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**Mitsubishi Hitachi Power Systems Americas, Inc. and
Mohamed Shahat.** Case 12–CA–188952

June 18, 2018

DECISION AND ORDER

BY CHAIRMAN RING AND MEMBERS MCFERRAN
AND EMANUEL

On February 1, 2018, Administrative Law Judge Geoffrey Carter issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions¹ and briefs and has decided to affirm the judge’s rulings, findings,² and conclusions³ and to adopt the recommended Order as modified.⁴

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, Mitsubishi Hitachi Power Systems Americas, Inc., Lake Mary, Florida, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

¹ No party excepts to the judge’s dismissal of the allegations that the Respondent violated Sec. 8(a)(1) by issuing a written warning to employee Mohamed Shahat, directing Shahat not to discuss his complaint about his supervisor with other employees, and discharging employee Amasis Yazid.

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

³ In affirming the judge’s conclusion that the Respondent violated Sec. 8(a)(1) by discharging Shahat, Chairman Ring and Member Emanuel find it unnecessary to rely on the judge’s citation to *Fresh & Easy Neighborhood Market, Inc.*, 361 NLRB 151 (2014), and they express no opinion concerning whether that case was correctly decided. Member Emanuel notes that the credited evidence provides no plausible explanation for why the Respondent initially decided that Shahat should receive only a written warning on July 8, 2016, but decided to instead discharge him on July 14, 2016, after he had formally raised a group complaint about his supervisor to the Respondent on July 11, 2016.

⁴ We shall modify the judge’s recommended Order to conform to the Board’s standard remedial language.

1. Insert the following as paragraph 2(e) and reletter the subsequent paragraphs.

“(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.”

Dated, Washington, D.C. June 18, 2018

John F. Ring, Chairman

Lauren McFerran, Member

William J. Emanuel, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

John Plympton and Christopher Zerby, Esqs., for the General Counsel.

William deMeza, Jr., Esq., for the Respondent.

DECISION

GEOFFREY CARTER, Administrative Law Judge. In this case, the General Counsel asserts that Mitsubishi Hitachi Power Systems Americas, Inc. (Respondent) violated the National Labor Relations Act by, in 2016: disciplining and discharging piping systems engineer Mohamed Shahat (Shahat or Charging Party); discharging piping design engineer Amasis Yazid (Yazid); and threatening Shahat (before he was discharged) that he would be in trouble if he spoke to other employees about a complaint that he submitted to human resources about his supervisor. Respondent asserts that its decisions to discipline and discharge Shahat and Yazid were nondiscriminatory, and denies violating the Act in any fashion. As explained below, I find that Respondent violated Section 8(a)(1) of the Act when it discharged Shahat, but I recommend that the other allegations in the complaint be dismissed.

STATEMENT OF THE CASE

This case was tried in Kissimmee, Florida from October 30 to November 1, 2017.¹ Shahat filed the unfair labor practices charge in this case on November 29, 2016, and filed an amended charge on January 25, 2017.² Subsequently, the General Counsel issued a complaint on March 31, 2017.

In the complaint, the General Counsel alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by: (a) issuing a disciplinary action notice to Shahat on or about July 8, 2016, because he engaged in protected concerted activities; (b) discharging Yazid on or about July 22, 2016, because he engaged in protected concerted activities; (c) in August 2016, directing employees not to discuss complaints about their supervisor with other employees, and threatening employees with unspecified reprisals if they did so; and (d) discharging Shahat on or about October 13, 2016, because he engaged in protected concerted activities. Respondent filed a timely answer denying the alleged violations in the complaint.

On the entire record,³ including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and Respondent, I make the following

FINDINGS OF FACT⁴

I. JURISDICTION

Respondent, a Delaware corporation with an office and place of business in Lake Mary, Florida, engages in the business of providing power generation equipment and technology. In the 12 months before the complaint was filed, Respondent purchased and received goods at its Lake Mary, Florida facility that are valued in excess of \$50,000 and come directly from points outside the State of Florida. Respondent admits, and I find, that Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

¹ I agreed to keep the trial record open after November 1, 2017, to allow time for Respondent to finish searching its files for electronically stored information (ESI) that would be responsive to the General Counsel's subpoena. (Tr. 7–8, 497–498.) On November 22, 2017, Respondent disclosed responsive ESI to the General Counsel. After reviewing the ESI, the General Counsel filed a motion on November 30, 2017, to close the record and set a briefing schedule because the General Counsel did not wish to present additional evidence. Hearing no objection from Respondent or Charging Party, on December 4, 2017, I issued an order granting the General Counsel's motion.

² All dates are in 2016, unless otherwise indicated.

³ The transcripts and exhibits in this case generally are accurate. However, I hereby make the following corrections to the trial transcripts: Throughout – “Mason” should be “Meysam”; Tr. 198, l. 23: “system” should be “statement”; Tr. 264, l. 1: “Shabbat” should be “Shahat”; Tr. 394, l. 23: “personnel” should be “personal”; Tr. 416, l. 6: “Yard’s” should be “Yazid’s”; Tr. 449, l. 22: “meaning” should be “needing”; and Tr. 494, l. 3: “were” should be “where.”

⁴ Although I have included several citations in this decision to highlight particular testimony or exhibits in the evidentiary record, I emphasize that my findings and conclusions are not based solely on those specific citations, but rather are based on my review and consideration of the entire record for this case.

II. ALLEGED UNFAIR LABOR PRACTICES

A. Background

1. Overview of respondent's business

As indicated above, Respondent provides products and services for the electric power generation industry. Those products include gas, steam and geothermal turbines, boilers, and environmental control systems. The industrial gas turbines that Respondent produces are large enough to provide power for an entire city. (Tr. 111, 184, 224, 404; GC Exh. 46 (pp. 1, 3).)

2. The piping group

The piping group at Respondent's facility is responsible for designing the connective piping for gas turbines. Piping may carry natural gas, lubrication oil, cooling air, or other fluids necessary for the turbine. Piping design is precise and detail oriented because some of the piping must be able to withstand high temperatures and pressure, and a failure in the piping may damage expensive equipment and/or pose safety risks. (Tr. 224–226, 404–405.)

In September 2014, Respondent hired Arash Mohajeri to serve as assistant manager of engineering. In that capacity, Mohajeri supervised approximately 10 employees and 2 interns in the piping group, and reported to senior manager of plant engineering, Phil Deen, who previously supervised the employees in the piping group. (Tr. 17–18, 47–48, 185, 332, 401–402, 406, 488–489.)

As they work on piping design projects, employees assigned to the project can identify errors in the piping design and ask the responsible employee to correct the error. Respondent generally expects more senior engineers to produce work with fewer mistakes, but any engineer on the project can identify mistakes and suggest corrections. Since Mohajeri supervises the piping group, he is responsible for ensuring that the finished piping design is correct and mistake-free. Because of the attention to detail that is required to fulfill that responsibility, Mohajeri recognized that some might see his management style as that of a micromanager. On the other hand, Respondent regarded Mohajeri as a very good supervisor with strong technical skills and a professional demeanor, and credited Mohajeri for improving the efficiency of the piping group. (See, e.g., Tr. 226, 231, 314–324, 334, 383, 406–407, 429; GC Exhs. 43–44; R. Exh. 13.)

3. Mohamed Shahat and Amasis Yazid⁵ – background

In July 2013, Respondent hired Shahat as a piping systems engineer II. In that position, Shahat (among other duties) developed piping systems for Respondent's gas turbine power projects, and ensured that the piping requirements of the projects were fulfilled in a timely manner. (Tr. 99, 110–112, 260; R. Exh. 26.)

In April 2015, Respondent hired Yazid as a senior piping design engineer. In that role, Yazid (among other duties) was tasked with using 3D modeling software and other resources to

⁵ Yazid also went by the nickname “Lakim” when he worked for Respondent. (See, e.g., Tr. 24, 122, 419, 465; GC Exh. 3 (pp. 2–3); GC Exh. 4.)

develop piping system designs for Respondent's gas turbine power projects, and ensuring that the piping and equipment for the gas turbines were hooked up. (Tr. 18, 49, 67, 95, 184, 232–233, 409; R. Exh. 22.)

Both Shahat and Yazid worked as part of the piping group under Mohajeri's supervision. (Tr. 17–18, 28–29, 48, 70–71, 95, 99, 113, 185, 432.)

B. Respondent's Workplace Policies⁶

1. Performance evaluations and performance improvement plans

As explained in Respondent's employee handbook, "[p]erformance reviews are typically conducted annually and include discussion, assessment and goal setting. These reviews are designed to provide feedback and a formal assessment and documentation of performance, accomplishments, and career interests. The performance review may also include discussion of potential changes going forward and training or personal development. Human Resources oversees the performance review process." (GC Exh. 46 (p. 9).)

Respondent has its direct supervisors complete annual performance evaluations in May of each year, subject to the review of a second level supervisor and the human resources department.⁷ As part of the evaluation, the supervisor rates the employee in several categories by selecting one of the following ratings: Does Not Meet Requirements; Needs Improvement; Meets Expectations, Exceeds Expectations; or Outstanding Achievement. Based on the category ratings, which carry different weights in the evaluation, the employee receives an overall performance rating. Both the direct supervisor's manager and human resources need to approve the annual performance evaluation before the direct supervisor presents it to the employee. Employees who receive an overall rating of Meets Expectations or higher on their annual performance evaluations become eligible for a wage increase. (Tr. 50–51, 76, 112, 247–248, 376–378; see also R. Exh. 9 (draft annual performance evaluation for Shahat, containing all five ratings).)

If an employee receives an overall annual performance evaluation rating of Needs Improvement or lower, then Respondent's policy is to prepare a performance improvement plan (PIP) that identifies the current performance that is under review, and the plan that Respondent expects the employee to follow to improve his or her performance. The employee's supervisors normally prepare the PIP, but human resources will review the PIP before it is implemented. Respondent may take

⁶ Respondent issues its employee handbook to all employees, regardless of the employee's assigned department. (Tr. 89, 374–375; see also GC Exh. 46 (excerpt from employee handbook); R. Exh. 38 (same).)

⁷ At the beginning of the fiscal year, Respondent prepares "individual performance plans" that define the goals for each employee. The individual performance plan does not include performance ratings, but can serve as a reference regarding employees' progress with their assigned goals when supervisors check in with employees periodically about their performance, and when supervisors prepare employees' annual performance evaluations. (Tr. 227–229, 246–247; see also R. Exh. 1 (individual performance plan for Yazid); compare R. Exh. 3 (annual performance evaluation for Yazid).)

corrective action (e.g., disciplinary action) in conjunction with, during or after the PIP. (Tr. 30, 95–96, 107–108, 249, 325–326, 378, 381; GC Exh. 5 (example PIP form).)

2. Disciplinary policy

In circumstances where an employee is not meeting Respondent's expectations or standards, Respondent's managers "may provide coaching, direction, more focus or additional training in order to encourage, help or direct [the employee] to improve skills, redirect behaviors and otherwise get back on track." The tools that managers may use to get an employee back on track may include: coaching; an improvement plan (which can be either developmental or corrective); a disciplinary action notice; suspension pending review; and discharge. "Coaching, improvement plans, or disciplinary action up to [and] including termination of employment are based on the nature and severity of the issue." Respondent's human resources department is notified whenever an employee receives formal discipline, and any formal disciplinary action notices that are issued are placed in the employee's personnel file. (Tr. 19, 50, 96–97; GC Exh. 46 (p. 18); see also GC Exhs. 2 (sample disciplinary action notice), 45 (same, with an explanatory cover sheet).)

While Respondent generally follows a progressive discipline policy, Respondent may discharge an employee with no prior disciplinary record if that is appropriate under the circumstances (e.g., for a severe infraction). Similarly, although Respondent may attempt to work with employees who perform poorly on the job and use discipline as a tool in that effort, there is no requirement that Respondent impose discipline or implement a performance improvement plan before discharging an employee for poor performance. (Tr. 107–109, 342–343, 381–382, 479, 491; see also Tr. 89–90, 478 (noting that Respondent's progressive discipline policy applies to all employees, regardless of department).)

3. Anti-harassment and equal employment opportunity policies

Respondent's employee handbook states that Respondent "will provide equal opportunity in employment to all applicants and individuals without regard to race, color, sex, age, religion, national origin, disability, genetic information, or other characteristics protected by law. [Respondent] also prohibits workplace harassment, as well as retaliation against team members who complain of suspected discrimination or harassment." The employee handbook also advises employees that "[i]f you feel you have been the victim of discrimination, harassment or retaliation, or have information concerning discrimination, harassment or retaliation with respect to any applicant or team member of [Respondent], please contact your Human Resources Manager immediately. [Respondent] will promptly investigate complaints and take appropriate action. [Respondent] will not retaliate against any individual who complains and/or reports incidents of discrimination or who takes part in an investigation of a discrimination complaint." (GC Exh. 46 (pp. 3–4); see also id. (p. 13); R. Exh. 37; Tr. 374, 477.)

If Respondent determines that either a formal or informal investigation of a harassment complaint is required, then the human resources department will direct and/or conduct the inves-

tigation. “The investigation may include, but is not limited to, interviewing the complaining party, the alleged harasser, supervisors and any other personnel, as required, to obtain sufficient, factual information upon which to make a determination.” (R. Exh. 37 (section 4.2(c)).)

4. Employee complaints

Respondent has an open door policy that permits employees to present any concerns to their supervisor or manager, and/or to human resources or a higher level manager. Employees may also submit a formal complaint to human resources, which will investigate the complaint. Respondent does not have formal guidelines for how it will investigate a complaint. Instead, Respondent decides what interviews to conduct and what documents to review based on its assessment of what is relevant to the complaint. Human resources vice president Brian Shannon supervises all investigations at Respondent’s Lake Mary facility, with input as appropriate from Respondent’s legal department, as well as human resources manager Julie Hester, who handles some investigations and reports to Shannon. (Tr. 66–67, 94, 225–226, 375, 378–380, 405–406; GC Exh. 46 (p. 12).)

C. 2015 – Early Conflict between Mohajeri and Certain Piping Group Employees

In or about September 2014, Mohajeri began supervising approximately 10 employees in the piping group. (Tr. 17–18, 47–48, 185, 332, 401–402, 406, 488–489.) By 2015, disagreements began to emerge between Mohajeri and some of the piping group employees, including Shahat and Yazid, including the conflicts described below.

1. May 2015 – Shahat’s request for a letter of recommendation

On May 28, 2015, Shahat asked Mohajeri if he could write a letter of recommendation for the Masters of Science in Engineering Management program at the University of Central Florida. Mohajeri declined to write the letter because he did not know Shahat well enough.⁸ (Tr. 152, 192–193, 306; GC Exhs. 9 (p. 1), 18.)

In light of Mohajeri’s decision that he should not write a letter of recommendation for Shahat, Shahat asked Deen to write the letter, since Deen supervised Shahat in the piping group before Mohajeri joined the company. Deen agreed, and on June 1, 2015, completed a recommendation letter stating that Shahat would be an excellent candidate for the Masters of Science program. (Tr. 48, 61–62, 433–435; R. Exh. 21 (p. 3); see also GC Exh. 18 (Deen’s recommendation letter, stating that Shahat communicated effectively, has excellent organizational and research skills, and was a very intelligent and hardworking engineer who is capable of grasping new concepts very quick-

⁸ Shahat and Mohajeri disagree somewhat about the reason that Mohajeri offered for not writing the recommendation letter. See GC Exh. 9 (p. 1) (showing that Shahat maintained Mohajeri said he could not write a beneficial recommendation, while Mohajeri contended that he declined to write the letter because he did not know Shahat well enough). I have credited Mohajeri’s explanation because it is corroborated by Yazid’s testimony about what Shahat told him that Mohajeri said when Mohajeri declined to write the recommendation letter. (See Tr. 192–193.)

ly).⁹

2. May/June 2015 – the 3D modeling assignment dispute

In late May 2015, the piping group was shorthanded and was working on multiple projects. Because of those circumstances, Mohajeri asked Shahat to assist with the doing the 3D modeling of the piping for a project. Although Shahat had some prior experience with 3D modeling from a job with another company, Shahat resisted taking the 3D modeling assignment that Mohajeri proposed because, in Shahat’s view, a 3D designer should handle the 3D modeling work instead of an engineer. Asserting that 3D modeling was part of Shahat’s job duties, Mohajeri insisted that Shahat handle the 3D modeling as requested, and arrangements were made for Shahat to complete a one-week training course on 3D modeling. (Tr. 36–37, 162–164, 260–262, 274–275, 307, 438; GC Exh. 9 (p. 2); R. Exh. 21 (pp. 1–2, 4).)

On June 2, 2015, Mohajeri renewed his request that Shahat perform 3D modeling work. Shahat reiterated his view that a piping designer should perform the task, and also expressed reluctance to work more than 8 hours in a day because of family commitments and his Masters program studies. Mohajeri advised Shahat that if Shahat continued to refuse the 3D modeling assignment, then Mohajeri would submit a disciplinary action notice to human resources to discipline Shahat for insubordination. Mohajeri showed Shahat a draft disciplinary memo, and asked Shahat to take a couple of days to rethink the issue. Yazid, who was sitting nearby in his cubicle, overheard the conversation and testified that Mohajeri’s tone was belligerent, bullying and “my-way-or-the-highway” in nature. (Tr. 37–38, 160–162, 185–187, 275–277; R. Exh. 21 (pp. 1–2); see also GC Exh. 10 (disciplinary action notice that Mohajeri, using the draft disciplinary memo, created after he met with Shahat); Tr. 37 (noting that Mohajeri prepared the disciplinary action notice after he met with Shahat).)

On June 5, 2015, Shahat met with Mohajeri and, after being confronted with the prospect of being issued a disciplinary action notice, agreed to perform the 3D modeling assignment as requested. After the meeting, Mohajeri wrote up a second disciplinary action notice about the dispute, but did not submit it (or the June 2 notice) to human resources.¹⁰ In the June 5 no-

⁹ Deen testified that he wrote Shahat’s recommendation letter in a way to highlight Shahat’s strengths because he wanted to help Shahat get into the Masters program. (Tr. 435–436, 476.) To the extent that Deen implied that he avoided commenting on Shahat’s technical abilities because Shahat was weaker in that area at the time (see Tr. 435, 476), I have not given that testimony any weight because Deen’s testimony on that point conflicts with the annual performance evaluation that Shahat received in or about late April 2015. In that evaluation, Shahat received an overall Meets Expectations rating, and received an Exceeds Expectations rating for his functional technical skills. See GC Exh. 36 (stating, among other things, that Shahat “has the functional and technical knowledge and skills to do the job at a high level of accomplishment”).

¹⁰ Although Mohajeri did not submit the disciplinary action notices to human resources, Respondent retained the notices for future reference concerning Shahat. (See Tr. 108 (Shannon relied on the disciplinary action notices when he decided to discharge Shahat); GC Exhs. 12 (memo indicating that Mohajeri would keep the documentation about

tice, Mohajeri noted that Shahat's future performance evaluations would be based (at least in part) on the "outcome of the tasks and directions" that Mohajeri assigned to him. In addition, Mohajeri sent a memorandum to Deen on June 11, 2015, to notify Deen of the dispute and how it was resolved. (Tr. 38–40, 44–45, 261, 279–280, 436, 495–496; GC Exhs. 9 (p. 2), 11, 12; R. Exh. 8.)

3. July 2015 – Shahat considers transferring to a different department

In early July 2015, Shahat interviewed with Respondent's global sourcing department about the possibility of transferring to a position there. Deen believed that Shahat might perform well in the global sourcing job because Shahat had good communication skills. When Shahat told Mohajeri that he might want to transfer because the piping group wasn't the group for him, Mohajeri stated that he wouldn't stop Shahat from transferring. Shahat interpreted Mohajeri's statement to mean that Mohajeri was trying to push Shahat out of the piping group. (Tr. 61, 286–287, 439–440; R. Exh. 8.)

Ultimately, Shahat did not transfer to the global sourcing department. Although Shahat did well in his interview, he requested a raise to go along with the new job, and thus the global sourcing department director decided not to select Shahat for the position. (Tr. 61, 439–440; R. Exh. 8.)

4. August 2015 to spring 2016 – Shahat, Yazid and other employees discuss working conditions and Mohajeri's management style

In August 2015, Mohajeri established work goals for employees in the piping group. Shahat, Yazid and employees U.K., S.H. and A.L. spoke and agreed that the work goals were too difficult for the timeframe given and required excessive work hours. Shortly after the new work goals were implemented, employee A.L. quit and Mohajeri assigned A.L.'s work to Shahat without adjusting the remainder of Shahat's work goals. When Shahat complained to Mohajeri that the work goals were too high and would require Shahat to work 12–14 hours a day to complete, Mohajeri responded that if Shahat could not work the necessary hours to meet the goals, Mohajeri would find someone else who could. (Tr. 117–120.)

More generally, over the latter half of 2015, and heading into 2016, Shahat, Yazid and employees U.K. and S.H. periodically spoke amongst themselves about their dissatisfaction with the working conditions in the piping group and how Mohajeri treated them. For example, Shahat, Yazid, U.K. and S.H. shared their concerns about how Mohajeri spoke to them in an aggressive and abrasive manner, but spoke in a more friendly way to piping group employees who had a national origin and/or religion that was to Mohajeri's liking.¹¹ Shahat and

the 3D modeling dispute for future reference if needed), 13 (July 8, 2016 disciplinary action notice that refers back to the June 2015 disciplinary action notice); see also R. Exh. 8 (Mohajeri's log of interactions with Shahat, which describes the 3D modeling dispute.)

¹¹ According to Shahat and Yazid, Mohajeri treated employees with Iranian backgrounds well, and did not treat Sunni Muslim employees (such as Shahat and Yazid) well. (Tr. 121–123, 149–150, 154, 191–

Yazid also did not believe it was appropriate for Mohajeri to refer to employees by their national or regional origin (such as Mohajeri referring to Shahat as "Arab Mohamed," which Shahat associated with "an inherited conflict between the people from a Persian descent from Iran and people from Arab descent"). (Tr. 116, 120–123, 189–192, 209–210; see also Tr. 115–116 (Shahat observed Mohajeri speak to employee U.K. in an aggressive and abrasive manner in or about early May 2016), 187–188 (Yazid observed Mohajeri speak to employee S.H. in a forceful and abrasive manner in March/April 2016), 208 (explaining that employees in the piping group sit in cubicles that are divided by a 5-foot high partition, such that if one employee stands up, he or she can see over the partition into nearby cubicles).)

Although Shahat, Yazid and employees U.K., S.H. and A.L. spoke to each other about their problems with Mohajeri, there is no evidence that they presented their concerns to Mohajeri or to another member of management in this timeframe (August 2015 to early May 2016).¹² (See Tr. 146–151, 168, 211–212, 348.)

D. May 2016 – Shahat and Yazid Receive their Annual Performance Evaluations

1. Shahat's 2015–2016 performance evaluation

In preparing Shahat's annual performance evaluation, Mohajeri initially planned to give Shahat an overall rating of Needs Improvement. However, after discussing Shahat's evaluation with Deen, Mohajeri agreed to give Shahat a break and assign a Meets Expectations rating and try and motivate Shahat to improve (as opposed to assigning a Needs Improvement rating, which normally would require Respondent to place Shahat on a performance improvement plan). Deen advised Mohajeri that when he met with Shahat about his evaluation, Mohajeri should make sure that Shahat understood the things that he needed to work on.¹³ (R. Exhs. 8 (referencing Mohajeri's discussion with Deen), 9 (draft evaluation with Needs Improvement rating); Tr. 30, 60–61, 265–266, 280–281, 283–284, 441–443, 486, 491.)

Accordingly, on May 19, 2016, Mohajeri advised Shahat that he received an overall rating of Meets Expectations for his 2015–2016 annual performance evaluation. Mohajeri stated as follows on the evaluation paperwork regarding Shahat's overall rating:

Mohamed cooperates well with [customers] and colleagues

192, 397–398; R. Exhs. 41–42 (EEOC charges filed by Shahat and Yazid).)

¹² Shahat did testify that he spoke to Mohajeri on "multiple occasions" about how Mohajeri treated employees, but did not specify a date when he did so before May 2016. (See Tr. 123–124.)

¹³ The evidentiary record establishes that Shahat did have some performance issues in early 2016, before his performance evaluation. For example, from January to April 2016, Mohajeri noted instances where Shahat demonstrated poor time management, improperly shifted work to other employees, and overlooked necessary corrections to piping drawings. Mohajeri relied on informal coaching to address these issues, and Respondent did not discipline Shahat for any performance problems. (R. Exhs. 8, 14 (pp. 1–4); Tr. 45, 60, 137, 265, 444.)

inside and outside of the team. He has a good understanding of MHPS methods. He is practical and a good resource to his team members.

Most important message: Time Management and improvements [are] the key[s] to success.

(GC Exh. 7; see also Tr. 29, 112–113, 145, 282.) Mohajeri did not tell Shahat that Respondent increased his rating from Needs Improvement to Meets Expectations, but Mohajeri did indicate that Respondent gave Shahat a break in certain rating categories.¹⁴ (Tr. 30, 145, 285–286.)

Towards the end of the May 19 meeting, Shahat told Mohajeri about his concerns that Mohajeri treats him and certain other employees differently than the rest of the piping group; and that Mohajeri had an aggressive, abrasive and micromanaging style that was creating a stressful environment for the group. Mohajeri responded that he would make a note of Shahat's concerns, but also suggested that Shahat should worry about himself instead of others. (Tr. 123–124; GC Exh. 9 (p. 1)).¹⁵

2. Yazid's 2015–2016 performance evaluation

On May 19, 2016, Mohajeri advised Yazid that he received an overall rating of Needs Improvement for his 2015–2016 annual performance evaluation. Mohajeri stated the following on the evaluation paperwork regarding Yazid's overall rating:

Lakim is a team player and a hard worker. He needs to focus more on multitasking and prioritizing on [the] projects side along with improving his problem solving skills and end product quality on the technical side. Proving his expertise and establishing his lead in piping design inside and outside of SP3D is very crucial.

Most important message: Technical knowledge in piping design along with quality and accuracy of deliverable is the key to success.

(GC Exh. 3 (p. 5); R. Exh. 2; see also Tr. 21, 23, 51, 212, 245–246, 250–251, 410–412.)

Although Yazid disagreed with various aspects of his performance evaluation, he acknowledged on the evaluation that “I am aware that I can do better if given the proper tools to ex-

¹⁴ Deen testified that in a conversation in which Shahat asked about receiving a raise or promotion, he (Deen) told Shahat that a raise or promotion was not going to be possible, in part because Respondent cut Shahat a break on his last performance review. Shahat denied having such a conversation with Deen. (Tr. 146, 443, 496.) I have not given weight to either side's testimony on this point because the conflicting testimony was equally credible, and in any event is not material to my analysis.

¹⁵ I have not credited Mohajeri's testimony that he thought Shahat remained quiet when he (Mohajeri) asked Shahat to comment or offer feedback about Mohajeri's performance. (See Tr. 284.) First, Mohajeri's testimony on that point was tentative in nature. Second, Shahat's detailed testimony about the concerns he presented to Mohajeri is corroborated by Shahat's July 11, 2016 complaint letter to human resources, in which he noted speaking to Mohajeri about his concerns regarding Mohajeri's management approach and the manner in which Mohajeri treated Shahat. (GC Exh. 9 (p. 1).)

ecute,” and advised Mohajeri that he was having difficulty adjusting to Respondent's standards and process. Yazid did not provide any feedback or comments to Mohajeri about Mohajeri's performance as a manager when Mohajeri provided an opportunity to do so in the evaluation meeting. (GC Exh. 3 (p. 5); Tr. 250–252, 329–330; see also R. Exh. 2 (describing some of the performance issues that Yazid experienced between May 2015 and May 2016, such as inaccurate piping drawings that required correction); Tr. 238–241, 243–245 (same, discussing R. Exhs. 2, 5).)

E. June 2016 – Yazid and the Change Notice Incident

1. June 7 – Yazid's change notice mistake

In January 2016, Respondent was designing the piping for two projects (the NTE projects) when a question arose about whether the piping should be changed from S-80S stainless steel piping to a thinner S-40S stainless steel piping. The proposed change in piping was estimated to cost \$23,800 per project, for a total of \$47,600. (R. Exh. 6 (pp. 3–12).) On February 2, 2016, however, Mohajeri advised the participants on the NTE projects that Respondent would not change the piping, and thus the S-80S piping would remain as the piping selected for the project. Accordingly, piping group employees assigned to the NTE projects prepared design drawings that (among other things) specified S-80S piping. (R. Exhs. 6 (p. 13), 23 (drawings listing S-80S piping as one of the “shop materials”); Tr. 421–423.)

On June 6, 2016, Yazid approached Deen and asked Deen to approve an Engineering Change Notice (ECN) to switch the piping on the NTE projects from the S-80S to S-40S piping (Mohajeri was not available because he was on vacation at the time). Yazid proposed the ECN because the piping fabricator asserted that Mohajeri agreed to different piping earlier in the year (Yazid was not copied on the January/February emails about this issue). When Deen asked Yazid if he checked the NTE project drawings to verify what piping was needed, Yazid answered, “yes.” To avoid delaying the projects (and avoid significant financial penalties that would result from any delay), Deen approved the ECN and notified the NTE project manager that new piping would need to be ordered (at a \$47,600 cost increase) due to an engineering error. (R. Exh. 25; GC Exh. 4 (indicating that Mohajeri was on vacation when Yazid spoke to Deen about the ECN); Tr. 24–25, 193–195, 212–213, 242–243, 324–325, 415–421; see also R. Exh. 6.)

On June 7, Mohajeri returned to the office and Yazid informed him about the ECN. Mohajeri reviewed the ECN and determined that it was not necessary. Respondent accordingly had Yazid notify the NTE project manager that the ECN was canceled. Since Respondent canceled the ECN before the new piping was ordered, Respondent avoided the \$47,600 cost of replacing the piping, but nonetheless lost some trust with the project manager. (Tr. 24–25, 195–196, 213, 256–257, 419, 423, 425–426; R. Exhs. 6 (pp. 1–2), 25; see also GC Exh. 4.)

On June 8, Mohajeri confronted Yazid about the ECN mistake, and directed Yazid to provide a written statement about why he recommended the ECN. Yazid, however, was reluctant to write a statement because he believed Respondent was trying to pin the incident on him and use it as a basis to get rid of

him.¹⁶ (Tr. 23–25, 196–198, 423–424; GC Exh. 4 (indicating that Respondent also contemplated taking disciplinary action against Yazid because of the ECN mistake); R. Exh. 25.)

After the meeting with Mohajeri, Yazid contacted Deen to report that he had an issue with Mohajeri and wanted to speak with Deen regarding grievances about Mohajeri, the ECN incident, and Mohajeri's demand that Yazid write a statement. Deen, however, directed Yazid to work these issues out with Mohajeri. Ultimately, Yazid agreed to write a statement about the ECN incident, but maintains that he did so under duress. (Tr. 198–199, 424.)

2. June 8 – Yazid emails Hester to request a meeting

Later on June 8, 2016, Yazid sent the following email to human resources manager Julie Hester:

Julie,
I have [a] situation I would like to discuss with you.
Can I drop by?

Thanks,
Amasis Lakim Yazid

(GC Exh. 19.) Hester received Yazid's email, but overlooked it and did not respond. Although Yazid intended to give Hester a grievance statement related to the change notice incident and his concerns about Mohajeri's management style, Yazid did not attach the grievance statement to his June 8 email, or attempt to contact Hester again to arrange a meeting. (Tr. 68, 199–200, 213–214, 343–344; see also GC Exh. 35 (Yazid's grievance statement, drafted on June 8, 2016, but not given to Respondent until July 22, 2016).)

3. Respondent prepares to take action concerning Yazid

In light of the ECN incident, Mohajeri and Deen decided to begin preparing a performance improvement plan (PIP) for Yazid, who was already slated for a PIP in light of his overall Needs Improvement rating from his May 2016 performance evaluation. Hester provided Mohajeri with PIP paperwork on June 8, and on June 28, Mohajeri began drafting the PIP for Yazid. In the PIP, Mohajeri noted the ECN incident as one example of Yazid's performance issues. Mohajeri and Deen planned to meet with human resources on July 11 to discuss the PIP. (GC Exh. 5; R. Exhs. 2, 4; Tr. 25–26, 254–255, 326–329, 414; see also Tr. 30, 249, 327, 412 (noting that a PIP is standard procedure if an employee receives a Needs Improvement

¹⁶ Yazid testified that, in the June 8 meeting, he also told Mohajeri that he (Mohajeri) had a belligerent and micromanaging style that placed undue stress on Yazid and other piping group employees. Mohajeri denies Yazid ever complaining about his management style. (Compare Tr. 197–198 with Tr. 300.) I have not credited Yazid's testimony as to precisely what he said to Mohajeri on this point. First, Yazid's testimony and Mohajeri's denial are equally credible, which means that the General Counsel did not carry its burden of proving what Yazid told Mohajeri in the meeting. Second, the evidentiary record shows that Yazid tended to be rather circumspect in this timeframe when he spoke to other managers (e.g., Deen and Hester) about Mohajeri. Given that tendency, I cannot find by a preponderance of the evidence that Yazid confronted Mohajeri using the language that he described in his testimony.

rating on his or her performance evaluation.)

F. Early July 2016 – Shahat and the Cubicle Swap Dispute

On July 7, 2016, Mohajeri instructed Shahat to swap cubicles with M.A., another employee in the piping group. When Shahat responded that Mohajeri should provide a reason for the swap, Mohajeri stated that the swap would enable the piping group to have better communication and flow, and added that in any event, Shahat needed to comply with Mohajeri's directive because refusing to comply would constitute insubordination. Shahat responded that he would speak to Deen about the issue before agreeing to swap cubicles.¹⁷ Later on July 7, Mohajeri emailed Shahat and M.A. to instruct them to swap their cubicles by the close of business on July 8. (GC Exhs. 16 (p. 2), 42; R. Exh. 8; Tr. 139–142, 155, 157–160, 169, 172, 288, 291–292; see also GC Exh. 13; Tr. 288–290, 445–446 (noting that Mohajeri planned for several piping group employees to change cubicles).)

After speaking with Shahat, Mohajeri notified Deen of the dispute, and with Deen's approval, drafted a disciplinary action notice (dated July 8) to issue a written warning to Shahat for insubordination. (R. Exh. 8; GC Exh. 13; Tr. 41–42, 292–293, 295, 448–449.) Mohajeri stated as follows in the draft disciplinary action notice:

Reason for Disciplinary Action: Due to the group expansion and optimization, [Shahat] was informed by the manager that he needs to change his office with another employee to make the group's flow and interactions more effective. The employee acknowledged that he clearly understood what [the] manager was asking him to do but he repeatedly refused to execute the task. He disregarded the manager's direct request and implied that the manager does not have the authority to change his office. This is a repeated incident and clear sign of insubordination (last incident was [on] June 3, 2015).

Recommendation: The previous incident (June 3, 2015) was archived as [an] undocumented verbal notice to help the employee correct his actions and maintain/improve his professionalism. Since this is a recurring incident, it is decided that this incident [is] to be archived as a written warning. If it is repeated in [the] future again, progressive disciplinary action will be taken.

(GC Exh. 13.)

Mohajeri did not issue, or tell Shahat about, the July 8 disciplinary action notice, initially because Shahat needed an opportunity to speak to upper management about the dispute, and

¹⁷ Shahat later explained (in a July 11 letter to human resources) that he objected to the cubicle swap because he believed that Mohajeri had been bullying and verbally abusing him in the workplace, and he believed that the proposed swap would make matters worse by relocating Shahat to a cubicle across from Mohajeri's office. (GC Exh. 16 (p. 2); see also Tr. 141 (Shahat testified that, in addition to his concern about being closer to Mohajeri's office, he was comfortable in his existing cubicle, which was quiet and next to a window).) There is no evidence that Shahat told Mohajeri on July 7 that he didn't want to move cubicles because Mohajeri was mistreating him, but given the nature of that explanation, it is not surprising that Shahat did not communicate it to Mohajeri.

later because Respondent decided to hold off on issuing the disciplinary action notice altogether. Shahat, meanwhile, was out sick on July 8, and thus did not swap cubicles on that date. (Tr. 41–42, 142, 157–158, 172, 293–294; R. Exh. 8 (p. 2).)

G. July 11, 2016 – Shahat Submits Complaint about Mohajeri

On July 11, Shahat returned to work and scheduled a meeting with Deen to discuss the cubicle swap dispute.¹⁸ Deen advised Shahat that he should swap cubicles as Mohajeri instructed. (R. Exh. 28; Tr. 460.) Shahat then presented Deen with a complaint letter that stated as follows:

Mr. Deen,

I feel compelled to bring to your attention my intentions, as I have a great deal of respect for you and I am very much appreciative for the employment opportunity and the progress of my professional career I've gained, during my employment with the company.

For the past 2 years, I've endured a great deal of disrespect, and verbal abuse from Mr. [Mohajeri], this has escalated to a point it's affecting my wellbeing and quality of life, as I'm always preoccupied, with what I may next encounter, and in which way will he attack me next. This has robbed me from enjoying a job I so much love and very much enjoyed during my first year of employment under the directive of Matsuda san.

I no longer enjoy my personal time off and weekends as I walk on egg shells the 8 plus hours of my day, and worry of what may await me when I'm back at work.

There's other team member(s) that are also very much in constant stress, due to the manner in which he communicates, at times using intimidation to keep folks from coming forward and reporting him. I am not at liberty to disclose name(s) of the other employees, but will be asking HR to please conduct an investigation.

At this point, not involving HR will be an injustice to myself and to all the folks that have to deal with the bullying and harassment. The details of the incidents are in my formal complaint letter to HR, [but] I wanted to inform you and provide you with a copy of my written complaint, to keep you abreast of the events that have led to my complaint as I don't want my complaint to be of surprise, should HR request to speak to you on this matter.

(GC Exh. 15; see also R. Exh. 21 (Shahat's complaint letter to human resources, which Shahat also provided to Deen); Tr. 53,

¹⁸ I do not credit Deen's testimony that he also met with Shahat on July 7 about the cubicle swap dispute. (See Tr. 446–448, 457, 482–483.) Deen's credibility on this point is undermined by his Board affidavit, which was completed before the trial in this matter and at a time closer to the events in question. In his affidavit, Deen said nothing about meeting with Shahat on July 7. Instead, Deen explicitly stated in his affidavit that Shahat met with him on July 11 to discuss the cubicle swap dispute. (Tr. 482–485.) Second, Shahat credibly testified that he only discussed the cubicle swap with Deen on July 11, the same day that he gave Deen his complaint letters. (Tr. 160, 172–173, 496–497; see also GC Exh. 16 (complaint letter dated July 11).)

125–126.)

As Deen reviewed Shahat's letters, Shahat noted that other people in the piping group felt the same way about Mohajeri. Deen told Shahat that no other employee had come to him about any issues with Mohajeri, but also acknowledged that Shahat's complaint raised serious issues. Accordingly, Deen walked with Shahat to the human resources office to arrange for Shahat to speak with Hester, and also to provide Hester with a copy of Shahat's letter to Deen. (Tr. 53–56, 71, 125–128, 148–149, 345–346, 461–463, 488–489; see also Tr. 468.)

In the meeting with Hester, Shahat presented a complaint letter and supporting documents. (Tr. 345–346.) Shahat stated as follows in his letter to human resources:

To the Department of Human Resources:

It has taken me some time to find the courage to lodge this formal complaint against my manager, Mr. Arash Mohajeri, but I can no longer deal with his abuse. Mr. Arash has been bullying me and emotionally abusive towards me for the past 2 years which had become detrimental to my physical and mental health.

I on May 19, 2016 spoke to Mr. Arash during my performance appraisal evaluation meeting, regarding my concerns, with his management approach, and manner in which he's treated me, since working under his directive. He advised he'd take notes of my feedback, on our work relationship, however the work relationship has worsen[ed] and it is now taking a toll on my health and mental state of mind.

I am certain other team member(s) in my group are facing similar issues with Mr. Arash, and [are] afraid to come forward, in fear of retaliation and losing their jobs. I am not at liberty to disclose name(s), but can ask an internal investigation is conducted.

The timeline of events below, [has] left me no choice but to file this complaint in hopes that the Department of Human Resources can aid me with this matter, and assist me with the much needed aid in improving morale and my work environment:

[May 2015: Mohajeri declined Shahat's request to write a letter of recommendation for Shahat's Masters of Science in Engineering Management program, stating that his feedback wouldn't be beneficial.]

[May 2015: Mohajeri advised Shahat that Shahat needed to do some 3D modeling design work. When Shahat expressed reluctance and suggested that an experienced designer should do the modeling instead of an engineer such as Shahat, Mohajeri threatened Shahat with possible termination and demanded that Shahat sign a letter that supported Mohajeri's view of the dispute.]

[March 12, 2016: While attending a concert with friends, Shahat encountered coworker B.J., and also Mohajeri. In the presence of Shahat's friends and B.J., Mohajeri asked Shahat what business he had at a Persian event, and also asked whether Shahat was in-

volved with a Persian woman.]

[May 2016: Mohajeri told Shahat not to wear a particular pair of shoes because Mohajeri owned a pair also, and thought it would be unpleasant if he and Shahat wore the same shoes.]

[June 16, 2016: After Shahat did not catch some mistakes on drawings that he reviewed, Mohajeri became enraged and verbally attacked Shahat by yelling at him and ranting about being incompetent and careless with his work.]

[July 6, 2016: Mohajeri asked Shahat why he signed a coworker's birthday card so close to where Mohajeri signed the card, and asked Shahat whether he did so because he thought he and Mohajeri were at the same level.]

[July 7, 2016: the cubicle swap incident, about which Shahat asked human resources to intervene because the proposed swap would station Shahat in close proximity to Mohajeri and potentially lead to more abuse.]

(R. Exh. 21; see also Tr. 71, 152–155, 304.)

In the approximately 30-minute meeting with Hester, Shahat noted (among other things) that Mohajeri was rude and condescending when giving direction, was not open to opinions or suggestions about process improvements, and was bullying and creating a hostile work environment. Shahat also noted that other employees in the piping group felt the same way he did (about Mohajeri's conduct). Hester asked Shahat if he could provide the names of any witnesses to the incidents that he described, but Shahat declined to do so because he did not want to get other employees in trouble. Hester acknowledged that Shahat's allegations were serious, assured Shahat that she would thoroughly investigate his complaint, and advised Shahat that he should not swap his cubicle until the investigation was completed. (Tr. 71–72, 92, 128–129, 346–347, 349–351, 365; R. Exh. 33 (Hester's notes from her July 11 interview with Shahat);¹⁹ see also R. Exh. 21 (noting that Shahat was not at liberty to disclose the names of witnesses).) Further, Respondent decided not to take any disciplinary action against Shahat regarding the cubicle swap dispute, to avoid the discipline appearing to be in retaliation for Shahat's complaint. (R. Exh. 8 (July 12 entry); Tr. 33; see also Tr. 42, 105, 352–353 (noting that Respondent also decided not to require Shahat to change cubicles while Shahat's complaint was being investigated).)

H. Mid-July 2016 – Managers Meet about Shahat and Yazid

1. Yazid's performance improvement plan

On July 10, Mohajeri signed a performance improvement plan for Yazid. The PIP indicated that, within six weeks, Yazid needed to show improvement in the following areas: (a) completing tasks in 3D with minimum supervision; (b) picking one task and driving it to a successful result with minimum

¹⁹ Although Hester and Shahat discussed all of the allegations in Shahat's complaint, Hester only wrote down notes about the aspects of the complaint that she believed related to whether there was a hostile work environment. (Tr. 347, 349–351; R. Exh. 33.)

supervision; (c) producing quality deliverables in both 3D and projects-related products with a minimum of minor errors; (d) understanding and tracking tasks and making progress on them without constant supervision; and (e) taking ownership of, troubleshooting and completing tasks with a minimum of minor errors. (R. Exh. 4; Tr. 27, 238, 252–253, 326, 412–414.)

Deen and Mohajeri planned to meet with human resources on July 11 to discuss Yazid's PIP (before presenting it to Yazid). However, on July 11, Deen postponed the meeting to July 14 because human resources wanted to have a "broad meeting regarding this issue." (R. Exh. 2; Tr. 25, 27, 255, 329.)

2. July 14 & 19 – managers and human resources make decisions about Shahat and Yazid

On July 14, Deen, Mohajeri, Shannon, director of plant engineering Thangyah Schwartz and vice president of engineering Carlos Koeneke met to discuss Shahat, Yazid and the "piping group's path forward." (R. Exh. 39; see also R. Exhs. 2, 8 (July 11 and 12 entries reflecting the forthcoming July 14 meeting); Tr. 33, 48.)

Regarding Shahat, the managers at the meeting were inclined to discharge him because of Deen's and Mohajeri's recommendations, Shahat's performance issues (as documented by Mohajeri), and the June 2015 and July 2016 disciplinary action notices that Mohajeri prepared (but did not formally issue) for Shahat. Shannon, however, stated that Respondent would take no employment action until human resources finished investigating Shahat's complaint (to avoid seeming like Respondent retaliated against Shahat because he filed a complaint). (R. Exh. 39; Tr. 108, 389–390, 459, 464–465; see also Tr. 457 (regarding the decision that Shahat should be discharged, Deen testified that he and Shannon agreed that Respondent needed to "cut [its] losses and move on").²⁰ As for Yazid, Deen and Shannon decided to discharge him instead of implementing the PIP that Mohajeri prepared. (Tr. 95, 258, 386–387, 415, 427.)

On July 19, the human resources department notified Mohajeri that Yazid would be discharged soon, and thus Mohajeri scheduled a meeting for July 22 to terminate Yazid's employment. (R. Exh. 2 (July 19, 2016 entry); Tr. 26.) Although the human resources department was still working on Shahat's

²⁰ In connection with my finding that Respondent decided to discharge Shahat on July 14, I note that I do not credit Deen's and Shannon's testimony that they met on July 7 (immediately after the cubicle swap dispute, and before Shahat submitted his complaint) and decided that it was time to discharge Shahat. (See Tr. 387–388, 457–458, 487.) Shannon's credibility on this point is undermined by the fact that, in his Board affidavit, Shannon stated that he did not decide to terminate Shahat until October 2016, shortly before Shahat's actual termination. (Tr. 101–102, 401.) Further, to the extent that Deen and Mohajeri maintain that Deen decided to discharge Shahat after the cubicle swap dispute on July 7, that testimony is inconsistent with how Deen and Mohajeri actually handled the cubicle swap dispute. Indeed, the evidentiary record shows that Deen and Mohajeri agreed to write up a written warning to discipline Shahat for insubordination concerning the cubicle swap, but then decided to hold off on issuing the discipline once Shahat submitted his complaint. (Tr. 295–296, 448–449, 487; GC Exh. 13; R. Exh. 8 (July 7, 11 & 12, 2016 entries).) The steps that Deen and Mohajeri took towards disciplining Shahat on July 7 undercut the proposition that Respondent decided to discharge Shahat at that time.

complaint, Schwartz informed Mohajeri on July 19 that he (Schwartz) and Shannon had agreed to let Shahat go. (R. Exh. 8 (July 19, 2016 entry); Tr. 33–34.)

I. July 22, 2016 – Respondent Discharges Yazid

1. The discharge meeting

On July 22, Respondent asked Yazid to come to the conference room for a meeting, at which Deen and Mohajeri told Yazid that he was being discharged for poor performance (Hester was also present at the meeting). When Yazid asked for more information, Mohajeri and Deen responded that they had not seen an improvement in Yazid's performance. Yazid acknowledged that he and Mohajeri had discussions about Yazid's performance, but objected that there was no performance plan or any other procedure in place to re-evaluate his performance. In addition, Yazid objected that Hester did not respond when Yazid tried to reach out to her (in his June 8 email) to discuss his concerns about Mohajeri. The managers in the meeting did not respond to Yazid's objections. (Tr. 18, 28, 49–52, 67, 77, 95, 200–204, 258–259, 387, 428; GC Exh. 23.)

After the discharge meeting, Hester escorted Yazid to his desk to collect his belongings. When Hester said she was sorry that it had come to this (Yazid's discharge), Yazid said that it was a little too late for that, and added that he was not the only one in the piping group who had grievances concerning Mohajeri. Hester asked Yazid to send her the grievance and the names of any other employees who experienced similar treatment because Respondent takes such matters seriously and would conduct an investigation. (Tr. 204–206; see also Tr. 67–68, 205, 344 (indicating that at some point on July 22, Hester reviewed her emails and located Yazid's June 8 email request for a meeting); GC Exh. 19 (Yazid's June 8 email).)

2. Yazid submits his grievance statement

In the evening after his discharge on July 22, Yazid emailed Shannon and Hester to provide a copy of his grievance statement. (Tr. 69–70, 206–207, 345; GC Exhs. 20, 35.) Yazid stated as follows in his email:

Mr. Shannon & Ms. Hester,

I would like to express my appreciation for the opportunity at MHPSA.

I would have liked things to work out differently. Having expressed my appreciation for the opportunity, I feel that there was never a plan of action implemented from my performance review in place to measure my performance standard and this is why I wanted to express my concerns to you about some practices and concerns I had before this unjust of course of action took place. I have tried to reach out to HR and management to express my concerns with no follow up.

Arash Mohajeri has been operating in a [manner] that has put the whole team in a stressful and uncomfortable situation through his abrasive tactics, harassment and personnel preferences without any clear defined process or standards to adhere to.

I would have thought this course of action would be unac-

ceptable and there would be some measurements in place to gauge an [employee's] work performance to see if the status quo has been met after a probationary period which was never clearly defined, nevertheless; the personal attack of his way or the high way has validated his actions.

I am attaching my grievance for your review and records that I tried to express prior to this ambush.

(GC Exh. 20.)

Yazid attached his grievance statement (dated June 8) to his July 22 email. Yazid stated as follows in his grievance statement (in pertinent part):

I was urged under duress to [write] a statement on the steps and conclusions I came to, to execute an engineering change request in the amount of \$23,800 regarding a pipe schedule change from schedule 80 to schedule 40. . . . I was made to feel as though my career was on the line the approach Arash took in pulling me in a conference room and manipulating a situation into a more over blown ordeal than it was.

In February of this year . . . I was tasked to manage the NTE-Projects . . . however, I expressed concerns that I didn't have the resources to execute effectively according to the MDL-Schedule. . . . When attempting to rely on team members with prior experience, I was left with little support and guidance from Arash in the beginning stages of the project Because of the overwhelming pressure and constant harassment of why documents [were] not correct, it affected my mental and physical health in ways I've never experienced before. Consequently, I was hospitalized by my doctor due to high blood pressure and chronic back pain as a result of the environment he (Arash) put me in. I was not given adequate help and or instruction how to manage the project with a system I was still trying to familiarize myself with.

During the same time frame other team members had adequate assistance to facilitate and manage their projects. At least two to three members were assigned to help with other projects running simultaneously. I had to fend for myself and because of the mistakes made, he held that against me and included the defects in my performance review. I expressed my concerns and disagreed with his views because he didn't take into account the learning curve and lack of support I was given to execute properly.

Arash's constant micro management, personal preferences and comparisons to be like other team members, creates a tense environment. Singling members out by taking them into a conference room almost weekly and berating them about their performance is not professional and shows poor leadership qualities. A leader should have clearly defined procedures and give his or her team the tools and assistance they need to execute effectively in order to hold persons accountable for defects.

Consequently, this approach has created a high stress, high tense and unhealthy working environment.

(GC Exh. 35; Tr. 97, 206–207.)

3. Human resources’ response to Yazid’s email and grievance

Shannon received Yazid’s July 22 email and grievance statement while he (Shannon) was on a business trip. After reading the email on his cell phone, Shannon mistook the email as coming from Shahat, and sent the following reply to Yazid:

Your claim has been taken and in due time Ms. Hester will perform an investigation. These things do not happen overnight but are taken very seriously. We have started the investigation report taking to management. Keep in mind to do a thorough investigation you will have to divulge those who you have mentioned in your claim. Without the ability to speak to them it is your word against your manager.

(GC Exh. 33; see also Tr. 97–98, 206–207, 391–392.)

Later, Shannon learned that Yazid submitted the complaint email and grievance on July 22. Shannon, however, decided not to investigate Yazid’s complaint because he believed Yazid was merely a disgruntled employee who was attempting to get back at Mohajeri. (Tr. 98, 207–208, 369–370, 392.) Hester, meanwhile, did not respond to Yazid’s July 22 email and grievance because she deferred to Shannon to handle the matter. (Tr. 70, 369.)

J. July–September 2016 – Respondent’s Investigation of Shahat’s Complaint

After completing her intake interview with Shahat about his July 11 complaint, Hester notified Shannon about the complaint. Shannon tasked Hester with investigating the complaint under his supervision, and the two of them collaborated about how the investigation would proceed. As part of that discussion, Shannon suggested that Hester ask Deen and Mohajeri to

provide written responses to Shahat’s complaint, and also suggested that Hester set up interviews with Deen and Mohajeri to get their side of the story. (Tr. 73, 104–105, 352, 380, 393.)

On or about July 26, Shannon saw Shahat in the hallway and asked Shahat to email him a copy of Shahat’s July 11 complaint. Shannon added that Respondent takes such allegations seriously and would conduct a full investigation. Later in the day, Shahat emailed Shannon copies of his (Shahat’s) July 11 letters to Deen and the human resources department. (Tr. 102–103, 129–130, 393; GC Exh. 34.) Shannon responded by sending the following email to Shahat:

We are going to start our investigation that will involve discussions with both Arash and Phil. From there we will talk to you. I have to be back in Canada all next week but if needed I will have Julie talk to you next week. Once I return I will review all the information from the interviews and make a decision on how we move forward.

(GC Exh. 34; see also Tr. 103–104.)

On August 9, Shannon emailed Mohajeri and asked him to review Shahat’s complaint and send written responses to the allegations.²¹ Mohajeri agreed to do so, and sent his responses to Shannon on August 11. (R. Exhs. 8, 15; Tr. 34–35, 73, 304, 309, 366.) Mohajeri stated as follows in his responses to the complaint:

²¹ The 1 month delay between Shahat’s complaint and Respondent’s requests for responses from Deen and Mohajeri resulted, in part, from the fact that the human resources department was transitioning to a new payroll system (a transition that Hester was involved with), and in part from scheduling issues related to Shannon’s and the managers’ busy calendars. (Tr. 103–104, 353, 393.)

Allegation from Shahat’s Complaint	Mohajeri’s Response
Other team members in the piping group are facing similar issues with Mohajeri	“There is an open door policy in engineering group at all levels of management. I have always encouraged the team members to communicate with me any concerns they have that they need to discuss.”
Mohajeri’s May 2015 refusal to write a letter of recommendation for Shahat	[Mohajeri reviewed the questionnaire and determined that he could not answer some of the questions because he had not worked long enough with Shahat. Mohajeri explained this to Shahat and suggested that Shahat ask Deen to provide the reference.]
May 2015 dispute about Shahat doing 3D modeling work	[3D modeling work is part of Shahat’s job duties. Shahat received a week long training course to ensure he had the necessary skills to do the 3D modeling work. Due to a high workload and limited manpower in the piping group, Mohajeri asked Shahat to do some 3D modeling work. When Shahat resisted, Mohajeri drafted a disciplinary action form, but did not submit the form to human resources when Shahat agreed to do the 3D modeling assignment.]
March 12, 2016 – while at a concert on the weekend, Mohajeri saw Shahat and asked why Shahat was at a Persian event, and also asked if Shahat was involved with a Persian woman	“I did meet the employee at the concert and had a short casual talk. There was no improper or unethical conversation during the encounter.”

Allegation from Shahat's Complaint	Mohajeri's Response
May 2016 -- Mohajeri advised Shahat not to wear a certain pair of casual shoes because Mohajeri owned a pair also	"I'm a professional in my career with a proven track record of treating people with respect and commitment to the corporate code of conduct."
June 16, 2016 – Mohajeri verbally attacked Shahat after Shahat submitted drawings that contained some mistakes	[Shahat was the reviewer of the drawings and thus was responsible for catching any mistakes. Shahat has committed similar errors in the past despite meetings regarding his performance and various opportunities to review his work and correct mistakes. Shahat has responded that this is the best that he can do.]
July 6, 2016 – Mohajeri asked why Shahat signed his name in close proximity to Mohajeri's name on a birthday card for a coworker	"I'm a professional in my career with a proven track record of treating people with respect and commitment to the corporate code of conduct."
July 7, 2016 – the cubicle swap dispute	[The cubicle swap was approved by upper management as a strategy to improve efficiency and communication in the piping group. Shahat refused to swap cubicles until he discussed this issue with upper management.]

(R. Exh. 15; see also Tr. 43–44, 306–309.)

In the same time period, Deen provided human resources with his responses to the assertions in Shahat's complaint letter to Deen. Deen reported that he never witnessed Mohajeri direct any disrespectful language, verbal abuse, intimidation or bullying behavior towards Shahat or any other employee. To the contrary, Deen observed Mohajeri treat others in a professional manner, and noted that although he (Deen) has an open door policy, none of the employees in the piping group has ever expressed concerns to him about how Mohajeri treats them. (GC Exh. 17; Tr. 56–57, 73, 359, 366, 468–469.)

On or about August 11, Hester met with Deen and Mohajeri for a 30–60 minute group discussion about Shahat's complaint and the piping group. Hester asked Mohajeri some general questions about the piping group and how he might handle certain situations. Deen and Mohajeri also expressed surprise and disappointment that Shahat submitted a complaint, and agreed that there wasn't any information to substantiate Shahat's allegations (which they viewed as petty in nature).²² (Tr. 35, 57, 73, 353, 357, 470–471; see also Tr. 394.)

Finally, Hester reviewed two policy documents as part of her investigation. Specifically, Hester reviewed Respondent's anti harassment policies, and also reviewed a document titled "What do I need to know about workplace harassment" that the United

²² During trial, I excluded handwritten notes that Hester wrote after the August 11 meeting with Deen and Mohajeri. (R. Exh. 34 (rejected exhibit).) As I explained, even if the notes qualified as a business record, the notes contained inadmissible hearsay in the form of Hester's written notes about what the managers said at the meeting. I also indicated that, to the extent that Respondent wished to present evidence about what was said in the meeting and/or Respondent's state of mind about the merits of Shahat's complaint, it could simply call Deen or Mohajeri to the stand to testify about that issue (Deen and Mohajeri testified at trial, and Deen was present for the entire trial as Respondent's designee) and/or rely on Hester's final report about the investigation. (Tr. 354–357, 371–372.) In short, I excluded Hester's notes as inadmissible hearsay, and also as cumulative of other evidence concerning Respondent's (and Deen's & Mohajeri's) state of mind concerning Shahat's complaint. I stand by that ruling, and thus Respondent's Exhibit 34 will remain in the rejected exhibits file.

States Department of Labor (DOL) posted on its website to provide DOL employees with an overview of the types of unlawful harassment, as well as a description of the DOL's workplace harassment policy.²³ (R. Exh. 35; Tr. 358–360, 366, 368; see also Tr. 394.)

Hester and Shannon did not take any of the following steps to investigate Shahat's complaint: (a) conduct a followup interview with Shahat; (b) interview Yazid or otherwise consider or investigate Yazid's July 22 email and grievance (which included allegations that Mohajeri improperly subjected employees to harassment); (c) conduct one-on-one interviews with Mohajeri and Deen; or (d) interview any other employees in the piping group to determine if they could provide any information that might shed light on the merits of the allegations in Shahat's complaint. (Tr. 73–74, 139, 358, 367, 394, 470.) As to why they did not interview any other members of the piping group, Shannon and Hester asserted that Shahat did not provide them with the names of any employees who witnessed or experienced any misconduct by Mohajeri, and also asserted that Shahat's complaint primarily raised personal disputes between Shahat and Mohajeri. (Tr. 358, 394.)

K. June–September 2016 – Ongoing Friction between Shahat and Mohajeri

1. Shahat's work performance

Between June and September 2016, Shahat continued to make errors in some of his work assignments, including failing to catch mistakes in piping drawings before approving them as ready for use (for purchasing and fabrication), and having trouble keeping up with his workload. As an example, on certain projects, Shahat was assigned as the reviewer, and thus was responsible for ensuring that the piping drawings were error

²³ I pause here to note that the DOL is not the agency that enforces Title VII of the Civil Rights Act of 1964 (Title VII, the statute that, among other things, prohibits unlawful harassment based on race, color, sex, national origin or religion). Instead, the U.S. Equal Employment Opportunity Commission (EEOC) enforces Title VII and issues guidance on what may constitute unlawful workplace harassment. (See, e.g., <https://www.eeoc.gov/laws/types/harassment.cfm> (EEOC overview of harassment as a form of employment discrimination).)

free (regardless of whether Shahat or another piping group employee made the error). When Mohajeri noticed errors that Shahat did not catch as the reviewer, Mohajeri had to return the drawings to the piping group for correction, thereby slowing down work on that and other projects. Mohajeri coached Shahat about these problems (verbally and via email), but there is no evidence that Mohajeri sought to take disciplinary action against Shahat or place Shahat on a performance improvement plan because of these issues. At trial, Mohajeri acknowledged that multiple engineers work on projects and can identify and correct mistakes, and also acknowledged that, even with multiple engineers looking at drawings, mistakes can still be present when the drawings reach Mohajeri for final approval. (R. Exhs. 8 (June-August 2016 entries), 12, 13, 14 (pp. 5–10); GC Exhs. 9 (pp. 2–3), 43–44; Tr. 60, 267–273, 314–324, 330–331, 481.)

2. Mohajeri’s concerns about private meetings with Shahat

After Shahat filed his complaint in July 2016, Mohajeri developed a concern about how to handle private meetings with Shahat in light of the complaint and ongoing investigation. At the suggestion of Deen and human resources, Mohajeri advised Shahat that they should have a witness present (e.g., a representative from human resources) if Shahat desired a private meeting to discuss his career path or promotion opportunities.²⁴ (Tr. 35, 303–304, 469–470; see also R. Exh. 8 (entry following August 30, 2016); Tr. 132.)

L. September 2016 – Respondent Determines that Shahat’s Complaint Cannot be Substantiated

On September 22, 2016, Hester completed her investigation and filed a report finding that there was no merit to Shahat’s complaint that Mohajeri subjected him to a hostile work environment. Instead, Hester characterized the conflict between Mohajeri and Shahat as simply a personality clash. (GC Exh. 21; see also Tr. 75, 361–364, 367–368, 471.) Hester’s report stated, in pertinent part, as follows:

Executive Summary

This is a matter concerning allegations of the existence of a “hostile work environment” at MHPSA in Lake Mary, Florida. After an inquiry team: (i) conducted interviews with the employee raising the claim [] and the employee alleged to have created the hostile work environment []; (ii) reviewed documentation from [Shahat and Mohajeri]; and (iii) reviewed relevant corporate policies and legal basis with the legal department for such a claim, it is the conclusion of

²⁴ Shahat testified that in August 2016, Mohajeri asked Shahat to come to the conference room for a one-on-one discussion, during which Mohajeri aggressively told Shahat that he (Shahat) should make sure there is a witness present if he wanted to speak to Mohajeri. Shahat also testified that Mohajeri told him that they would see who wins regarding Shahat’s complaint to human resources, and warned Shahat that he would be in huge trouble if he discussed the complaint with anyone in the piping group. (Tr. 130–132.) Mohajeri denied talking to Shahat about the complaint or warning Shahat (or anyone else) about discussing the complaint with others. (Tr. 301–303; see also Tr. 252.) I found Shahat and Mohajeri to be equally credible on this topic – since the General Counsel bears the burden of proof and did not meet that burden, I have credited Mohajeri’s testimony on this point.

the team that there is no merit to the claim based on the material provided and reviewed. The critical element necessary to validate such a claim was [conduct] both subjectively and objectively “pervasive and severe.”²⁵ There was no evidence in the interviews or documentation provided that supported a claim that the work climate was objectively pervasive or severe. It is on that basis that the team composed of Project Engineering & Quality Vice President, Engineering Management, and Human Resources finds no merit for the claim raised. It is the opinion of the team that the issue between the two employees is a personality clash based on different interpersonal styles. . . .

Analysis of Results

. . . The employees interviewed were all aware of the relationship issues between the two key parties. All employees interviewed acknowledged, to varying degrees, that the matter was concerning the two personalities involved. Mr. Shahat expressed a genuine concern for his job security due to his performance appraisal evaluations and almost being written up for insubordination. He also felt that he needed aid in improving morale and his work environment. He did express being “frustrated” with the working situation and what Mr. Shahat described as Mr. Mohajeri’s management style. Mr. Shahat did not, however, except for one reference to an elevated blood pressure, indicate that the actions of Mr. Mohajeri had a material impact on Mr. Shahat or interfered with Mr. Shahat’s ability to perform his job, impacted his job performance in any measurable way, or otherwise amounted to a distraction in his working situation, as it related to interaction with Mr. Mohajeri.

Both employees provided data that each believed was relevant to their respective positions on the issue at hand. After a review of both sets of documents, it is my opinion that the material provided demonstrates that Mr. Shahat may be concerned for his job due to his own performance issues since he states that Mr. Mohajeri has been disrespecting him for the past 2 years, but is now filing a complaint in hopes to solidify his employment since he was just put on a performance improvement plan.²⁶

²⁵ I pause again to note that under Title VII, a claim of workplace harassment is actionable if, among other factors, the harassment is “sufficiently severe or pervasive ‘to alter the conditions of [the victim’s] employment and create an abusive working environment.’” *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 67 (1986) (emphasis added). To the extent that Respondent’s investigation report states that alleged harassing conduct must be “severe and pervasive” or “severe and persistent,” I note that those formulations are incorrect. (See GC Exh. 21 (pp. 1, 3); see also R. Exh. 35 (printout from DOL website that uses both the correct “severe or pervasive” terminology and the incorrect “severe and pervasive” terminology); Tr. 361 (Hester testimony using the “severe and persistent” terminology). I emphasize that I provide this information for clarification only -- the merits of this case do not turn on whether Respondent accurately stated Title VII’s legal principles.

²⁶ The assertion that Shahat was on a performance improvement plan is incorrect. Respondent did not place Shahat on a PIP at any time during his employment. (Tr. 31, 52–53, 60, 137, 481.)

Findings

This complaint has not, however, proven out, based on the information collected or provided. The allegations appear to be based on an internal clash of personality styles between two employees. After talking to Mr. Mohajeri and the other managers of the team, they have made every attempt to accommodate Mr. Shahat and his working environment by providing training, coaching, and even the offer to transfer into another department[.]

(GC Exh. 21.) Having found that Shahat's complaint about Mohajeri could not be substantiated, Shannon and Deen agreed to move forward with discharging Shahat for poor performance (including insubordination). (Tr. 57–58, 75–76, 99–102, 105, 296–297, 361, 387, 390, 399–400, 463; see also Tr. 464–465 (noting that on July 14, Respondent put its plans to terminate Shahat on hold until Shahat's complaint was resolved).)

M. October 13, 2016 – Respondent Discharges Shahat

On October 13, Mohajeri arranged a meeting for Shahat, Deen, Hester and Shannon in the piping group conference room (Mohajeri could not attend because he was leaving for a business trip). At the meeting, Shannon notified Shahat that he (Shahat) was being discharged for poor performance. When Shahat asserted that he was being discharged because of Mohajeri, Shannon said no and reiterated that Respondent was discharging Shahat for poor performance.²⁷ Shannon and Hester then brought Shahat the personal items from Shahat's desk, and Koeneke (who had joined the meeting) escorted Shahat to his car. (Tr. 29, 52, 58–60, 76, 99, 105–107, 132, 134–137, 297–298, 390–391, 465–466; R. Exh. 8 (Oct. 13 entry); GC Exh. 22.)

N. Comparator Evidence

As one tool for keeping track of employee performance, coachings and other issues, Mohajeri makes entries on a timeline/log for the employee in question, generally by typing in the date that an issue arose and a description of the issue and how it was addressed (e.g., by a coaching). Out of the approximately 10 employees in the piping group, Mohajeri kept a log for Shahat, Yazid and three other employees in 2015 and 2016. Mohajeri did not keep a log for any other piping group employees in that time period because Mohajeri generally used logs to record major or noteworthy issues, but not smaller issues (i.e., if an employee did not have any major performance issues, then Mohajeri would not create a log for that employee). Of the five logs in the evidentiary record, Shahat's and Yazid's logs had the most entries (18 entries for Yazid and 31 for Shahat, compared to 2–4 entries on the logs for the other three employees). (Tr. 22–23, 31–34, 229–230, 298–300, 330–336; R. Exhs. 2, 8, 20.)²⁸

²⁷ The participants in the meeting disagree about whether Shannon also told Shahat that Respondent did not find any merit to Shahat's complaint, but that factual dispute is not material to my analysis. (Compare Tr. 105–106, 394–395 with Tr. 135–136.)

²⁸ The General Counsel also presented evidence about four other employees that Respondent terminated for performance-related reasons. The comparators worked in a variety of positions outside of the piping

Applicable Legal Standards

A. Witness Credibility

A credibility determination may rely on a variety of 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. *Farm Fresh Co., Target One, LLC*, 361 NLRB 848, 860 (2014); see also *Roosevelt Memorial Medical Center*, 348 NLRB 1016, 1022 (2006) (noting that an administrative law judge may draw an adverse inference from a party's failure to call a witness who may reasonably be assumed to be favorably disposed to a party, and who could reasonably be expected to corroborate its version of events, particularly when the witness is the party's agent). Credibility findings need not be all-or-nothing propositions — indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Farm Fresh Co., Target One, LLC*, 361 NLRB at 860. My credibility findings are set forth above in the findings of fact for this decision.

B. Protected Concerted Activity for the Purpose of Mutual Aid or Protection

To be protected under Section 7 of the Act, employee conduct must be both “concerted” and engaged in for the purpose of “mutual aid or protection.” Although these elements are closely related, Board precedent makes clear that they are analytically distinct, and also makes clear that the elements must be analyzed under an objective standard (such that an employee's subjective motive for taking action is irrelevant). *Fresh & Easy Neighborhood Market*, 361 NLRB 151, 152–153 (2014).

As the Board has explained, concerted activity includes not only activity that is engaged in with or on the authority of other employees, but also activity where individual employees seek to initiate or to induce or to prepare for group action, as well as individual employees bringing truly group complaints to the attention of management. *Fresh & Easy Neighborhood Market*, 361 NLRB at 153; see also *Meyers Industries*, 268 NLRB 493, 497 (1984), remanded sub nom. *Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 474 U.S. 971 (1985), supplemented *Meyers Industries*, 281 NLRB 882, 887 (1986), affd. sub nom. *Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), cert. denied 487 U.S. 1205 (1988). Notably, the requirement that, to be concerted, activity must be engaged in with the object of initiating or inducing group action does not disqualify merely preliminary discussion from protection under Section 7. In that regard, the Board has observed that inasmuch as almost any concerted activity for mutual aid or protection has to start with some kind of communication between individuals, it would come very near to nullifying the rights of organization and

group, and were terminated because of a variety of performance issues. (See Tr. 77–87; GC Exhs. 24–32; see also GC Posttrial Br. at 37.) I have given little weight to this comparator evidence because the General Counsel did not establish that these comparators were similarly situated to Shahat and/or Yazid, and also did not show that Respondent treated the comparators differently (in a meaningful way) than Shahat and Yazid.

collective bargaining guaranteed by Section 7 of the Act if such communications are denied protection because of lack of fruition. In addition, the Board has recognized that the activity of a single employee in enlisting the support of his or her fellow employees for their mutual aid and protection is as much ‘concerted activity’ as is ordinary group activity. *Fresh & Easy Neighborhood Market*, 361 NLRB at 153; see also *Whittaker Corp.*, 289 NLRB 933, 933 (1988) (explaining that the object or goal of initiating, inducing or preparing for group action does not have to be stated explicitly when employees communicate).

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. In short, proof that an employee action inures to the benefit of all is proof that the action comes within the ‘mutual aid or protection’ clause of Section 7. The Board has explained that this holds true even if the employee who asks for support from coworkers in addressing an issue with management would receive the most immediate benefit from a favorable resolution of the issue. Specifically, under principles of solidarity, an employee who solicits assistance from coworkers to raise his or her issues to management is requesting that his coworkers exercise vigilance against the employer’s perceived unjust practices. The solicited employees, meanwhile, have an interest in helping the aggrieved employee — even if the aggrieved employee alone has an immediate stake in the outcome — because the next time it could be one of them that is the victim. *Fresh & Easy Neighborhood Market*, 361 NLRB at 153, 155–156.

C. Section 8(a)(1) Allegations

Section 8(a)(1) of the Act makes it unlawful for an employer (via statements, conduct, or adverse employment action such as discipline or discharge) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in Section 7. The test for evaluating whether an employer’s conduct or statements violate Section 8(a)(1) of the Act is whether the statements or conduct have a reasonable tendency to interfere with, restrain or coerce union or protected activities. *Farm Fresh Company, Target One, LLC*, 361 NLRB at 860 (noting that the employer’s subjective motive for its action is irrelevant); *Yoshi’s Japanese Restaurant & Jazz House*, 330 NLRB 1339, 1339 fn. 3 (2000).

To prove that an adverse employment action violates Section 8(a)(1) of the Act, the General Counsel must demonstrate that: the employee engaged in activity that is “concerted” within the meaning of Section 7 of the Act; Respondent knew of the concerted nature of the employee’s activity; the concerted activity was protected by the Act; and Respondent’s adverse action against the employee was motivated by the employee’s protected, concerted activity. *Global Recruiters of Winfield*, 363 NLRB No. 68, slip op. at 16 (2015); *Lou’s Transport, Inc.*, 361 NLRB 1446, 1447 (2014), *enfd.* 644 Fed.Appx. 690 (6th Cir. 2016); *Correctional Medical Services*, 356 NLRB 277, 278 (2010); see also *Medic One, Inc.*, 331 NLRB 464, 475 (2000) (noting that “[e]vidence of suspicious timing, false reasons given in defense, failure to adequately investigate alleged mis-

conduct, departures from past practices, tolerance of behavior for which the employee was allegedly fired, and disparate treatment of the discharged employees all support inferences of animus and discriminatory motivation”). If the General Counsel satisfies the initial burden of showing of discrimination, then the burden shifts to Respondent to present evidence, as an affirmative defense, demonstrating that it would have taken the same action even in the absence of the employee’s protected activity. See *Global Recruiters of Winfield*, 363 NLRB No. 68, slip op. at 16; *Timekeeping Systems, Inc.*, 323 NLRB 244, 244 (1997).

Discussion and Analysis

A. Did Respondent Violate the Act when it Prepared (and Later Considered) a Disciplinary Notice for Shahat on July 8, 2016, after the Cubicle Swap Dispute?

1. Complaint allegation

The General Counsel alleges that Respondent violated Section 8(a)(1) of the National Labor Relations Act (the Act) by issuing a disciplinary notice to Shahat on or about July 8, 2016, because he engaged in protected concerted activities, and to discourage employees from engaging in those or other protected concerted activities. (GC Exh. 1(g) (pars. 6(a), (d)).)

2. Analysis

The evidentiary record shows that on July 8, 2016, Mohajeri (with Deen’s approval) prepared a disciplinary action notice to issue a written warning to Shahat for refusing to swap cubicles as instructed. Mohajeri stated in the disciplinary action notice that Shahat’s refusal to swap cubicles was a form of insubordination, and noted that Shahat engaged in similar insubordinate behavior in June 2015 when Shahat initially refused to do a 3D modeling assignment. Ultimately, Mohajeri did not issue the July 2016 disciplinary action notice to Shahat because Shahat filed his complaint with human resources on July 11, and Respondent did not want the discipline to appear to be in retaliation for Shahat’s complaint. (FOF, Section II(F)–(G).)

By July 8, 2016, Shahat already had engaged in concerted activity by speaking with some of his coworkers on multiple occasions about Mohajeri’s management style, which they viewed as aggressive and abrasive. In addition, at the end of his May 2016 performance evaluation, Shahat expressed some of these group concerns to Mohajeri, by telling Mohajeri that he (Mohajeri) treats Shahat and certain other employees differently than the rest of the piping group, and by stating that Mohajeri had an aggressive, abrasive and micromanaging style that was creating a stressful environment for the group. (FOF, Section II(C)(4), (D)(1).)

The General Counsel relies on a somewhat novel theory for why the July 8, 2016 discipline was discriminatory. Specifically, the General Counsel argues that the July 8, 2016 disciplinary action notice was initially just an unofficial memo that Respondent never issued; however, when Shannon relied on the July 8 disciplinary action notice to support his July 14 decision that Shahat should be discharged, Respondent unlawfully converted the unofficial July 8 notice into formal discipline because of Shahat’s protected concerted activities (such as Sha-

hat's July 11 complaint about Mohajeri).²⁹ (GC Posttrial Br. at 37–38.)

Although Shannon admitted that he considered the July 8, 2016 disciplinary action notice as a factor in his decision to discharge Shahat, that admission does not render the disciplinary action notice unlawful. First, I find that the July 8 disciplinary action notice was a reasonable and measured response to Shahat's refusal to swap cubicles, and was a response that Respondent would have taken irrespective of Shahat's protected concerted activities. There is no dispute that on July 7, 2016, Shahat refused to move his cubicle when directed to do so. Mohajeri deemed Shahat's refusal an act of insubordination, and Mohajeri's and Deen's decision to prepare the July 8, 2016 disciplinary action notice to warn Shahat about further insubordinate conduct was fully consistent with how they handled Shahat's June 2015 refusal to accept a 3D modeling assignment (an incident that occurred well before Shahat engaged in any protected concerted activity that Respondent was aware of).³⁰ (See FOF, Section II(C)(2).)

Second, I am not persuaded by the General Counsel's argument that it was improper for Respondent (through Shannon) to consider the July 8, 2016 disciplinary action notice as a factor in its decision to discharge Shahat. There is nothing wrong, per se, with an employer retaining information about informal or unofficial employee reprimands for future use (although that practice may convert the informal action into a form of discipline).³¹ Further, the General Counsel did not show that there

²⁹ The General Counsel asserts that Respondent treated the June 3 and 5, 2015 disciplinary action notices in a similar fashion. There is no complaint allegation concerning the June 3 and 5, 2015 disciplinary action notices.

³⁰ To the extent that Shahat drew a line in the sand about swapping cubicles because he hoped to protest Mohajeri's management style, that intent was not at all clear on July 7–8. Instead, the cubicle swap incident appeared to be a stand-alone issue, and Respondent understandably treated it as such. To be sure, Shahat subsequently connected the dots (between the cubicle swap dispute and Mohajeri's management style) in his July 11 complaint, but by that time, Respondent already had prepared the July 8 disciplinary action notice.

³¹ The Board has held that verbal warnings, coachings and reprimands are forms of discipline if they are part of a disciplinary process (e.g., a progressive disciplinary system) and lay a foundation for future disciplinary action against the employee. See *Alter Care of Wadsworth Center for Rehabilitation*, 355 NLRB 565, 565–566 (2010); *Oak Park Nursing Care Center*, 351 NLRB 27, 28 (2007); *Promedica Health Systems*, 343 NLRB 1351, 1351 (2004), *enfd.* in pertinent part 206 Fed.Appx. 405 (6th Cir. 2006), *cert. denied* 549 U.S. 1338 (2007). The tell-tale sign regarding whether a warning, coaching or reprimand lays a foundation for future discipline is that the employer may consider it at a later date when the employer is deciding whether to impose discipline and/or what kind of discipline it should impose. *Promedica Health Systems*, 343 NLRB at 1351–1352. Although it is clear that a warning, coaching or reprimand is a form of discipline if it automatically leads to discipline in the event of a future infraction, an automatic link to future discipline is not required. Instead, warnings, coachings and reprimands may qualify as forms of discipline if they lay a foundation for future discipline, even if the employer retains the discretion regarding whether to actually take disciplinary action. *Promedica Health Systems*, 343 NLRB at 1351 (explaining that warnings and reprimands qualify as

was anything unusual about Respondent considering the July 8, 2016 disciplinary action notice as part of its review of Shahat's overall performance. Indeed, there is no evidence that Respondent treated Shahat differently than other similarly situated employees, nor is there evidence that Respondent deviated from any established practice regarding when unofficial disciplinary notices may be considered.

In short, I find that: (a) Respondent would have prepared the July 8, 2016 disciplinary action notice even in the absence of Shahat's protected concerted activities (such that, at a minimum, Respondent established an affirmative defense to the allegation that it prepared the discipline for unlawful reasons); and (b) the General Counsel did not show that Respondent improperly considered the July 8, 2016 disciplinary action notice as a factor in Shahat's discharge. I therefore recommend that this allegation in the complaint be dismissed.

B. Did Respondent Violate the Act when it Discharged Yazid on July 22, 2016?

1. Complaint allegation

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by discharging Yazid on or about July 22, 2016, because he engaged in protected concerted activities, and to discourage employees from engaging in those or other protected concerted activities. (GC Exh. 1(g) (pars. 6(b), (d)).)

2. Analysis

In May 2016, Yazid received a Needs Improvement rating on his annual performance evaluation because, among other issues, he was having trouble with multitasking and was making mistakes in his work for the piping group. A few weeks later, on or about June 6, Yazid erroneously asserted that Respondent needed to issue an engineering change notice to change the piping for two projects, at an additional cost of \$47,600. Although Mohajeri ultimately caught the mistake and arranged to cancel the change notice before Respondent incurred any additional expenses, the incident further eroded Respondent's confidence in Yazid's work. Yazid, meanwhile, was unhappy that Mohajeri was demanding that he (Yazid) write a statement about the change notice incident, and therefore emailed Hester in human resources to request a meeting. Yazid, however, did not describe his concerns to Hester in his email, beyond stating that he wanted to drop by to discuss a "situation." The meeting with Hester never occurred, in part because Hester overlooked Yazid's email, and in part because Yazid never followed up with Hester after his initial meeting request. (FOF, Section II(D)(2), (E)(1)–(2).)

On July 14, 2016, Respondent scrapped the idea of placing Yazid on a performance improvement plan, and instead decided to discharge Yazid. Respondent then notified Yazid (on July 22) that he was being discharged. After learning of his discharge, Yazid objected that Hester did not respond to his June 8 request for a meeting. Later in the day, Yazid sent Hester and Shannon an email that expressed concerns about Mohajeri's management style and its effect on employees in the piping

forms of discipline if they are "taken into consideration in determining whether further discipline is warranted").

group, and attached a grievance statement describing similar concerns. Respondent did not investigate Yazid's grievance because it believed Yazid was simply a disgruntled employee trying to get back at Mohajeri. (FOF, Section II(E)(3), (H)–(I).)

Based on the evidentiary record, I find that the General Counsel failed to meet its initial burden of showing that Respondent discharged Yazid because of his protected concerted activities. Specifically, the General Counsel did not establish that Respondent knew about any of Yazid's protected concerted activities before Yazid's discharge, and thus did not establish that Respondent's decision to discharge Yazid was motivated by Yazid's protected concerted activities. I did not find that Yazid engaged in any protected concerted activities on June 8 (the date on which the General Counsel relies). Yazid certainly emailed Hester on June 8 to request a meeting, but only stated that he had a situation that he wanted to discuss, and said nothing about his specific concerns. As for Yazid's discussions with Mohajeri on June 8 in the aftermath of the change notice incident, the evidentiary record is simply not clear enough for me to determine what Yazid said to Mohajeri, or whether Yazid's remarks might have been aimed at improving the working conditions of employees in the piping group (as opposed to being aimed at addressing Yazid's disagreement with Mohajeri about how the change notice was handled). To be sure, Yazid presented more specific concerns about Mohajeri to Respondent on July 22, but that only occurred after Respondent notified Yazid that he was being discharged.

I recognize that on July 14, shortly after Shahat's complaint, Respondent did change its plan to place Yazid on a performance improvement plan. Indeed, I find that in the July 14 meeting, Respondent essentially decided that it should clean house in the piping group by discharging both Shahat and Yazid (as Deen put it regarding Shahat, it was time for Respondent to cut its losses and move on (see FOF, Section II(H)(2)). My finding on that point, however, does not change the outcome for Yazid, because Yazid's performance issues were well documented, and (as noted above) the General Counsel did not prove that Respondent discharged Yazid because of his protected concerted activities. Accordingly, I recommend that this allegation of the complaint be dismissed.

C. Did Respondent Unlawfully Threaten Shahat about Discussing his Complaint about Mohajeri with Other Employees?

1. Complaint allegation

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by, in August 2016, directing employees not to discuss complaints about their supervisor with other employees, and threatening employees with unspecified reprisals if they did so. (GC Exh. 1(g) (par. 5).)

2. Analysis

As indicated above, the General Counsel asserts that in August 2016, Mohajeri warned Shahat that he would be in huge trouble if he discussed his July 11 complaint with other employees. I was not able to credit Shahat's testimony that Mohajeri made that statement, and no other supporting evidence was offered. (FOF, Section II(K)(2).) Given the absence of

reliable evidence about the alleged threat, I recommend that this allegation in the complaint be dismissed.

D. Did Respondent Violate the Act when it Discharged Shahat on October 13, 2016?

1. Complaint allegation

The General Counsel alleges that Respondent violated Section 8(a)(1) of the Act by discharging Shahat on or about October 13, 2016, because he engaged in protected concerted activities, and to discourage employees from engaging in those or other protected concerted activities. (GC Exh. 1(g) (pars. 6(c)–(d)).)

2. Analysis

In May 2016, Shahat received a Meets Expectations rating on his annual performance evaluation. Respondent assigned Shahat that rating despite the fact that Mohajeri periodically had to coach Shahat about time management, improperly shifting work to other employees, and not catching mistakes in work that he reviewed for certain piping group projects. Towards the end of his meeting with Mohajeri about the evaluation, Shahat took the opportunity to tell Mohajeri that, among other things, Mohajeri's management style was creating stress for the piping group employees, and that Mohajeri was treating Shahat and certain other employees differently than the rest of the piping group. (FOF, Section II(D)(1).)

In the morning on July 11, Shahat met with Deen to discuss a dispute that arose on July 7 with Mohajeri about swapping cubicles. In that meeting, Shahat presented Deen with two complaint letters about Mohajeri (one letter for Deen, and one letter for the human resources department). In each of the two letters, Shahat asserted that Mohajeri had subjected him to bullying and abusive behavior, and also had subjected other piping group employees to similar misconduct. Deen walked with Shahat to the human resources department, where Shahat met with Hester for a 30-minute intake interview about the allegations in Shahat's complaint. Hester assured Shahat that the human resources department would investigate his complaint. (FOF, Section II(G).)

As previously noted, on July 14, a group of managers (including Deen and Mohajeri) met to discuss Shahat, Yazid and the "piping group's path forward." The managers essentially decided to clean house in the piping group by discharging both Shahat and Yazid, but decided that they needed to hold off on discharging Shahat because Shahat had just filed his complaint, and it would seem retaliatory to discharge him at that time. (FOF, Section II(H)(2).)

From July to September 2016, Hester investigated Shahat's complaint (with Shannon's guidance and supervision). Hester obtained written responses from Mohajeri and Deen about the allegations in Shahat's complaint. Hester also met with Mohajeri and Deen together to discuss Shahat's complaint (which the managers viewed as petty in nature), and reviewed Respondent's harassment policies and a summary of workplace harassment guidelines that she obtained from a Department of Labor website. Hester did not, however, take any of the following steps in her investigation:

- (a) re-interview Shahat (e.g., to gather more information after

Hester had Mohajeri's and Deen's input and responses);

(b) consider or investigate Yazid's July 22, 2016 email and grievance about Mohajeri (which raised similar concerns about Mohajeri, to the point that Shannon initially thought Yazid's email and grievance came from Shahat); or

(c) contact or interview any of the 8–10 employees in the piping group to see if they might corroborate or rebut the allegations in Shahat's complaint and/or Yazid's email and grievance.

Ultimately, Hester concluded that Mohajeri did not subject Shahat to a hostile working environment, and that their conflict boiled down to a clash of personalities. (FOF, Section II(J), (L); see also FOF, Section II(I)(3).)

With the investigation of Shahat's complaint behind it, Respondent proceeded to discharge Shahat for poor performance. Notably, to the extent that Shahat had performance issues in the summer and fall of 2016, Respondent (through Mohajeri) relied on informal coachings to address those issues (instead of imposing discipline or placing Shahat on a performance improvement plan). Respondent formally discharged Shahat on October 13, 2016. (FOF, Section II(K)(1), (L)–(M).)

I find that the General Counsel met the initial burden of showing that Respondent discharged Shahat because of Shahat's protected concerted activities. First, the General Counsel demonstrated that Shahat engaged in concerted activity by showing that Shahat spoke periodically with some of his coworkers about their view that Mohajeri was mistreating them and creating an abusive and stressful environment in the piping group.

Second, Respondent was aware of Shahat's concerted activity. The evidentiary record shows that: (a) on May 19, Shahat told Mohajeri (at the end of Shahat's performance evaluation) that Mohajeri's management style was creating a stressful environment for the piping group; and (b) on July 11, Shahat submitted complaint letters to Deen and human resources to assert that Mohajeri was subjecting Shahat and other piping group employees to bullying and abusive behavior. In his July 11 complaint, Shahat explicitly advised Respondent that he knew of other employees who were being mistreated by Mohajeri, but were too afraid to come forward because they feared losing their jobs.

Although Respondent maintains that Shahat's complaints were only personal in nature (see R. Posttrial Br. at 27–28, 33–35), I do not find that argument to be persuasive.³² To the contrary, Shahat presented Respondent with a truly group complaint when he raised concerns about how Mohajeri treated certain piping group employees – indeed, Shahat's complaints

³² Respondent also makes much of the fact that Shahat was not willing to not provide the names of employees who shared his concerns or experienced similar mistreatment when Respondent requested that information while investigating Shahat's July 11 complaint. (See R. Posttrial Br. at 24, 26, 33.) I do not find that Shahat was required to disclose the names of like-minded employees or employee witnesses for Shahat's activities to qualify as concerted. It was enough that Shahat came to Respondent to present truly group complaints about Mohajeri's management practices.

to Mohajeri, Deen and human resources were a logical outgrowth of the concerns that Shahat previously discussed with some of his coworkers. See *Lou's Transport*, 361 NLRB at 1447 (finding protected concerted activity where two drivers spoke to each other about working conditions, and drivers complained individually to the employer about the same issues); *Amelio's*, 301 NLRB 182, 182 fn. 4 (1991) (finding that “an individual is acting on the authority of other employees where the evidence supports a finding that the concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group”).³³

Third, Shahat's concerted activities were for the purpose of mutual aid and protection, and thus were protected by the Act. As previously noted, Shahat clearly complained that Mohajeri was engaging in misconduct that affected the working conditions of multiple employees in the piping group. It does not matter that Shahat may also have had a personal stake in addressing his relationship with Mohajeri – the fact remains that Shahat's complaint promised to benefit all of the employees in the piping group. It is well established that proof that an employee action inures to the benefit of all is proof that the action comes within the mutual aid and protection clause of Section 7 of the Act. *Fresh & Easy Neighborhood Market*, 361 NLRB at 155 (collecting cases).

And fourth, Respondent's decision to discharge Shahat was motivated by Shahat's protected, concerted activity. The timing of Respondent's decision to discharge Shahat is suspicious. As of July 8, Respondent planned to simply issue a written warning to Shahat for insubordination associated with the cubicle swap dispute. There was no suggestion that Shahat was in danger of being fired for performance reasons – to the contrary, Respondent was fine with merely coaching Shahat when issues arose with his work. However, after Shahat submitted his complaint on July 11, Respondent scheduled a managers' meeting on July 14 to discuss the path forward for the piping group, and decided that Shahat should be discharged (albeit not while Shahat's complaint was being investigated). That chain of events indicates that it was Shahat's complaint (which Respondent viewed as petty), and not some other reason, that prompted Respondent to decide that Shahat should be discharged. See *Crisdel Group, Inc.*, 360 NLRB 751, 759 (2014) (finding discriminatory animus in part because the timing of the employee's layoff was suspicious).

The conclusion that Respondent was motivated to discharge Shahat because Shahat engaged in protected concerted activity is also supported by the fact that Respondent failed to adequately investigate Shahat's complaint. Respondent performed an intake interview with Shahat on July 11, and essentially made no further effort to explore sources of information that might

³³ I note that Yazid's July 22 email and grievance about Mohajeri also was a logical outgrowth of the concerns that he, Shahat and some other piping group employees discussed. Respondent therefore received two similar complaints from individuals who previously spoke to each other about their concerns about Mohajeri. As noted above, when presented with similar circumstances in *Lou's Transport* and in *Amelio's*, supra, the Board found that the employees engaged in protected concerted activities.

have corroborated Shahat's allegations. Respondent did not attempt to speak to any other employees in the piping group (a group of only 8–10 people), disregarded Yazid's July 22 email and grievance, and accepted Mohajeri's denial of any misconduct at face value. Respondent's limited investigation inevitably led it to conclude that Shahat's complaint could not be substantiated, that Shahat was just being petty in his interactions with Mohajeri, and that Respondent should proceed with discharging Shahat as previously decided.³⁴

I am not persuaded by Respondent's proffered affirmative defense that it, irrespective of Shahat's complaint, Respondent would have discharged Shahat in the fall of 2016 because Shahat performed poorly at work. While it is true that Shahat had some work performance issues after he submitted his complaint, Respondent handled those issues in the same fashion as it did before Shahat complained – that is, Mohajeri coached Shahat about the issues, but took no additional action. The fact that Respondent handled Shahat's work performance in this manner suggests that Respondent was willing to tolerate Shahat's occasional work-related mistakes. The prospect of discharging Shahat for his work performance only arose after Shahat submitted his July 11 complaint about Mohajeri, and I note that significant the shift in how Respondent handled Shahat's work-related mistakes (from coaching to discharge) after Shahat complained about Mohajeri further supports my finding that Respondent discharged Shahat because he engaged in protected concerted activities. *Medic One, Inc.*, 331 NLRB at 475 (noting that tolerance of behavior for which the employee was allegedly fired supports an inference of discriminatory motivation).

In sum, the General Counsel met its burden of showing that Respondent discharged Shahat for discriminatory reasons, and Respondent failed to prove its affirmative defense. I therefore find that Respondent violated Section 8(a)(1) of the Act by discharging Shahat on October 13, 2016 because Shahat engaged in protected concerted activities.

CONCLUSIONS OF LAW

1. By discharging Mohamed Shahat on October 13, 2016, because he engaged in protected concerted activities on or about May 19 and/or July 11, 2016, Respondent violated Section 8(a)(1) of the Act.

2. By committing the unfair labor practices stated in Conclusion of Law 1 above, 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.

³⁴ As the Board has explained, the General Counsel may demonstrate a motive to discriminate by showing that an employer failed to investigate whether an alleged discriminatee engaged in misconduct that led to the disputed disciplinary action (or discharge). See, e.g., *Manor Care Health Services – Easton*, 356 NLRB 202, 204 (2010), enfd., 661 F.3d 1139 (D.C. Cir. 2011); *Medic One, Inc.*, 331 NLRB at 475. That line of cases applies here, because by failing to adequately investigate whether Mohajeri engaged in misconduct towards Shahat, Respondent also failed to adequately investigate whether Shahat was being petty in his July 11 complaint (as Respondent believed, see FOF, Section II(J)), as opposed to bringing forward truthful, group concerns about Mohajeri.

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.

Respondent, having discriminatorily discharged Mohamed Shahat, must offer him reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him. Respondent must also make Shahat whole for any loss of earnings and other benefits.³⁵

The make whole remedy 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). In accordance with *King Soopers, Inc.*, 364 NLRB No. 93 (2016), enfd. in pertinent part 859 F.3d 23 (D.C. Cir. 2017), Respondent shall compensate Shahat for search-for-work and interim employment expenses regardless of whether those expenses exceed his 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*, supra, compounded daily as prescribed in *Kentucky River Medical Center*, supra. Respondent shall also be required to expunge from its files any references to its unlawful decision to discharge Shahat, and within 3 days of thereafter shall notify Shahat that this has been done and that the unlawful decision will not be used against him in any way.

In accordance with *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB 101 (2014), Respondent shall compensate Shahat for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and, in accordance with *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), Respondent shall, within 21 days of the date the amount of backpay is fixed either by agreement or Board order, file with the Regional Director for Region 12 a report allocating backpay to the appropriate calendar year(s). The Regional Director will then assume responsibility for transmitting the report to the Social Security Administration at the appropriate time and in the appropriate manner.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended³⁶

³⁵ As part of its request for make whole relief, the General Counsel asked that I order Respondent to pay consequential damages to reimburse Shahat for any economic harm that he incurred as a result of Respondent's unfair labor practices. As the Board has recognized, a change in Board law would be required for me to award consequential damages. See, e.g., *Guy Brewer 43 Inc.*, 363 NLRB No. 173, slip op. at 2 fn. 2 (2016). Since I must follow existing Board law (which does not authorize me to award consequential damages), I deny the General Counsel's request for consequential damages.

³⁶ 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.

ORDER

Respondent, Mitsubishi Hitachi Power Systems Americas, Inc., Lake Mary, Florida, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging employees because they engage in protected concerted activities.

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

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

(a) Within 14 days from the date of the Board's Order, offer reinstatement to Mohamed Shahat to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him.

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

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

(d) Compensate Mohamed Shahat for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

(e) Within 14 days after service by the Region, post at its facility in Lake Mary, Florida, copies of the attached notice marked "Appendix" in both English and Japanese.³⁷ Copies of the notice, on forms provided by the Regional Director for Region 12, after being signed by Respondent's authorized representative, shall be posted by 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 Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, Respondent has gone out of business or closed the facilities involved in these proceedings, Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by Re-

spondent at any time since October 13, 2016.

(f) 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 Respondent has taken to comply.

Dated, Washington, D.C. February 1, 2018

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 discharge employees because they engage in protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL offer reinstatement to Mohamed Shahat to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges he would have enjoyed absent the discrimination against him.

WE WILL make Mohamed Shahat whole for any loss of earnings and other benefits suffered as a result of the unlawful October 13, 2016 discharge against him, less any net interim earnings, plus interest, plus reasonable search-for-work and interim employment expenses.

WE WILL, within 14 days from the date of the judge's Order, remove from our files any references to the unlawful October 13, 2016 discharge against Mohamed Shahat and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the unlawful discharge will not be used against him in any way.

WE WILL compensate Mohamed Shahat for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 12, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar year(s).

MITSUBISHI HITACHI POWER SYSTEMS
AMERICAS, INC.

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/12-CA-188952 or by using the QR code

³⁷ 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."

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.

