a.m. to 4:45 p.m.

The Administrative Law Judge's decision can be found at www.nlr.gov/case/28-CA-203713 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 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, (602) 416-4755.