

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**CSC HOLDINGS, LLC**

**and**

**COMMUNICATIONS WORKERS OF  
AMERICA, AFL-CIO**

**Case 29-CA-190108**

**CSC HOLDINGS, LLC'S BRIEF IN SUPPORT OF EXCEPTIONS TO  
THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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CSC Holdings, LLC (“Respondent” or the “Company”) submits this brief pursuant to Section 102.46 of the Rules and Regulations of the National Labor Relations Board in support of its exceptions to Administrative Law Judge Kenneth W. Chu’s April 27, 2018 decision in this matter.<sup>1</sup> Through its Exceptions and Brief in Support of Exceptions, the Company respectfully submits that the ALJ’s determinations are based on flawed factual findings and legal conclusions and should not be adopted.

### **INTRODUCTION**

Michael Wills (“Wills”) was terminated in July 2016 as a result of an extraordinarily long and well-documented history of insubordination and blatant disregard for Company policies. The multitude of infractions that resulted in his discipline have never been disputed, not even by the Charging Party, in the proceedings below. Nonetheless, the ALJ concluded that the Company violated Section 8(a)(3) of the Act because Wills engaged in isolated incidents of protected activity prior to his termination. The ALJ’s decision is fatally flawed because there is not a scintilla of evidence that his protected activity was a motivating factor in his termination decision, or that the Company otherwise harbored an anti-union animus. To the contrary, all of the evidence points to one conclusion: the Vice President who made the decision to terminate Wills’ employment had no knowledge whatsoever of Wills’ purported protected activity. Indeed, the undisputed testimony was that Wills’ lengthy disciplinary record, coupled with the fact that he was on Final Warning at the time of his most recent act of insubordination, were the only things that factored into the decision to terminate his employment. Accordingly, the ALJ erred in finding that the Charging Party established a prima facie case of discrimination.

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<sup>1</sup> Hereafter, the Administrative Law Judge’s Decision will be referred to as “ALJD” or “Decision” and the Administrative Law Judge will be referred to as the “ALJ.”

The ALJ's decision is infected with numerous other errors. For example, the ALJ shifted the burden to the Company to articulate legitimate, nondiscriminatory reasons for Wills' termination without finding in the first instance that the termination was motivated by Wills' protected activity. That is contrary to well-settled Board law. Then, after the Company recited all of its legitimate reasons for Wills' termination, the ALJ simply concluded that those reasons were without merit because the discipline imposed was, in his view, too harsh a punishment. In doing so, he impermissibly substituted his own business judgment for that of the Company's, which also is flatly contrary to Board law. As demonstrated below, the ALJ's findings that the Company's articulated reasons for termination were pretextual all suffer from egregious errors of fact and law. There is simply no evidence that Wills' protected activity was a factor in the decision to terminate his employment, much less a motivating one.

At bottom, the ALJ's decision gives license to employees to engage in all sorts of misconduct, so long as they also engage in protected activity at some point during their employment. But absent proof that protected activity *caused* the adverse employment action, the NLRA does not give employees immunity from discipline for their misconduct. But that is exactly what the ALJ did below, because there is no proof that Wills' termination was due to anything other than his rich history of job-related misconduct. For the reasons set forth in greater detail below, the Board should decline to adopt the ALJ's Decision and Order.

In any event, the Board should vacate the Decision and Order on the independent ground that the ALJ is an "Officer of the United States" who was not appointed in accordance with the Appointments Clause of the United States Constitution – a result compelled by the Supreme Court's decision on June 21, 2018 in *Lucia v. Sec. & Exch. Comm'n*, No. 17-130, 2018 WL 30057893, at \*5 (U.S. June 21, 2018).

## STATEMENT OF THE CASE

### **I. The Business of CSC Holdings, LLC**

CSC Holdings, LLC,<sup>2</sup> provides cable television, Internet, and telephone services to residential and business customers in the New York metropolitan region. (Tr. 291.)

The Company employs Direct Sales Residential Account Executives “RAE” (commonly referred to as Direct Sales Representatives) who are responsible for door-to-door sales of the Company’s services. (Tr. 50, 51-53, 291, 437.) At all times relevant hereto, Wills was employed as an RAE. (Tr. 50.) RAEs travel to and from customers in their assigned geographic area, and also work at the Company office in which they are based. (Tr. 53-54.) The Company has offices in Jericho, New York and Hauppauge, New York. (Tr. 50.) Since 2014, Wills was based out of the Company’s Hauppauge office. (Tr. 50-51.)

In addition to selling in the field, RAEs attend “boost meetings” at their home office at the start of their shift. (Tr. 54.) During the boost meetings, management reviews sales figures from the prior day, reviews sales objectives, and attempts to motivate the RAEs to hit sales goals. (Tr. 406, 438, 734-35.) The Company encourages RAEs to share their ideas and concerns during boost meetings. (Tr. 407, 438, 734-35.) Following boost meetings, RAEs go to their assigned geographic area visiting customers. (Tr. 54.)

At times, the Company invites its business partners, such as representatives from premium cable channels (*e.g.*, HBO, Showtime, Starz) to present at boost meetings. (Tr. 788, 819.) These presentations are designed to educate and train the RAEs about the cable services they are required to sell and to assist the sales representatives in providing better service to customers. (Tr. 788, 368, 595-96.)

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<sup>2</sup> CSC Holdings, LLC is owned and operated by Altice USA, Inc. (formerly d/b/a Cablevision).

In June 2016, Daniel Ferrara<sup>3</sup> assumed responsibility for the direct sales division as the Vice President of Outbound Marketing and Direct Sales.<sup>4</sup> (Tr. 65, 785.) Since July 2016, six Manager-Residential Direct Sales (known as Direct Sales Managers) reported to Ferrara. (Tr. 786.) Carmine Pero was the Direct Sales Manager at the Hauppauge office and oversaw the sales team based in that office. (Tr. 732.) The Supervisors of Residential Direct Sales (known as Direct Supervisors) reported to Pero. (Tr. 389.) The Direct Supervisors of the Hauppauge office were Eric Zimmermann, Steven Spalletta, and Thomas Farina. (Tr. 64, 573.) Each supervisor oversaw a team of RAEs, and assisted with general co-management of the sales representatives of the office. (Tr. 64, 573.)

The sales teams were supported by Human Resources. Paul Hilber was the Senior Vice President Human Resources/Senior Business Partner. (Tr. 389.) Erica Simon was a Manager-Human Resources Generalist. (Tr. 389, 659.) Simon reported to Human Resources Director Jennifer Condoulis. (Tr. 659.) Judy Courtney assisted the sales teams as a human resources business partner. (Tr. 682.)

## **II. Wills Had A Long And Well-Documented History Of Insubordination During His Brief Tenure At The Company.**

Throughout his employment at the Company, Wills repeatedly disregarded Company policies and engaged in a variety of insubordinate behavior.

### **A. Wills Engaged In A Multitude Of Insubordinate And Disrespectful Conduct That Resulted In A Formal Written Warning In 2013.**

Beginning in 2013, Wills sent disrespectful emails to management in violation of the Company's Standards, Practices and Procedures, which required RAEs to be courteous and respectful to all persons the RAE contacted in performing their job. (RX 4.) On July 16, 2013,

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<sup>3</sup> The ALJ misspelled Ferrara as "Ferrera" throughout his decision. (Tr. 784.)

<sup>4</sup> Prior to June 2016, Ferrara oversaw only the outbound marketing division. (Tr. 785.)

management coached Wills about his disrespectful email interactions, asking that he continue to share his opinions and feedback, but that he do so in a manner that was respectful of others. (RX 4.) Despite being coached on his behavior, on September 19, 2013, Wills wrote an email to Pero criticizing and insulting another member of management, questioning “how many people has he scraped off the bottom of his shoe to make himself look better”. (RX 4.) Wills also called his supervisor a “rat”. (Id.)

Wills also disregarded the Company’s Standards, Practices and Procedures requiring employees to be accessible during normal business hours and respond to management within thirty minutes. (RX 4.) During the week of September 21, 2013, while Wills’ immediate supervisor was out, Wills failed to return phone calls or text messages from Hugh Johnson or Christopher Brooker, and he failed to report his daily sales numbers to the management team. (RX 4.)

After Wills had multiple coaching sessions reviewing his violations of these Company policies, and he subsequently failed to comply, he received a Formal Written Reprimand on September 25, 2013. (RX 4.) Although Wills did not receive formal discipline for each infraction that culminated in the Formal Written Reprimand, the warning he received recited all of Wills’ insubordinate actions from the prior months. (RX 4.)

B. Wills Received A Final Warning In 2014 For His Failure To Follow The Company’s Attendance Policy.

On October 22, 2014, Wills took a personal day without requesting time off in advance or informing any of his supervisors, despite being reminded of the Company’s attendance policy less than two weeks earlier. (RX 5.) Wills received a Final Written Warning at that time as a result of his no call/no show, which violated the Company’s attendance policy. (RX 5.)

Wills did not contest either of the corrective actions at the time he received them and they remained part of his discipline record. (Tr. 299-301, 819.) (ALJD 16.)<sup>5</sup>

C. Wills Continued To Disregard Company Policies And Was Insubordinate To His Supervisors, Resulting In A Documented Verbal Warning In November 2015.

Wills' performance did not improve. In particular, he repeatedly ignored Company directives with respect to Company-issued equipment. Wills (like all RAEs) was issued a Company iPad, and the Company required all RAEs to activate the "Find My Friends" Application ("Find Friends App." or "Application") on the device while out in the field. (RX 2 at 2.) Wills ignored this requirement on multiple occasions.

The Company's iPad Privacy Policy states: "Direct Sales RAE understands that the Company will expect all RAE's to have the Find[] Friend App installed on their iPad. The Find My Friend App must be active and connected to a network ... at all times during scheduled working hours...". (Tr. 294-95.) (RX 2 at 2.) The Application enabled management to confirm the location where the RAEs were working. (Tr. 576.) (RX 2 at 2.) Wills received and acknowledged the Company's iPad Privacy Policy. (Tr. 295.)

Wills intentionally disobeyed this policy by repeatedly disabling the Application on his iPad and disregarding verbal warnings from his supervisor, Zimmerman. (Tr. 576-92.)

In May 2015, Zimmerman could not locate Wills and instructed him to activate the Application. (Tr. 577.) Wills refused to comply. He unfriended the management team each night, requiring the management team to reconfigure the Application again the following morning. (Tr. 579.) On May 27, 2015, Zimmerman emailed Pero documenting that, despite a prior discussion

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<sup>5</sup> The Company has a policy of reviewing an employee's entire employment history in all employment decisions, especially when the employee has a pattern of similar disciplinary issues. (Tr. 819.) Although a warning can become inactive after twelve months, it will not be removed from his or her personnel file and can be reviewed as part of an employee's overall performance record. (Tr. 818.) (ALJD 16.)

with Wills about his compliance with the iPad policy, Wills intentionally disregarded the policy by “unfriending” management on the Application every night in order to make it more difficult for management to locate his device. (Tr. 577-80.) (RX. 17.) Zimmerman sought to clarify the Company’s iPad Privacy Policy for Wills, noting the hassle it was creating for management to reactive the Application every morning by re-friending him. (Tr. 576-80.) (RX. 17.) (ALJD 4.) Zimmerman subsequently confirmed with Wills that his unfriending of management violated the policy. (Tr. 580.) *See also* (Tr. 580-82.) (RX 18.) (management reminded Wills to activate his location services and accept friend requests from supervisors on September 12, 2015 and September 17, 2015); (Tr. 584.) (RX 19.) (Wills deactivated the Application despite the warnings he received to activate the Application during working hours).

When supervisors could not locate Wills in the field, Zimmermann checked whether there was an error with the supervisors’ Application, but each time Zimmerman confirmed that Wills was intentionally disabling the Application on his iPad. (Tr. 581-82, 584.)

The Company reinforced to Wills that he was required to follow the Policy, and addressed his refusal to do so in the performance appraisal he received in October 2015. (ALJD 4.) (GCX. 2.) Wills did not contradict or otherwise challenge the contents of his appraisal. (ALJD 4.) (Tr. 315-316.)

After Wills continued to disable the Find Friends Application and it became evident he had no desire to follow the Policy, despite the Company asking him to correct the issue through multiple coaching sessions, Wills received a Documented Verbal Warning on November 9, 2015. (GCX. 6.) (ALJD 6, 8.) Wills did not dispute the basis for his Documented Verbal Warning. (Tr. 302.)

When Wills received the Documented Verbal Warning, Human Resources Manager Erica Simon reviewed the Find Friends Application requirements with him again and Wills agreed that it was his responsibility to turn on the Application every day. (GCX. 6.) The Documented Verbal Coaching listed each time Wills had violated the Policy and the Company's efforts to get him to comply with it. (*Id.*)

Yet, in February 2016, Wills was called back to the office because he deleted one of his supervisors from the Find Friends Application in violation of the Policy. (RX 21.)

D. Wills Received Another Final Warning In February 2016 After He Continued To Be Insubordinate And Engaged In At Least Ten Instances of Misconduct.

Wills continued to disregard basic work rules and continued to treat his supervisors with disrespect. As a result of his repeated policy violations and other misconduct, Wills was again placed on a Final Warning on February 22, 2016. (GCX 5.) Wills did not dispute the basis for his Final Warning. (Tr. 301.) (ALJD 6-7.)

1. *Wills Was Insubordinate To Manager Carmine Pero.*

On December 16, 2015, management asked Wills to present a competitor's bill in order to substantiate a discounted price he gave a customer before service was installed. (Tr. 734.) (GCX 5.) In an email to the management team, Wills was defiant towards Direct Sales Manager Carmine Pero, stating: "Carmine....you have got to be kidding me?" (Tr. 734.) (GCX 5.)

Later, on December 21, 2015, during a boost meeting led by Pero, Wills surfed a non-work related website rather paying attention to the meeting. (Tr. 734, 762.) (GCX 5.) Pero instructed Wills to refrain from surfing the Internet during boost meetings, and Wills acknowledged he should not have been doing so on his iPad. (Tr. 360, 734, 762.) (RX 14; GCX 5.)

2. *Wills Repeatedly Failed To Adhere To The Company Policy To Obtain Social Security Numbers That Are Required For Every Transaction.*

RAEs are required to obtain a customer's Social Security number for every transaction in order to ensure the integrity of each sale submitted, unless the REA obtains pre-approval from their supervisor or manager. A supervisor or manager must pre-approve the customer providing a driver's license, passport number or Tax ID in lieu of a Social Security number. (RX 1 at 8.) This policy is reflected in the Direct Sales Standards, Policies and Procedures. (Tr. 294.) (RX 1 at 8.) Wills acknowledged that he understood these policies and procedures. (Tr. 347.)

Yet, on at least 13 separate occasions, Wills failed to obtain Social Security numbers from customers without even seeking approval from his supervisors, much less obtaining approval.

More specifically, on January 7, 2016, Wills placed a sales order with no customer Social Security number. (GCX 5.) Supervisor Thomas Farina met with Wills and reviewed the policy, which Wills agreed to follow in the future. (GCX 5.) However, Wills continued to neglect this most basic requirement.

On February 10, 2016, 9 of 11 transactions Wills submitted were missing Social Security numbers without Wills obtaining pre-approval from any supervisor. (GCX 5.) In fact, in a testament to what happens when Wills' derelictions began to stack, the Company attempted to contact Wills on that date to discuss this deficiency, but they could not locate him because he had again disabled his Find Friends Application. When they finally were able to locate Wills, the Company again reviewed the policy with him. (GCX 5.) He stated he did not feel comfortable asking customers for their Social Security numbers, but the Company instructed him to follow the policy, and he agreed to do so. (GCX 5.) Just hours after he agreed to follow the policy, Wills violated it yet again on the evening of February 10, 2016 when he submitted another order without the customer's Social Security number. (GCX 5.)

Wills committed additional violations of the Social Security number policy on February 12, 13, 19 and 20, 2016. (GCX 5.) Each time management spoke to Wills, he stated he would follow the policy by obtaining Social Security numbers, but then failed to do so. (GCX 5.)

3. *Wills Interrupted A Boost Meeting To Call His Supervisors Incompetent.*

Wills continued to be disrespectful and insubordinate to his managers. For example, during a boost meeting on February 17, 2016, Manager Carmine Pero reminded the employees to be mindful of acting professional in public spaces while wearing company logos. (Tr. 465-66.) Wills interrupted the meeting because he disagreed with Pero, then he stated: “I have to boost up Robin Lynch and other RAE’s because of the incompetence of the [s]upervisors.” (Tr. 735.) (GCX 5.) Management considered Wills’ calling supervisors “incompetent” during an open meeting with the sales team to be insubordination. (Tr. 735.)

The next day, on February 18, 2016, Human Resources Manager Simon and Sales Manager Carmine Pero met with Wills to address his repeated failure to follow work rules, and several instances in which his “tone and treatment of others has been addressed as it was considered inappropriate and disrespectful and would no longer be tolerated.” (GCX 5.) (ALJD 7.) Simon was clear that the Company was concerned with Wills’ disrespectful and insubordinate behavior at the boost meeting. (Tr. 98, 735.)

Consequently, Wills received a Final Warning on February 22, 2016. (Tr. 735.) (GCX 5.) On that date, Sales Manager Carmine Pero met with Wills. (Tr. 736.) (GCX 5.) Pero explained to Wills he was receiving the Final Warning because of his pattern of insubordinate, disrespectful behavior, and his failure to adhere to the Company’s policies without showing any signs of improvement. (Tr. 736.) Notably, Wills did not contest the issuance of the Final Warning or any of the instances of misconduct cited therein. (Tr. 302.)

E. While On His Second Final Warning, Wills Continued To Be Insubordinate In Text Messages And Emails, And Disregarded Additional Company Policies On at Least Four Occasions.

While he was on Final Warning, the Company afforded Wills ample time to improve his performance and behavior. Between March and July 2016, the Company counseled Wills on a number of occasions for his continued failure to follow Company policies and procedures.

On March 17, 2016, Wills failed to follow the Company's protocol with regard to contacting a supervisor outside his home office.<sup>6</sup> (Tr. 736-37.) (RX. 32.) (ALJD 9.) RAEs are required to call all supervisors in their home office before reaching out to supervisors in a different office. In this case, Wills called only one of the Hauppauge supervisors, Steven Spalletta, regarding an approval for an outlet placement. (GCX 18 at 7.) When he could not reach Spalletta, instead of attempting to call another Hauppauge supervisor, he immediately called the manager of the Jericho Direct Sales office, Matthew Haggerty. (GCX 18 at 7.) The Company did not discipline him for that infraction, but instead, Supervisor Tom Farina met with Wills and reviewed the proper procedure with him. (Tr. 29-30, 244-56, 661, 719-20.) (GCX. 18 at 7.) (ALJD 9.)

In April 2016, Wills violated Company policy by failing to contact a supervisor when his iPad died. The Company did not take further disciplinary action against him for that infraction. (Tr. 262, 380.) (ALJD 10.)

On May 3, 2016, on the heels of having been counseled, Wills again failed to follow the Company's protocol for contacting supervisors outside of his office. (Tr. 737-38.) Direct Sales Manager Matthew Haggerty received a call from Wills asking for approval to waive the

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<sup>6</sup> Sales representatives occasionally need to contact supervisors from the field for waivers of fees, credits, or other deviations from standard policy. (Tr. 717-18.) Under the Company's protocols, RAEs from the Hauppauge office must first contact any of the Direct Supervisors from that office, and next contact the Direct Manager before contacting managers at the Jericho office. (See Tr. 660, 718-19.)

Company's requirement for an advance payment. Haggerty asked if Wills had first tried contacting supervisors from his home office (Hauppauge), and Wills told Haggerty that he had "called everybody." (Tr. 738, RX 32.) Then, Haggerty called and emailed Pero regarding his call with Wills. (Tr. 737-38; RX 32.) Pero asked whether any of the Hauppauge supervisors had in fact received a call from Wills before he contacted Haggerty. (Tr. 738.) Pero asked the Hauppauge supervisors to check their phones for any missed calls from Wills, but none had received a call from him. (Tr. 738.)

For a second time, Simon and Pero spoke to Wills about following the protocol to contact supervisors in his home office, and confronted Wills regarding his misrepresentation to Haggerty about calling "everybody." (RX 24, 664.) Simon and Pero reminded Wills he could not go directly to management from the Jericho sales office if he needed to reach a supervisor. (Tr. 662.) Wills confessed he was not truthful with Haggerty because he did not try to contact everyone in the Hauppauge office before calling him. (Tr. 664, 738.) (RX 24.)

Wills' insubordination persisted. On May 7, 2016, Wills was disrespectful to supervisor Zimmerman. That day, Wills misspelled the name of Supervisor Spalletta on an Order Entry form. (Tr. 664, 738.) (RX 12.) Zimmermann corrected Wills' misspelling, and Wills responded to Zimmermann's correction in an angry manner, accusing Zimmermann of insulting him. (Tr. 593-95) (RX 12.)<sup>7</sup> Wills was confrontational about the spelling correction, questioning Zimmerman,

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<sup>7</sup> Wills had previously overreacted to a straightforward message from Zimmermann. In October 2015, Zimmermann emailed Wills asking that he turn on his Find Friends App., which Wills had routinely failed to do. Wills responded to Zimmermann with an angry text stating: "You and I need to sit down and have a serious talk. I totally resent the fact that you sent this type of email when my [a]pp was on a few minutes after I left the office. Just so you know, I have a screen shot proving it. Should I start airing out your many mistakes, unprofessional actions and not following company policies to Erica [Simon] and Carmine [Pero] as well?" (RX 7.) Wills testified that he believed his response was appropriate, even though he understood that the manager was trying to enforce a Company policy. (Tr. 320.)

“did you fully understand who I was referring to or is there someone else in the office you are confusing this name with?” (RX 12.)

In June 2016, Wills claimed that he was “harassed” because Supervisor Farina contacted him during his off duty hours. (Tr. 739-742.) (RX. 25.) (ALJD 10.) On June 6, 2016, Supervisor Farina called Wills on his day off because there was an issue with one of his sales that required Wills’ attention. (Tr. 740.) It is routine for managers to contact sales representatives about issues regarding their sales because they receive a commission based on completed installations. (Tr. 748.) Wills did not answer Farina’s call, but instead replied with the following text message to Supervisor Farina:

“Tom...please tell me what I have to do OR what needs to be said for you to RESPECT me and my wishes and NOT CALL MY PHONE OR DISTURB ME with company business on my day off or off duty hours? Are you telling me that your [sic] calling me today with this business is SO URGENT that it could not wait until tomorrow afternoon? How many times do I have to ask you the same thing not to do? If you absolutely need to put this order in no schedule today for an install on Thursday, just go ahead and do it. Frankly speaking, enough is enough!!!!!!”

(RX 9.)

Farina then responded, “Was instructed to call you from [c]armine,” and Wills replied: “Forgive me for being straight forward and to the point but I honestly do NOT believe you.” (RX 10.)

Farina forwarded Wills’ messages to Pero. (RX 25.) Pero forwarded the messages to Human Resources Manager Erica Simon and Dan Ferrara. (Tr. 667, 741.) (RX 25.) Pero found Wills’ messages to be disrespectful and insubordinate because of the tone, and aggressive use of capitalization and exclamation points, especially the fact that Wills accused his supervisor of being a liar. (Tr. 741-42.)

Wills also wrote to Simon regarding Supervisor Farina contacting him on his day off, stating:

Let me be extremely clear. I DO NOT WISH TO BE DISTURBED, TEXTED, CALLED, ADVISED, WARNED OR IN ANY WAY CONTACTED ON MY DAYS OFF, VACATION OR OFF DUTY HOURS...

It's disrespectful and now it's insulting! I need this to stop IMMEDIATELY!!!!!!!

(GCX 13.)

Wills received an out of office message from Simon so he forwarded his email to another Human Resources Manager, Karen O'Neill. (Tr. 666.)

On June 16, 2016, Simon met with Wills and explained to him that if someone from the management team reaches out to him on his days off, he can choose not to answer his phone but the response he sent to his supervisor was completely inappropriate and would not be tolerated. (Tr. 286, 676.) (RX 27) At that meeting, Simon reminded Wills that this was the fourth time they were having the same conversation about the inappropriate way in which Wills communicates with people, including supervisors. (RX 27.) Simon also reminded Wills that he already was on a Final Warning for, among other things, inappropriate and insubordinate behavior.

F. After Four Months On Final Warning And Extensive Coaching For His On-Going Misconduct and Insubordination, Wills Engaged In Additional Misconduct During A Meeting Led By One Of The Company's Business Partners, Which Resulted In Wills' Termination.

1. *Wills Defied Zimmerman's Instructions During A Meeting Led By Starz.*

One week after Simon reminded Wills about his interactions with supervisors while he was on a Final Warning, Wills was again insubordinate to Supervisor Zimmerman at a Starz presentation on June 23, 2016.

On that date, a representative from Starz, a premium cable channel, gave a presentation in the Hauppauge office attended by approximately 40 sales representatives and managers. (Tr. 596-598, 742.) (ALJD 16.) The presentation was intended to educate the sales force on Starz's product offerings and content for improving customer service and potentially increasing subscriptions for the channel. (Tr. 368, 595-96, 788.) The meeting began at 12:30 p.m. at the Hauppauge sales "bullpen". (Tr. 596-598, 742.) (RX 33.) Management started the meeting by instructing employees to put their phones down and pay attention, and then Pero introduced the Starz representative. (Tr. 605.) Supervisor Zimmermann stood at the doorway that separates the bullpen from an adjoining room, and Wills sat on the third chair from the doorway near Zimmermann. (Tr. 598, 600.)

Zimmermann observed Wills looking down, apparently watching a video on his phone. (Tr. 600.) Zimmermann could not see what Wills was watching, but Wills was holding the sides of the phone, not typing, and Zimmermann could see lights and heard some low audio emanating from Wills' phone. (Tr. 608.)

Zimmermann then leaned over to get Wills' attention, stating "Mike." (Tr. 600.) Wills looked up and Zimmermann told him, "Can you please pay attention and put your phone down?" (Tr. 600.)<sup>8</sup> Wills looked back down at his phone. (Tr. 600.)

Zimmerman again asked Wills to put his phone down and pay attention during the meeting. (Tr. 231, 600-601.) (ALJD 16:40.) Wills responded that he was paying attention, and Zimmerman repeated, "No, you're not." (ALJD 16: 41.) Wills looked back up at Zimmermann and responded,

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<sup>8</sup> Wills admitted he was on his phone and heard Zimmerman say something, but he could not recall what Zimmerman said. (Tr. 113) (ALJD 16: 33-34.)

“I saw you on your phone.” (Tr. 601.) Zimmermann whispered back, “That’s irrelevant. This meeting is for you. So, I need you to put your phone down and please pay attention.” (Tr. 601.)

Wills put his phone down for about 30 seconds, but then lifted it up to record a video of Zimmerman standing in the doorway. (Tr. 534, 601, 632.)

Zimmermann was concerned with Wills’ demeanor and behavior so he attempted to diffuse the situation by asking if he should pose. (Tr. 602.) Wills put his phone down, but then menacingly stared at Zimmermann for about twenty seconds. (Tr. 602, 604.) Zimmerman felt threatened and looked away.<sup>9</sup> (Tr. 602.) In order to avoid any further conflict and disruption, Zimmermann left the room and went to find Pero to tell him what had just happened. (Tr. 607.)

Approximately two minutes later, Wills used his iPad to take a picture of a sales representative on his computer. (Tr. 201-02.) (ALJD 17.) Rather than pay attention to the presentation, Wills continued to observe other representatives who he claimed were also on their computers (Tr. 195-96, 201-02, 204-05), but at least one photograph, taken by Wills, shows the representative actually watching the presenter. (Tr. 378.) (ALJD 17.) (GCX. 10; RX. 15.)

Management similarly instructed other representatives they saw on their phones to pay attention and put down their phones. For example, Supervisor Farina instructed Sales Representative Chris Hart to stop using his phone, and Hart complied. (Tr. 429.) (ALJD 18: 2-4.) Sales Representative Mario Madrigales also understood he was expected to turn off his phone and pay attention. (Tr. 431-32.) (ALJD 18: 5-6; 31: 25, 29-30.)

Indeed, Wills admitted that it was part of his job duties to pay attention during presentations by vendors, and, that he had been previously coached about paying attention during meetings. (Tr. 60, 147, 357.)

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<sup>9</sup> Zimmerman was concerned because he thought Wills could become violent. (Tr. 603, 615, 732-33.)

2. *Zimmerman Immediately Reported Wills' Insubordination To Higher Management.*

When Zimmermann left the meeting, he was visibly upset. (Tr. 743.) Zimmerman said he felt threatened by Wills and that he wanted to call law enforcement. (Tr. 743.) Pero tried to calm Zimmermann down and told him there was no need to involve the police, but that Zimmermann could do so if he wished. (Tr. 744.) Pero asked Zimmerman to memorialize the incident in an email so that Pero could raise it with the appropriate people within the Company. (Tr. 607, 743.)

Zimmermann emailed Pero describing Wills' insubordinate and threatening demeanor in the Starz meeting. (RX 23.) Shortly after Zimmermann spoke to Pero, he called the Suffolk County Police Department and a police officer reported to the Hauppauge office. (Tr. 608-09.) Given the nature of Zimmerman's concern, Pero forwarded Zimmerman's message to Human Resources Director Jennifer Condoulis, and copied Simon and Vice President Dan Ferrara. (RX 28.) Pero added that Zimmermann felt "threatened by Mike and [his] safety is in jeopardy." (RX. 28.)

Pero also discussed the incident with Ferrara, and Ferrara decided to immediately investigate the matter. (Tr. 787-88.) (RX 28.)

3. *Management Conducted A Thorough Investigation Of Wills' Misconduct At The Starz Meeting.*

Ferrara investigated Wills' misconduct at the Starz meeting; Human Resources Generalist Erica Simon and Pero assisted in the investigation. (Tr. 788.) (RX 28.) Ferrara began by reviewing Wills' disciplinary file. (Tr. 791-92.) Next, Ferrara reviewed Wills' "Boss timeline," a system that the Company uses to track concerns, issues, corrective actions and coachings given to an employee. (Tr. 468, 792-93.) (GCX 18 at 1-8.) Ferrara, who had only assumed responsibility for Direct Sales a few weeks earlier in June 2016, was shocked Wills was still employed given his extremely poor disciplinary record. (Tr. 794.) Ferrara's initial impression was that the situation

in the Starz meeting alone, putting aside Wills' entire disciplinary record, was potentially very serious. (Tr. 794.)

Simon and Pero interviewed Sales Representative Adam Morris. (Tr. 678, 744.) Morris was seated in a chair near Wills and near where Zimmermann was standing during the Starz presentation. (Tr. 678, 744.) Morris stated: "Mike was on the phone and appeared to be 'doing everything but listening.'" (Tr. 745.) (RX 29.) Morris saw Zimmermann ask Wills to pay attention twice and instead of following the instruction, Wills accused Zimmermann of being on his phone. (Tr. 745.) (RX 29.) Morris stated that Wills was "belligerent." (RX 29.)

Following the interview of Morris, Simon emailed Ferrara, noting that Morris corroborated that Zimmermann did in fact ask Wills to pay attention and put his phone down more than once. (Tr. 799)

Ferrara and Simon also interviewed Zimmermann. (Tr. 680, 611.) Zimmermann said he asked Wills to put his phone down and pay attention twice, but Wills ignored him. (Tr. 790.) Zimmerman stated that Wills stared at him, lifted his phone up and recorded him, and then continued staring at him instead of paying attention to the presenter. (Tr. 790.) Zimmermann stated that he felt intimidated by Wills during the meeting. (Tr. 680, 790.)

Due to the threatening nature of Wills' conduct, Ferrara discussed with Simon the possibility of immediately suspending Wills while the investigation was pending. (Tr. 688-89, 791.) Suspensions are not part of the Company's progressive discipline policy but can be utilized in certain situations – e.g., if an employee poses a threat to employees or customers. (Tr. 689, 690.) Ferrara was concerned that Wills could pose a threat to customers' safety. (Tr. 688-89, 791.) Simon forwarded Zimmerman's email to Human Resources representative Judy Courtney and added that Ferrara had considered suspension "*until further investigation.*" (Tr. 688-89, 791.)

(GCX 22.) (emphasis added) Based on the limited information Courtney received, she replied that she did not agree with a suspension at the time as it did not appear Wills posed an immediate threat. (Tr. 688-89, 791.) Ferrara proceeded with the investigation.

The following day, on June 24, 2016, Simon and Ferrara interviewed Wills. (Tr. 680, 795.) At first, Wills acted confused about the reason for the interview, but then asked if Ferrara was referring to the incident with Zimmermann. (Tr. 795.) Ferrara asked Wills why he had not followed the instruction from his supervisor to put his cell phone down in the middle of a meeting. (Tr. 795.) First, Wills said he did not hear what Zimmermann had told him, then he said he heard Zimmermann ask him to pay attention. (Tr. 795-96.) Wills said he heard Zimmermann ask him to pay attention again and “common sense” told him that meant he should put his phone down so he did and “that was the end of it.” (Tr. 796.)

Wills told Ferrara that he made a recording of Zimmermann and played the recording for them. (Tr. 681, 796-97.) Though Wills initially denied that Zimmerman instructed him to put down his phone, Wills admitted that Zimmerman did in fact ask him to put down his phone when he explained that he created the video because he wanted to raise a complaint that “ten seconds after Eric [Zimmerman] told [him] *to get off the phone*, [Eric Zimmerman] was on the phone.” (Tr. 231.) (emphasis added.) The video prompted Ferrara to ask, “How could you be taking a video if you put your phone away?” (Tr. 681, 796-97.) When Ferrara pointed out this inconsistency, Wills became visibly frustrated. (Tr. 681, 797-98.) Ferrara ended the meeting reminding Wills that he was on a Final Warning and told him they would get back to him after reviewing the incident further. (Tr. 682, 798.)

4. *Vice President Daniel Ferrara Alone Decided To Discharge Wills As A Result Of His Misconduct At The Starz Meeting And His Extensive History Of Disciplinary Problems.*

Ferrara made the ultimate decision to terminate Wills' employment. (Tr. 687, 746, 787.) Ferrara believed termination was necessary as Wills was already on a Final Warning and there was no further corrective action to be taken other than termination. (Tr. 800.) Given that Ferrara had assumed responsibility for Direct Sales just a few weeks earlier, he asked Simon and Pero whether they agreed with his decision to terminate Wills. (Tr. 746, 801.) Pero and Simon agreed with Ferrara's decision. (Tr. 684, 746.) Ferrara then decided to discharge Wills because of his pattern of insubordination, his lengthy disciplinary record, inability to correct or improve his performance, and the incident with Zimmerman during the Starz presentation. (Tr. 800.)

On July 6, 2016, Ferrara and Simon called Wills to inform him of his termination. (Tr. 802-03.) Ferrara explained to Wills that the Company reviewed the incident during the Starz presentation. Because the Company found he was insubordinate again while on his Final Warning, the Company terminated his employment. (Tr. 235, 803.)

5. *Wills' Purported Protected Activity Was Not A Factor In His Discharge.*

At the conclusion of the investigation, Ferrara made the decision to discharge Wills without ever knowing Wills had allegedly engaged in union activity. (Tr. 787, 686-87, 799-801.) As a preliminary matter, Ferrara and Wills worked in different offices. (Tr. 50-51, 785.) Ferrara worked from the Jericho office and did not oversee the Hauppauge office until his responsibility as a Vice President expanded to include the direct sales division in June 2016. (Tr. 50-51, 65, 785-86.) Further, the Direct Sales Managers who oversaw Wills did not report to Ferrara until July 2016. (Tr. 785-86.)

On May 23, 2016, at the Hauppauge office, Senior Vice President of Human Resources, Paul Hilber, had a dialogue with sales employees about being represented by a union. (Tr. 147, 826, 400, 410, 420, 422.) Wills attended the meeting and interrupted the meeting to share that he supported the Union and made a comment about employees being “tired of taking it in the ass.” (Tr. 153, 824, 421-23.) Despite his obscene comment, Hilber merely responded that kind of language was inappropriate. (Tr. 153, 824.) Hilber then continued the discussion and shared facts about the collective bargaining process. (Tr. 824.)<sup>10</sup> Afterwards, management noted on Wills’ Boss timeline that Wills made an obscene comment stating: “what we have to take it in the a\*\*.” (Tr. 714, 825.) (GCX 18 at 4.) (ALJD 28.) Wills’ alleged pro-union statement during the May 23, 2016 meeting occurred before the direct sales management team reported to Ferrara, and he had no personal knowledge of the meeting because he did not attend it. (Tr. 810-11.) (ALJD 28.) There was also no reference to Wills’ pro-union statement on his Boss timeline. (GCX 18 at 4.)

Ferrara was never informed of Wills’ union comments during the May 2016 meeting with Hilber. It is undisputed that Hilber had no involvement in the decision to terminate Wills’ employment, and the management team present at the meeting (Simon, Pero, and Zimmerman) did not tell Ferrara about Wills’ comment. (Tr. 647, 686-87, 825.) Though Ferrara reviewed Wills’ Boss timeline at the start of his investigation, there was no text identifying Wills as a union supporter, and Ferrara testified he did not know what Wills’ comment from the May 23, 2016 meeting was referencing. (Tr. 810-11.) (GCX 18 at 4.) Ferrara was not otherwise informed of the “union” comments Wills made during the meeting.

Indeed, no supervisor from the Jericho office where Ferrara worked knew Wills had engaged in union activity. Though Wills testified he engaged in union activity in the parking lot

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<sup>10</sup> There is no allegation that Hilber in any way violated the Act during this meeting or at any other time.

at the Jericho office, he admitted that during his brief encounter with Manager Haggerty in the parking lot he did not discuss the union. (Tr. 167-71.)

### **QUESTIONS PRESENTED**

- 1) Whether the ALJ erred in finding that the General Counsel established a prima facie case of discrimination without any evidence that the decision-maker had knowledge of Wills' supposed protected activity. [Exceptions 1-9.]
- 2) Whether the ALJ erred in shifting the burden to Respondent to establish a legitimate nondiscriminatory reason for Wills' termination without finding in the first instance that the termination decision was motivated by anti-union animus. [Exceptions 8-11.]
- 3) Whether the ALJ erred in concluding that the timing of Wills' discharge was "significant evidence" of unlawful motivation. [Exceptions 12-14.]
- 4) Whether the ALJ erred in concluding that Wills was treated differently from other employees based on his purported protected activity. [Exceptions 15-19.]
- 5) Whether the ALJ impermissibly substituted his own business judgment for that of the Company's in finding that termination was too severe a punishment for Wills' misconduct. [Exceptions 20-34.]
- 6) Whether the Decision and Order should be vacated on the ground that the ALJ is an Officer of the United States who was not appointed in accordance with the Appointments Clause of the United States Constitution. [Exception 36.]

### **ARGUMENT**

#### **I. The ALJ Erred In Concluding That The General Counsel Established A Prima Facie Case Of Unlawful Discrimination Because There Is No Evidence That Wills' Termination Was Motivated By Anti-Union Animus. [Exceptions 1 - 11.]**

The ALJ misstated and misapplied the legal standards set forth under *Wright Line*, 251 NLRB 1083 (1980), *enfd.*, 692 F.2d 899 (1981), *cert. denied*, 455 U.S. 989 (1982). (ALJD 26-28.) Contrary to the ALJ's analysis, under *Wright Line*, the charging party must make a *prima facie* case showing that union or other protected activity was a motivating factor in the adverse employment action. The elements of a *prima facie* case are: (i) that the employee engaged in protected activity; (ii) the employer was aware the employee engaged in such activity; (iii) the

employee suffered an adverse employment action; and (iv) there is a link or nexus between the employee's protected activity and the adverse employment action, which was motivated by animus. *Wright Line*, 251 NLRB at 1089; *Jupiter Med. Ctr. Pavilion*, 346 NLRB 650 (2006).

Only after a *prima facie* case is established, "the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity." *Consol. Bus Transit, Inc.*, 350 NLRB 1064, 1066 (2007), *enfd.*, 577 F. App'x 467 (2d Cir. 2009); *see also Am. Gardens Mgmt. Co.*, 338 NLRB 644 (2002). If the employer succeeds in demonstrating a lawful reason for the discharge, the burden then reverts to the charging party to attempt to prove that the employer's articulated legitimate, non-discriminatory reason is pretextual. *Golden State Foods Corp.*, 340 NLRB 382, 385 (2003).

The ALJ made erroneous legal conclusions and factual findings belied by the record evidence in this case. The Board reviews *de novo* the ALJ's decision. *See Boddy Const. Co.*, 338 NLRB 1083, 1083 (2003) ("In reviewing the decisions of administrative law judges, the Board considers the entire record, *de novo*, in light of the exceptions and briefs, to determine whether the judges' rulings, findings, and conclusions are supported by the preponderance of the relevant evidence."); *Standard Dry Wall*, 91 NLRB 544, 545 (1950) ("In all cases, save only where there are no exceptions to the Trial Examiner's proposed report and recommended order, the Act commits to the Board itself, not to the Board's Trial Examiners, the power and responsibility of determining the facts, as revealed by the preponderance of the evidence. Accordingly, in all cases which come before us for decision we base our findings as to the facts upon a *de novo* review of the entire record, and do not deem ourselves bound by the Trial Examiner's findings."), *enfd.* 188 F.2d 362 (3d Cir. 1951). In addition, where the ALJ's legal conclusions are not based on resolutions of all the relevant facts, the Board should make its own findings. *See Williamson*

*Mem'l Hosp.*, 284 NLRB 37, 38 (1987) (“Inasmuch as the judge has failed to perceive and resolve . . . the factual and legal issues before him, the Board is certainly free to review the record *de novo* and make appropriate findings of fact and conclusions of law”).

Here, the facts establish unequivocally that Wills’ termination did not violate Section 8(a)(3) of the Act. The ALJ incorrectly found that the Charging Party established a *prima facie* case because (A) there is no evidence that Ferrara, the Company official who solely made the decision to terminate Wills’ employment, knew about any protected activity in which Wills may have engaged; and (B) the ALJ did not find that the Company’s decision to terminate Wills was motivated by anti-union animus before shifting the burden to the Company to prove a legitimate nondiscriminatory reason. (ALJD 28.)

A. There Can Be No Inference Of Unlawful Discrimination Where The Sole Decision-Maker Was Never Aware Of Wills’ Union Activity.

The record fails to establish that Vice President Dan Ferrara, the sole decision-maker, had any knowledge of Wills’ union activity. (Tr. 800-01, 746, 787.) As a threshold matter, Ferrara vehemently denied that he had any such knowledge. (Tr. 612-13, 686-87, 747, 804.) There was no evidence to contradict Ferrara’s testimony that he did not know whether Wills supported a union or whether he engaged in any protected activity at all. In a tacit admission that there was no record evidence suggesting that Ferrara had such knowledge, the ALJ simply relied on his own assessment of Ferrara’s credibility in order to discredit Ferrara’s testimony. However, that conclusion is not entitled to any deference here because the ALJ’s credibility determinations were not based on witness demeanor.

In general, the Board will let stand an ALJ’s credibility findings that are based primarily on witness demeanor. *See Standard Dry Wall*, 91 NLRB at 545 (“It is our policy to attach great weight to a Trial Examiner’s credibility findings insofar as they are based on demeanor.”). But

“where credibility resolutions are not based primarily upon demeanor, it is well settled that the Board itself may proceed to an independent evaluation of credibility.” *Int’l Brotherhood of Elec. Workers*, 221 NLRB 1073, 1074 (1975); *see also Domsey Trading Corp.*, 351 NLRB 824, 882 fn. 56 (2007) (reversing ALJ’s credibility findings; “The Board has consistently held that where credibility resolutions are not based primarily upon demeanor ... the Board itself may proceed to an independent evaluation of credibility” (citation omitted)), *enf. denied on other grounds*, 636 F.3d 33 (2d Cir. 2011); *In re Vico Pros. Co.*, 336 NLRB 583, 590-91 (2001) (same).<sup>11</sup>

This principle applies here. The Board has *de novo* review of the ALJ’s conclusions with respect to Ferrara’s testimony because the ALJ did not reference Ferrara’s demeanor in his decision. (ALJD 28.) Moreover, as discussed below, in addition to the total absence of direct evidence that Ferrara knew about Wills’ protected activity, the overwhelming weight of the circumstantial evidence on which the ALJ relied does not support his finding, either.

The ALJ found that “[i]t was reasonable that Ferrara (sic) would have been made aware of Wills’ union activity in Jericho by other supervisors, especially during the time that the Union was organizing the Jericho employees.” (ALJD 28.) The ALJ’s conclusion is nothing more than rank speculation. As a preliminary matter, Ferrara oversaw only outbound telemarketing, not the direct sales division where Wills worked, until June 2016. (Tr. 785-86.) Further, there is no evidence in the record that any supervisor at Jericho saw Wills engaging in union activity at Jericho. Though the ALJ refers to a time Wills greeted Manager Matthew Haggerty, Wills himself testified he did not discuss the union with Haggerty during their brief encounter in the parking lot

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<sup>11</sup> *Accord RC Aluminum Indus., Inc.*, 343 NLRB 939, 939 fn.1, 942 (2004) (“[T]he Act commits to the Board itself the power and responsibility of determining the facts as revealed by a preponderance of the evidence, and the Board is not bound by the judge’s findings of facts, but bases its findings on a *de novo* review of the entire record”); *Warner Robins*, 55 FLRA 1201, 1204 (2000) (“[W]here considerations other than demeanor are implicated in a Judge’s credibility determination, the reasons for deferring to the Judge are less compelling. Therefore, where a party raises exceptions to credibility determinations based on considerations other than witness demeanor, the Authority will review those determinations based on the record as a whole”).

at the Jericho office. (Tr. 167-71.) (ALJD 13-14.) Similarly unavailing is the ALJ's reliance on Wills claiming a purported supervisor, Hugh Johnson, saw him engaging in union activity at the Jericho office's cafeteria. (Tr. 169.)<sup>12</sup> Thus, there is no factual basis in the record that supports the ALJ's conclusion that a supervisor at Jericho "would have" informed Ferrara about Wills' union activity. (ALJD 28.)

The ALJ also cited Wills' attendance at the meeting with Senior Vice President of Human Resources, Paul Hilber, on May 23, 2016 as a basis to discredit Ferrara's denial. (ALJD 28.) Wills supposedly engaged in protected activity at this meeting. But *Ferrara* had no personal knowledge of the meeting because: (1) he did not attend it, and (2) was not even supervising direct sales at that time. (Tr. 786, 810-11.) And, the supervisors who attended the meeting did not discuss Wills' comments with Ferrara. (Tr. 647.) Crucially, the Boss timeline of the meeting that Ferrara reviewed when making his termination decision does not use the word "union" or allude to any protected activity, so Ferrara would not have known of Wills' union activity from reading the notes. In fact, the comments in the Boss timeline referring to the May 23, 2016 documented Wills' offensive and obscene comment as: "what we have to take it in the a\*\*." (GCX 18 at 4.) (ALJD 28.) Ferrara testified he did not know what that comment referred to. (Tr. 811.)

The ALJ's reliance on the testimony of Manager Carmine Pero is also misplaced and does not provide any basis to discredit Ferrara. (ALJD 28.) Pero, who worked at the Hauppauge office, testified he had previously received an email from a sales representative asking if it was true the Union started in Jericho. (ALJD 14.) However, the email did not make any reference to Wills. (ALJD 14.) Though Pero was aware that several employees spoke about the Union at the

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<sup>12</sup> Other than Wills' bare testimony, there is no allegation that Hugh Johnson was a statutory supervisor at the time he allegedly saw Wills in Jericho, much less evidence in the record as to his supervisory status at the time he supposedly saw Wills there. (ALJD 13-14.)

Hauppauge office, his testimony is clear that he did not give Ferrara a “specific name” and there is absolutely no evidence Pero stated that Wills specifically was engaging in union activity. (Tr. 776-77.) (ALJD 14.)

Because there is no evidence that Ferrara even knew about Wills’ alleged protected activity, the Board’s inquiry can end here; there cannot be a violation of Section 8(a)(3) without proof that the decision-maker knew of Wills’ union activity. *Montgomery Ward & Co., Inc.*, 198 NLRB 52, 61 (1972) (“The Board has held: ‘Unquestionably, knowledge by the Respondents of the discharges’ union activity is a prerequisite to a finding that the discharges were made for that reason, and the General Counsel has the burden of proving this knowledge beyond mere suspicion or surmise.’” (citation omitted)). See also *Dr. Phillip Megdal, D.D.S., Inc.*, 267 NLRB 82, 82 (1983) (holding “[o]nce it has been established that a denial is credible, [the Board] cannot arbitrarily ignore it. Thus, [the Board] will not impute knowledge of union activities where the credited testimony establishes the contrary”); *Ellison Media Co.*, 344 NLRB 1112, 1122 (2005) (refusing to impute knowledge of employee’s protected activities to employer because there was a credible denial of such knowledge).

B. There Is No Evidence That Ferrara’s Decision To Discharge Wills Was Motivated By Anti-Union Animus.

In addition to side-stepping the requirement that Ferrara have knowledge about Wills’ protected activity, the ALJ compounded his error by foregoing another step in the *Wright Line* analysis: he did not conclude that the Company’s decision was motivated by anti-union animus. (ALJD 28.) After the ALJ concluded that Wills had engaged in union activity, that the Respondent was aware of his protected activity, and that Wills’ discharge was an adverse employment action, the ALJ acknowledged that the “remaining question is whether the Respondent terminated Wills because of discriminatory animus.” (ALJD 28.) But the ALJ failed

to answer that question. (ALJD 28.) Instead, the ALJ skips directly to what the employer must show to rebut the presumption of discrimination if the General Counsel had established a prima facie case. The ALJ plainly erred in applying *Wright Line*. See *Consol. Bus Transit, Inc.*, 350 NLRB at 1066. (*Only if a prima facie case is established “the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee’s union activity.”*).

The ALJ was required to confront discriminatory animus as part of the Charging Party’s prima facie case. In failing to do so, the ALJ incorrectly ignored the *absence* of anti-union animus and disregarded the fact that the Company refrained from taking additional corrective action against Wills for his obscene comment during the May 2016 meeting or any of his policy violations or insubordination afterwards - despite the fact he was on Final Warning at that time. *Neptco, Inc.*, 346 NLRB 18, 19 (2005) (explaining that “[a] mere suspicion of unlawful motivation for the discharges is not sufficient to constitute substantial evidence that the discharges resulted from improper motives”). The ALJ further erred in failing to consider that there was no evidence that Ferrara, the sole decision-maker, ever manifested animus against Wills. Cf. *John J. Hudson, Inc.*, 275 NLRB 874, 874 (1985) (holding that statements by supervisors not involved in termination are not evidence of anti-union animus); *Wild Oats Mkts.*, 339 NLRB 81, 88 fn. 10 (2003) (“Because Abbas [had] no involvement in the decision to sell the store, his statements to the employees do not establish an unlawful motive”). The ALJ’s failure to address discriminatory animus was clear legal error.

Likewise, the ALJ erred in not analyzing whether the General Counsel established a link or nexus between Wills’ supposed protected activity and his discharge. *Wright Line* requires a

“causal nexus between the union animus and the adverse employment action” alleged to have violated the Act. *N. Hills Office Servs., Inc.*, 346 NLRB 1099, 1099-1100 and fn. 11 (2006).

There is no nexus here. Wills’ egregious insubordinate conduct, which led to an investigation resulting in his discharge, was entirely unrelated to any protected activity. Indeed, Wills was never disciplined for his alleged protected activity, not even for his obscene comment at the May 2016 meeting with Hilber, and he never claimed that any of the corrective actions he received for insubordination and violations of Company policies were somehow motivated by his protected activity. Contrary to evidencing hostility towards Wills or unions, *the Company’s restraint in dealing with Wills actually negates any inference of animus towards him.*

Had the ALJ applied *Wright Line* correctly, the burden would never have shifted to the Company – and whether the Company’s articulated reasons for Wills’ termination were the true reasons should not have factored into the decision at all. At most, all that was established was that Wills engaged in protected activity and that he suffered an adverse employment action. That is insufficient to establish a violation of Section 8(a)(3) of the Act and the decision should be overturned on this basis alone. See *New Otani Hotel & Garden*, 325 NLRB 928, 941 (1998) (“And with this finding that the General Counsel has failed to establish the ‘requisite element’ of animus, the case ends here, and the complaint must be dismissed on this basis alone.”)

**II. The Company’s Decision To Terminate Wills Was Based Solely On His Undisputed And Extensive Record Of Disrespectful Behavior, Insubordination, And Misconduct. [Exceptions 12 - 34.]**

Significantly, the ALJ found that “[i]t is not disputed that Wills had an employment history replete with numerous violations of company policies, insubordination, and disrespectful behavior towards supervisors and managers.” (ALJD 29.) He concluded, however, that those were not the true reasons for Wills’ termination. His ultimate conclusion that anti-union animus was the real reason for termination is wholly unsupported by the record evidence in this case.

The ALJ concluded that there was no direct evidence of anti-union animus here. (ALJD 33, n. 10.) He found “indirect animus based on the manner the Respondent treated Wills’ discharge.” *Id.* However, all of the circumstances associated with Wills’ termination on which the ALJ relied are legally and factually insufficient to support an inference of discriminatory motivation.

A. The ALJ Erred In Concluding That The Timing Of Wills’ Discharge Was “Significant Evidence Of Unlawful Motivation”.

The ALJ incorrectly found that the timing of Wills’ discharge in July 2016 – less than two months after he supposedly made his support of the union clear – “represents significant evidence of unlawful motivation.” (ALJD 33.) As a factual matter, the ALJ erred by confining his analysis to the time between Wills’ protected activity in May and his discharge in July. That is because the ALJ found that Wills had engaged in protected activity as early as February 2016. (ALJD 27.) It is undisputed that Wills engaged in multiple acts of insubordination and committed numerous policy violations after February 2016. (Tr. 354, 286, 717-18, 736-42, 662-68, 593-95, 674-76) (GCX 18 at 7; RX 9, 10, 12, 18, 24, 27, 32.) As the ALJ acknowledges, none of Wills’ numerous policy infractions resulted in more severe discipline even after he purportedly engaged in protected activity. (ALJD 29.)

For example, although Wills had supposedly engaged in protected activity in April 2016, the Company did not seek to terminate Wills when he intentionally failed to follow the Company’s protocols for contacting supervisors on May 3, 2016 (despite having been coached about the protocols the prior month) and then sending disrespectful emails to Zimmerman on May 7, 2016. In addition, after the May meeting with Hilber when Wills expressed his support for the union, Wills sent inappropriate and insubordinate communications to his supervisors in June because he did not want to be contacted on his day off. (RX 9, RX 10, GCX 13; Tr. 739-42). Had the

Company actually harbored a discriminatory animus towards Wills based on his support for the union, it could have terminated him for any one of those incidents well before July. As stated above, the fact that the Company refrained from escalating the Final Warning to a termination in the wake of multiple instances of misconduct is simply incompatible with the notion that it had a discriminatory animus.

In any case, the ALJ's reliance on the timing of the discharge as "significant evidence of unlawful motivation" is misplaced. (ALJD 33.) The Board has cautioned against placing too much weight on the temporal proximity between alleged protected activity and a discharge, repeatedly holding that while it may be potentially relevant, it is not controlling. *Hanson Material Serv. Corp.*, 353 NLRB 71 (2008) (finding that while timing is relevant to establishing a causal link, it is not controlling when the discharge is causally connected to different circumstances).

More specifically, the Board has refused to give the time between an adverse action and union activity controlling weight where, as here, there is clear evidence of intervening employee misconduct. *See Syracuse Scenery & Stage Lighting Co.*, 342 NLRB 672, 675 (2004) (holding that while employees' union activities and discharges occurred within a relatively brief time period, the similarly close temporal proximity between employees' blatant misconduct and the decision to terminate them meant that "the factor of timing is too weak a foundation upon which to base a finding of pretext"); *Gaylord Hosp.*, 359 NLRB 1266, 1279 (2013) (finding employee's misconduct and workplace errors to be intervening event that ultimately "engendered discharge" and obviated any inference that discharge was suspect).

Contrary to the ALJ's finding, in this context, the timing of Wills' discharge following his comments at Hilber's meeting was nothing more than mere coincidence and should be accorded no weight whatsoever because there were additional intervening incidents of misconduct.

*Precision Clutch, Inc.*, 218 NLRB 306, 308 (1975) (acknowledging employees' discharge "following their distribution of union cards on Friday is a suspicious circumstance," but nonetheless finding the employer lawfully discharged two employees for repeated tardiness because "this timing is coincidental rather than causal.").

Moreover, the ALJ's reliance on *Trader Horn of New Jersey*, 316 NLRB 194, 198 (1995) is misplaced. The facts in *Trader Horn* are in sharp contrast to the facts here. There, the company discharged the three employees "on the same day that the employees were identified as being involved with the Union." *Ibid.* (emphasis added.) Given those facts, the ALJ in that case relied on *Knoxville Distribution Co.*, 298 NLRB 688 fn. 1 (1990) and *Sawyer of Napa*, 300 NLRB 131, 150 (1990) where the Board held that it may consider timing alone to infer discriminatory motive in very narrow circumstances. For example, in *Knoxville Distribution Co.*, 298 NLRB 688 fn. 1 "the Board found a violation in the simultaneity of the discharges of three employees for unrelated reasons 1 day before a union meeting." *Trader Horn*, 316 NLRB at 198. In contrast, here, Wills' discharge was not simultaneous to his union activity, as the ALJ found Wills had been engaging in protected activity since at least four months before the Company even considered discharging him and there were intervening incidents of misconduct.

*Manor Care of Easton, PA*, 356 NLRB 202 (2010), *enfd.* 661 F.3d 1139 (2011), is also inapposite. In addition to the timing of the events, the General Counsel in that case established that the company had unlawfully interrogated and threatened employees, failed to investigate the employee's alleged misconduct, and unlawfully confiscated union literature from employees. None of those factors are present here. There is no independent allegation (much less evidence) that the Company unlawfully interrogated or threatened employees in violation of Section 8(a)(1) or that the Company confiscated union literature. Also, unlike *Manor Care of Easton*, here the

Company unequivocally repudiated the claim that the termination was due to anti-union animus. *See* (ALJD 29.) (“[i]t is not disputed that Wills had an employment history replete with numerous violations of company policies, insubordination, and disrespectful behavior towards supervisors and managers”). Further, unlike *Manor Care of Easton*, here the Company conducted a thorough investigation before deciding to discharge Wills. Accordingly, *Manor Care of Easton* is irrelevant.

B. Wills Was Not Treated Differently From Other Employees.

There is no basis for the ALJ’s conclusion that Wills was treated differently from other employees based on his support of the union or for engaging in any other supposed protected activity.

First, the ALJ’s conclusion that Wills’ treatment compared to Ulysses Colon was disparate treatment (ALJD 32) is fatally flawed because the record does not establish that Wills and Colon were similarly situated. While there is evidence that Colon was subject to discipline on multiple occasions, any similarity ends there. Indeed, Ferrara testified that he viewed Wills’ insubordinate conduct at the Starz meeting in the context of his entire disciplinary record that contained a pattern of policy violations and insubordination dating back to 2013. (Tr. 800.) Colon first received coaching in November 2015 for performing paperwork during a Boost meeting, but he had a clean disciplinary record at that time.<sup>13</sup> In stark contrast to Wills, Colon did not have a single documented warning for insubordination. The evidence also reflects that Colon ultimately understood that he was required to pay attention. (GCX 35 at 3.) Wills, on the other hand, proceeded to record videos of a supervisor and then take pictures of other employees when advised to pay attention to the presentation. (Tr. 201-202, 204-05, 207.) Given the disparity between their

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<sup>13</sup> Moreover, Colon’s incident took place during a routine Boost meeting, whereas Wills interrupted and disrupted a live presentation given by one of the Company’s outside business partners, a critical distinction. (Tr. 788.)

disciplinary records and the manner in which they reacted to discipline, Wills and Colon can hardly be viewed as similarly situated. *BHP Copper Inc.*, No. 28-CA-094380, 2013 WL 3777288 (N.L.R.B. Div. of Judges July 18, 2013) (“different disciplinary actions because of significantly different employment histories [is] not unreasonable, and does not establish disparate treatment”).

Second, the ALJ failed to consider the Company’s conduct towards other employees who also spoke out in favor of the union. Indeed, there was testimony that two other employees also spoke up in favor of the Union at a meeting in Jericho. (Tr. 548, 550.) One of those employees is still employed by the Company and the other left voluntarily. (Tr. 538, 567.) The absence of any adverse employment action against them cannot be reconciled with discriminatory animus towards Wills.

Third, the ALJ’s conclusion that the Company did not “strictly enforce[]” its policy prohibiting cell phone use during boost meetings is also unfounded. There is simply nothing in the record to support the notion that the Company acted discriminatorily toward Wills when he was indisputably not paying attention during the Starz meeting. Indeed, the testimony on which the ALJ relies actually supports the opposite conclusion: the Company *consistently enforced* the policy by instructing representatives to turn off their phones. (ALJD 31) (“Madrigales and Hart complied with a supervisor’s instruction to put down their phone.”)<sup>14</sup>

Moreover, testimony from employees that they used their cell phones during Boost meetings or observed other employees using their cell phones is completely irrelevant because there was no testimony that the Company was actually aware of those violations. *See Armored*

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<sup>14</sup> Supervisor Farina also enforced the policy against Sales Representative Chris Hart. (ALJD 18.) Madrigales testified he saw Hart using his phone for about 2 minutes and observed Farina instruct Hart to stop using his phone. (Tr. 429-30.) (ALJD 18: 2-4.) Hart complied and put down his phone. In fact, Wills admitted the sales representatives he photographed were not using their cell phones when he took pictures of them. (Tr. 378.) (GCX. 10; RX. 15.)

*Motor Serv.*, 186 NLRB 634, 643 (1970) (“Other than the above slight exception to the decal rules, there is no direct testimony that management was aware of rule violations.”) Because there was no such testimony here that management knew about the supposed rule violations, it cannot be said that management condoned that behavior.

In any event, the record is clear that the Company uniformly enforced its policy prohibiting cell phone and iPad use during Boost meetings and meetings with business partners such as Starz.

Specifically, Wills admitted when he used his iPad during a boost meeting sometime in December 21, 2015, Supervisor Pero instructed him not to do so. Wills apologized and stated that this would not happen again. (RX. 14.) (ALJD 17: 29-31.) Another Sales Representative also emphasized that the Company did not permit the use of phones during general boost meetings, but rather the Company expected the representatives “excuse [themselves] in order to take the call and not lose the sale”. (Tr. 440.) (ALJD 18.) Thus, the record is devoid of evidence that Company tolerated the use of cell phones during meetings after it came to management’s attention, much less that it enforced the policy in a discriminatory fashion against those who engaged in protected activity.

In sum, “the foregoing evidence of supposed ‘disparate treatment’ is too weak and insubstantial to substitute for the missing element of animus.” *New Otani Hotel & Garden*, 325 NLRB at 945.

C. The ALJ Repeatedly And Impermissibly Substituted His Own Judgment For That Of The Company’s In Finding That Wills’ Misconduct Did Not Warrant Termination.

Reduced to its essentials, the ALJ’s decision is simply an attempt to substitute his own business judgment for that of the Company – *i.e.*, that Wills’ undisputed misconduct should have resulted in discipline less severe than termination. His conclusion in this regard is contrary to well-settled Board law and is incompatible with the record evidence in this case.

First, the ALJ concluded that Respondent failed to follow its own practice in not subjecting Wills to further discipline when he continued to be disrespectful and ignore Company policy after he was issued a Final Warning in February 2016. (ALJD 31.) There is nothing in the record to suggest that this was a departure from past practice. To the contrary, the ALJ's conclusion ignores testimony that while Wills' individual offenses in isolation may not have justified a termination, the cumulative effect of all of Wills' misconduct, coupled with the fact that he was already on Final Warning, left the Company with no choice but to terminate his employment. Simon also testified that it was the Company's practice to take additional corrective action only after multiple minor infractions become sufficiently problematic to warrant further discipline. That is exactly what happened here, where the Company refrained from taking further disciplinary action against Wills after February 2016 until his misconduct at the Starz meeting. At that point, he was already on Final Warning, and the only additional step to take was termination.

The ALJ's suggestion that the Company should have discharged Wills sooner than it did is an impermissible substitution of his judgment for that of the Company's. *See Cast-Matic Corp.*, 350 NLRB 1349, 1358 (2007) ('[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline.' (citation omitted)); *Framan Mech. Inc.*, 343 NLRB 408, 411-12 (2004) ("[I]t is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful . . . the crucial factor is not whether the business reason cited by [the employer was] good or bad." (citations omitted)); *M.A.N. Truck & Bus Corp.*, 272 NLRB 1279, 1293 (1984) ("It is not the province of the Board to second-guess legitimate business judgments.").

Moreover, the Company's practice of not disciplining employees for each incident of misconduct is also evidenced by how they dealt with Wills' prior transgressions. For example,

long before any evidence of protected activity, Wills' written warning from September 2013 recited numerous instances of misconduct, but he was issued a warning only after prior attempts to deal with his behavior through coaching proved to be unsuccessful and he continued his insubordination and disrespectful behavior by, for example, calling his supervisor a "rat." (RX 4.) Similarly, Wills received Documented Verbal Coaching only after numerous instances in which he deactivated the Find Friends Application on his Company issued iPad. (RX. 6.) (ALJD 4.)

In an attempt to justify his conclusion that termination was too severe, the ALJ relies on an email from a human resources representative stating that Wills should not be suspended for the Starz incident. The ALJ completely misconstrued that email. The record reflects that the discussion surrounding a possible suspension was a "suspension pending investigation" – an action that would have been appropriate had the Company concluded that Wills posed an immediate threat to other Company employees or customers. (Tr. 689, 791.) The Company did not believe Wills' misconduct rose to that level, making a suspension unnecessary. (Tr. 689.) However, the fact that it chose to allow Wills to keep working while the investigation was pending is completely irrelevant to the decision to terminate him following the result of that investigation. Indeed, the record is clear that suspension is not part of the Company's progressive discipline process and is only used when an employee poses a safety threat. (Tr. 690.) Here, not surprisingly, the only corrective action after repeated misconduct while Wills was on a Final Written warning was a termination.

The ALJ further erred when he found that Wills had a "clean slate" one year after his final warning on October 22, 2014. (ALJD 30.) An employee's disciplinary record is not expunged after one year. To the contrary, as Hilber explained, a corrective action always remains in an employee's record even after he returns to the status of an employee in good standing. The ALJ

expressly acknowledged this aspect of the Company's disciplinary policy. (ALJD 16.) ("verbal warning would still be in the personnel file and could be referred to in the future when the Respondent reviews the disciplinary history of that employee"). That is precisely the exercise in which Ferrara engaged when he made the decision to terminate Wills' employment.

The ALJ further erred when he concluded that Wills' behavior at the Starz meeting was "disrespectful" but not insubordinate. (ALJD 31.) This distinction is beside the point insofar as any conclusion that Wills' disrespectful behavior is not attributed to anti-union animus. Moreover, the record is devoid of any evidence to support the ALJ's conclusion that "acting in a disrespectful manner towards a supervisor would not have justified the Respondent discharging Wills." (ALJD 31.) This is a quintessential example of an ALJ substituting his own judgment for that of the Company, in clear violation of well-established Board law. *See Cast-Matic Corp.*, 350 NLRB at 1358 ("An employer has the right to determine when discipline is warranted and in what form. 'It is well established that '[t]he [B]oard cannot substitute its judgment for that of the employer' and decide what constitutes appropriate discipline.'" (citation omitted)); *Framan Mech. Inc.*, 343 NLRB at 411-12 ("[I]t is well settled that the Board should not substitute its own business judgment for that of the employer in evaluating whether an employer's conduct is unlawful . . . the crucial factor is not whether the business reason cited by [the employer was] good or bad.'" (citations omitted)). *M.A.N. Truck & Bus Corp.*, 272 NLRB at 1293 ("It is not the province of the Board to second-guess legitimate business judgments.").

In any case, the ALJ's conclusion that Wills was not insubordinate is contrary to the overwhelming weight of the evidence. Contrary to the ALJ's finding, Wills' own testimony establishes Zimmerman instructed him to pay attention and put down his phone, yet Wills continued to use his phone and iPad. Whether or not he was instructed to set his phone down (he

was), he clearly defied Zimmerman’s instruction that he pay attention to a presentation for services he was responsible for selling to customers. (Tr. 788.) Wills’ own testimony contradicts the ALJ’s findings and establishes he was insubordinate as well as disrespectful to Zimmerman during the Starz presentation:

- (1) Wills admitted he was not attentive to Zimmerman because he was using his phone; (Tr. 193)
- (2) Wills ignored the first comment Zimmerman made to him; (Id.)
- (3) Wills admitted Zimmerman told him to pay attention; (Id.)
- (4) Wills admitted Zimmerman told him to get off his phone; (Tr. 231)
- (5) Wills admitted he later used his phone to record a video of Zimmerman after being instructed to pay attention; (Tr. 195-96)
- (6) Wills admitted that two minutes after Zimmerman spoke to him he used the Company iPad to take a picture of another sales representative; (Tr. 201-02, 204-05) (GCX 10) and
- (7) Wills admitted he took a second picture of the sales representative. (Tr. 215)

Moreover, the record does not support the ALJ’s conclusion that Wills “put his phone down on his own volition after the second interaction with Zimmerman”. (ALJD 31: 43-44.) Again, Wills own testimony contradicts the ALJ’s conclusion on this point because he admitted that Zimmerman told him to get off his phone and he continued to use his phone and iPad – admissions that the ALJ inexcusably ignored. (Tr. 231, 195-96, 201-02, 204-05, 215.)

### **III. The Decision Should Be Vacated In Any Event Because The ALJ Was Not Appointed In Accordance With The Appointments Clause Of The Constitution. [Exception 36.]**

The Decision should be vacated because ALJs of the NLRB, including the ALJ in this matter, are “Officers of the United States” who have not been appointed pursuant to the Appointments Clause in Article II of the United States Constitution. (*See* Amended Answer, GCX 1(O).) In a decision issued on June 21, 2018, the Supreme Court held that administrative law judges (ALJs) of the Securities Exchange Commission (SEC) are “Officers of the United States

within the meaning of the Appointments Clause” and must be appointed pursuant to Article II of the Constitution. *Lucia v. Sec. & Exch. Comm’n*, No. 17-130, 2018 WL 30057893, at \*5 (U.S. June 21, 2018). *Lucia* is on point and controls here.

In *Lucia*, the Court held that ALJs of the SEC were “near-carbon copies” of the “special trial judges” (SJT) of the United States Tax Court that the Court had previously held, in *Freitag v. Commissioner*, 501 U. S. 868 (1991), to be “Officers” of the United States. *Lucia*, 2018 WL 30057893, at \*5-6. There can be no question that the ALJs of the NLRB are also near carbon-copies of the SEC’s ALJs and the SJTs of the US Tax Court, and are therefore “Officers of the United States” within the meaning of the Appointments Clause.

In reaching its conclusion that SEC ALJs are Officers, the Court relied on a number of factors that also apply to NLRB ALJs. First, the Court noted that SEC ALJs have a long-term appointment rather than a temporary or episodic position. (*Id.* at \*6.) Next, the Court found the SEC’s ALJs exercised “significant discretion” to carry out “important functions . . . to ensure fair and orderly adversarial hearings.” (*Id.* at \*7.) Specifically, SEC ALJs receive evidence and examine witnesses at hearings; conduct trials, including having the authority to “administer oaths, rule on motions, and generally regulat[e] the course of a hearing, as well as the conduct of the parties and counsel”; rule on admissibility of evidence; “shape the administrative record (as they also do when issuing document subpoenas)”; “enforce compliance with discovery orders” and punish all contemptuous conduct, including violations of their orders. (*Id.*)

In addition, the Court held that SEC ALJs “issue decisions containing factual findings, legal conclusions, and appropriate remedies” – and do so in a more autonomous role than the SJTs who were deemed to be Officers. (*Id.*) The SEC can decide that it will not review a decision by an ALJ, and when the SEC declines review, the ALJ’s decision becomes final and is deemed the

action of the SEC. (*Id.*) That “last-word capacity” compelled the Court to find that SEC ALJs were Officers just as the SJs in *Freytag*. (*Id.*)

The same result obtains here. Like the SEC, the NLRB has statutory authority to enforce national labor law. The NLRB can initiate unfair labor practice hearings “for the purpose of taking evidence upon a complaint . . . conducted by an Administrative Law Judge”. See N.L.R.B. Rules & Regulation § 102.34; N.L.R.B. Statements of Procedure § 101.2. The ALJs are designated to long-term positions rather than temporary assignments. The NLRB’s Rules and Regulations define the duties of an ALJ, including their authority to exercise significant discretion in adversarial hearings they preside over. Pursuant to the NLRB’s Rules and Regulations, Section 102.35(a), the ALJ has authority to “inquire fully into facts . . . and it is within its power to”:

- (1) Administer oaths and affirmations.
- (2) Grant applications for subpoenas.
- (3) Rule upon petitions to revoke subpoenas.
- (4) Rule upon offers of proof and receive relevant evidence.
- (5) Take or cause depositions to be taken whenever the ends of justice would be served.
- (6) Regulate the course of the hearing and, if appropriate or necessary, to exclude persons or counsel from the hearing for contemptuous conduct and to strike all related testimony of witnesses refusing to answer any proper question.
- (7) Hold conferences for the settlement or simplification of the issues by consent of the parties, but not to adjust cases.
- (8) Dispose of procedural requests, motions, or similar matters . . . .
- (9) Approve stipulations . . . .
- (10) Make and file decisions . . . .
- (11) Call, examine, and cross-examine witnesses and to introduce into the record documentary or other evidence.

In these respects, the functions of the NLRB ALJs are virtually indistinguishable from those of the SEC ALJs that the Court held rendered them Officers of the United States subject to the Appointments Clause.

Moreover, like SEC ALJs, NLRB ALJs also have “last-word capacity.” The NLRB has the option to review an ALJ decision, and when the Board declines review, the ALJ’s decision becomes final and an action of the Board. *See* N.L.R.B. Rules & Regulations § 102.48 (the findings, conclusions, and recommendations contained in the Administrative Law Judge’s decision will “automatically become the decision and order of the Board and become its findings, conclusions, and order” when a party does not file exceptions.)

The Supreme Court held that “one who makes a timely challenge to the constitutional validity of the appointment of an officer who adjudicates his case” is entitled to relief. *Ryder v. United States*, 515 U.S. 177, 182 (1995). (GCX 1(O)). Here, the Company timely challenged the appointment of the ALJ in its Amended Answer. (See GCX 1(O).) Because the ALJ here is an Officer of the United States who was not appointed in accordance with the Appointments Clause, the Decision and Order must be vacated on this basis alone.

\* \* \*

In sum, even if the ALJ’s appointment is deemed to be valid, the Decision and Order should be set aside. The record is crystal clear that Wills was a disciplinary problem before, during and after the time he claims to have engaged in protected activity. Indeed, the ALJ expressly acknowledged that “[i]t is not disputed that Wills had an employment history replete with numerous violations of company policies, insubordination, and disrespectful behavior towards supervisors and managers.” (ALJD 29.) The crux of the ALJ’s decision, however, is that the Company should have continued to issue written warnings to Wills *ad seriatim* and in perpetuity

simply because he arguably engaged in activity protected by the Act. But the Act does not vest the ALJ with a roving commission to second-guess the appropriate level of discipline to be imposed on an employee such as Wills with an undisputed history of poor performance and insubordination. Rather, the Act requires the Charging Party to prove that an adverse employment action was *motivated* by anti-union animus. The record is completely devoid of that most critical element of the Charging Party's case.

Employees who engage in protected activity do not get a free pass. Yet that is exactly what the ALJ's decision does here: it excuses all of Wills' misconduct after he already was on a Final Warning because he claimed to have engaged in protected activity. That is not the law. Absent a showing that an adverse employment action was motivated by anti-union animus or an employee's protected activity, there is no violation of Section 8(a)(3). Plainly, there was no such showing here, and the Board should therefore decline to adopt the ALJ's Decision and Order.

**CONCLUSION**

For the foregoing reasons, the Board should sustain the Company's exceptions and dismiss the Complaint in its entirety.

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