

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, SUBREGION 11

PRUITTHEALTH VETERAN
SERVICES - NORTH CAROLINA, INC.

and

Case 10-CA-191492

RICKY EDWARD HENTZ, an Individual

**COUNSEL FOR GENERAL COUNSEL'S ANSWERING BRIEF TO
RESPONDENT'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S
DECISION**

Dated: June 29, 2018

Respectfully submitted,

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A. Introduction

Pursuant to Section 102.46(d) of the Board's Rules and Regulations, as amended, Counsel for General Counsel hereby submits his Answering Brief to Respondent's Exceptions to Administrative Law Judge Keltner W. Locke's May 4, 2018 Decision. As will be demonstrated, Respondent's exceptions are without merit and should be rejected.

B. Statement of the Case¹

The Complaint and Notice of Hearing, which the Acting Regional Director issued on May 30, 2017, was based upon an unfair labor practice charge that Charging Party Ricky Hentz filed in Case 10-CA-.191492 on January 19, 2017. Administrative Law Judge Keltner W. Locke presided over the hearing in this case which was held from September 12, 2017 to September 14, 2017 in Asheville, North Carolina.

In his decision on May 4, 2018, the ALJ recommended finding that Respondent violated Section 8(a)(1) of the Act by instructing employees not to discuss their wages, directing them not to engage in concerted activities by telling Hentz to "stay in your lane," and by disciplining, demoting, and discharging Hentz in retaliation for his concerted activities.

The ALJ's decision should be adopted. The ALJ correctly concluded that Hentz engaged in protected concerted activities, based on his observation of witnesses, credibility

¹ In this answering brief, the followings citations apply: "ALJD" designates the Administrative Law Judge's Decision, "R" designates the Respondent's Brief on Exceptions, "T" designates the transcript from the September 12-14 hearing, "GC Ex." designates a General Counsel Exhibit from the hearing, and "R. Ex." designates a Respondent Exhibit from the hearing.

determinations, a review of the record evidence, and Board precedent. The ALJ correctly found that Hentz' engaged in concerted activities when he raised his and other employees' concerns regarding racial discrimination, short staffing, and other work conditions to Respondent's Administrator Justin Morrison, Respondent's Corporate Regional Human Resources Manager Della Mervin, Respondent's former Regional Partner Services Manager Tammy Ellis, and the Respondent's corporate hotline. Although Respondent argued that it disciplined, removed scheduling duties, and later discharged Hentz based on his attendance because it was "cut and dry," (T. 538:7) the ALJ appropriately determined that Respondent's proffered explanation was pretextual. Respondent's exceptions do not provide the Board any rational reason for reversing the ALJ's decision and order.

C. Answer to Respondent's Exceptions

Respondent submitted 38 exceptions to the ALJ's decision. In its brief, Respondent organized its exceptions into 12 different arguments. Below, Counsel for General Counsel addresses Respondent's exceptions in 12 responses, corresponding to Respondent's brief.

1. **The ALJ's Findings With Respect to Hentz' Communications with Morrison About the Workplace Are Supported by a Preponderance of the Evidence, and the ALJ Did Not Err in His Credibility Determination, or When Evaluating All Critical, Credible Evidence**

(Respondent's exceptions 1, 7, 31, and 36)

At hearing, Hentz credibly testified that he told Morrison, "I feel like Amy definitely treats African Americans differently than she do [sic] others, and I'm not the only one. I've had that conversation with other people as well who felt like there definitely was a discrepancy in the way she treated African Americans. I mean she was very standoffish and whatnot. And I told

him I was going to corporate.” (ALJD 25:25-29; T. 135:14-20) The ALJ’s decision did not explicitly credit or discredit this specific statement from Hentz, but we can infer that the ALJ found the statement credible for two reasons. First, throughout his decision, the ALJ only ever credited Hentz, and never discredited him. (ALJD 11:3-4, 15:6-10) Second, the ALJ later found that “the administrator hardly could be unaware that Hentz was voicing employees’ concerns to management when he, Morrison, was the member of management to whom Hentz spoke.” (ALJD 33:15-17)

As to witness credibility, the Board gives an ALJ great deference; choosing only to overrule an ALJ’ credibility resolutions where the clear preponderance of all the relevant evidence convinces the Board that the ALJ’s resolution was incorrect. See *Standard Dry Wall Products*, 91 NLRB 544, 545 (1950, enfd. by 188 F.2d 362 (3d Cir. 1951). In its brief, Respondent argues that there are four reasons why the ALJ should have discredited Hentz’ testimony, all of which are unpersuasive.

First, Respondent argues that Morrison’s blanket denial of Hentz’ statement should control. (R. 15; T. 44:17-19, 84:10-23, 481:6-20, 556:2-25, 557:1-15, and 621:4-10) However, the ALJ clearly and unequivocally discredited Morrison’s testimony throughout his decision. At points, the ALJ called Morrison’s testimony “a bit disingenuous” (ALJD 7:5), “particularly unbelievable” (ALJD 18:29), that “such testimony [is] vague, it is also self-serving, leading me to conclude that Morrison either made up or greatly exaggerated Hentz’ supposed shortcomings,” (ALJD 19:8-10), that Morrison “displayed a marked tendency to exaggerate and I do not consider his testimony reliable,” (ALJD 36:11-12). The ALJ later “concluded that Morrison was not a reliable witness but instead inclined to wild exaggeration.” (ALJD 45:29-32). The ALJ even took the unusual step of stating his belief that Morrison had a willingness to

“make up something that did not occur to place Hentz in a bad light...” (ALJD 49:41-50:21) The ALJ appropriately discredited Morrison, and the Board should give deference to his credibility finding. See *Standard Dry Wall*, 91 NLRB at 545.

Second, Respondent’s second and fourth argument involve former Registered Nurse Supervisor Jennifer Horton’s and Hentz’ statements to Morrison prior to Mervin’s investigation indicate that Morrison had not previously known about the racial discrimination allegations. (R. 15-16; T. 280:3-281:12, 147:19-149:6). Respondent is misguided. Morrison placed Horton and Hentz in difficult positions when he confronted them on November 21, 2016, the day Respondent’s racial discrimination investigation began. (T. 148:9-149:15, 281:12-283:10) When Morrison interrogated them about the racial discrimination investigation and his bias, both Horton and Hentz attempted to downplay their knowledge of or role in the investigation. (T. 148:9-149:15, 281:12-283:10) Specifically, Hentz acknowledged that he “danced around his question” because Morrison “became visibly upset.” (T. 149:3-8) The ALJ found that a witness’ willingness to honestly testify about being less than candid with a manager in a socially difficult position added to his or her credibility, not detracted from it. (ALJD 16:31, ft. 11) Morrison placed both Horton and Hentz in precisely that sort of difficult position, and their testimony at hearing should not be discredited based on their responses to Morrison in the moment. Ironically, in arguing that Horton’s testimony establishes that Morrison did not know the basis for Respondent’s investigation, Respondent conveniently ignores Horton’s testimony that Morrison identified Hentz by name during their discussion, asking if Horton “thought he was racist...apparently Ricky [Hentz] thinks so.” (T. 281:23-282:6) Rather than disproving Morrison’s knowledge, Horton’s and Hentz’ testimony evidence it.

Finally, Respondent incorrectly alleges a discrepancy in the ALJ's credited timeline of events. Respondent argues that Hentz could not have told Morrison about other employee concerns because Hentz testified that he told employees Linda Brinson and Danielle Jeter that he had already called corporate. (T. 138:24-139:13) Again, Respondent ignores the totality of the evidence. Hentz unambiguously and credibly established the timeline during his November 9, 2016 call to Morrison. (T. 134:13-136:11) Hentz told Morrison "I feel like Amy definitely treats African Americans differently... I've had that conversation with other people as well who felt like there definitely was a discrepancy in the way she treated African Americans." (T. 135:14-18) Thus, Hentz "had that conversation..." with employees like Jeter, Brinson, Taylor, Horton, Johnson, Robinson, Fleming, and Black prior to speaking with Morrison. (T. 137:8-139:22) Hentz also told Morrison during the call that he "was going to corporate," not that he had already gone to corporate. (ALJD 25:29, T. 135:19-20) Hentz' timeline is consistent with other documentary evidence, like Respondent's November 9, 2016 notes where Hentz called its corporate hotline and referenced other, similarly concerned employees. (GC Ex. 6) The ALJ correctly credited Hentz' firm timeline of events based on the preponderance of the evidence. Respondent's arguments fail after review of all credible evidence.

2. **The ALJ Correctly Applied the Proper Legal Analysis and Found that Hentz Engaged in Concerted Activities When He Discussed Staffing Concerns with Employee Rick Luce**

(Respondent's exceptions 4, 5, and 8)

and

3. **The ALJ Correctly Applied the Proper Legal Analysis and Found that Hentz Engaged in Concerted Activities When He Discussed Work Status Concerns with Employee Brandi Sigmund**

(Respondent's exceptions 28, 29, and 30)

Hentz testified that he spoke with Luce about staffing concerns and Sigmund about her desire to be placed on an "as-needed" work status, before sharing those concerns with Morrison. (T. 118:2-126:9) In its brief, Respondent misstates the standard for establishing concert, arguing that the ALJ failed to find that Luce and Sigmund's concerns were "based on an honest and reasonable belief." (R. 16)

In *NLRB v. City Disposal Systems*, the Supreme Court articulates a standard for establishing concert in the context of an individual asserting a collective-bargaining agreement right. *NLRB v. City Disposal Systems*, 465 U.S. 822, 822 (1984). Also known as the *Interboro* doctrine, the Board holds that a single individual's actions are concerted if he has a "reasonable and honest belief that he is being, or has been, asked to perform a task that he is not required to perform under his collective-bargaining agreement" and raises that concern to management. *Id.*; see also, *Interboro Contractors*, 157 NLRB 1295, 1298, 61 LRRM 2083 (2d Cir. 1967).

However, the *Interboro* doctrine does not apply in cases outside of a collective-bargaining context. The ALJ states as much in his decision, saying "Section 7 does not include any requirement that an employee have a good faith belief in the merits of his complaint." (ALJD 28:24-25) Instead, the appropriate question is whether Hentz' engaged in protected

concerted activity during his discussions with Morrison by bringing group complaints to management's attention as a "logical outgrowth" of his prior concerted discussions with other employees. See *Amelio's*, 301 NLRB 182, 183, fn. 4 (1991); *NLRB v. City Disposal Systems*, 465 U.S. at 822. The ALJ correctly applied that standard and found those discussions to be concerted, noting that Hentz brought "group complaints to management's attention...[with] little to gain personally by conveying these complaints..."² (ALJD 11:16-17, 23:27, fn. 14) Hentz' individual actions are precisely the sort of activities encompassed by Section 7 of the Act. See *NLRB v. City Disposal Systems*, 465 U.S. at 822.³

Regarding Sigmund, the Respondent also argues that the ALJ erred by concluding that the Respondent had denied Sigmund's request to work as a PRN, because Hentz' involvement with Sigmund "served to create, or at least exacerbate, unnecessary confusion," related to the PRN issue. (R. 20-21; ALJD 22:15) However, Respondent's argument is tangential to the real issue. By virtue of bringing Sigmund's issue to management's attention, regardless of his or

² The ALJ did not specifically find that Hentz' discussions with Morrison were a logical outgrowth of his earlier concerted activities. However, Counsel for General Counsel argues that Hentz' later discussions with Morrison are a logical outgrowth of his conversations with Luce and Sigmund because, as the ALJ noted, Hentz specifically sought to raise these issues with Respondent on behalf of others and with little to gain personally. (ALJD 11:28-29)

³ Respondent also took exception to the ALJ's finding that Ellege actually denied Sigmund's request to work "PRN." The minutiae of what Ellege told Sigmund are immaterial to whether Hentz engaged in, or was disciplined, for protected concerted activity.

Sigmund's understanding of the underlying PRN issue, Hentz engaged in protected concerted activity. *Amelio's*, 301 NLRB at 183, fn. 4 (1991)

4. **The ALJ Correctly Concluded that Hentz' "Walk and Talk" Conversations with Morrison were Concerted Based on the Preponderance of the Evidence and Board Law**

(Respondent's exceptions 6, 9, 10, 11, 27, and 34-38)

Hentz testified to having several conversations with other employees about staffing issues, including employees Toya Fleming, Joanna Severson, and Luce. (T. 111:6-114:14) Hentz also testified that he relayed those concerns to Morrison "on various occasions, whenever I could catch him if his door was open. His door was often closed. His thing was walk and talk, so I would walk and have to talk to him as we were walking to like the workroom or somewhere." (T. 114:3-6) Respondent makes two arguments for why Hentz' discussions with Morrison are not concerted, both of which fail.

First, Respondent argues that the ALJ erred by not identifying whose beliefs Hentz relayed to Morrison. (R. 21) However, Respondent fails to review the full record. The ALJ correctly credits Hentz testimony that he "engaged in protected concerted activity when he walked along with Morrison and told the administrator about the CNAs' complaints that the floors were understaffed." (ALJD 11:24-26; T. 114) Like any reasonable reader, the ALJ properly understood Hentz and Morrison's "short staffing" discussions within the broader context of Hentz' testimony. Hentz provided a detailed description of which employees he discussed short-staffing issues with, including Fleming, Severson, and Luce. (T. 111:6-114:14) When asked if he ever raised those issues to management, Hentz testified that he spoke to Morrison about them during "walk and talk[s]." (T. 114:4-5) As previously discussed, the ALJ

credited Hentz' version of events and those credibility findings deserve the Board's deference. (ALJD 11:3-4) See, *Standard Dry Wall*, 91 NLRB at 545.⁴ Thus, the ALJ did not err.

Second, Respondent argues that there is no evidence of any employee giving Hentz expressed authority to speak on their behalf. (R. 21-22) Again, Respondent fails to comprehend established Board law. Respondent correctly cites Board precedent that supports General Counsel's case; "Under Board law, to find that the Respondent discharged [the discriminatee] for engaging in protected concerted activity, the General Counsel must show...was acting along to initiate group action, such as bringing group complaints to management's attention." *Kvaerner Philadelphia Shipyard*, 347 NLRB 390, 392 (2006), citing *NLRB v. City Disposal Systems*, 465 U.S. 822. The ALJ correctly applied Board law by finding that Hentz heard other employee complaints, raised those complaints to management with little to no personal benefit, and did so in an effort to better the working conditions of those employees. (ALJD 11:28-39, 28:6-7, 32:35-37; T. 111:1-127:7)

Respondent wrongly argues that the Board should rely on *Manimark*, opposing the ALJ's reliance on *Compuware*. See *Manimark Corp. v. NLRB*, 7 F.3d 547, 551 (6th Cir. 1993); *Compuware Corp. v. NLRB*, 320 NLRB 101 (1995), enf. 134 F.3d 1285, 1289 (6th Cir. 1998). The Board is bound by its own precedent, not a district court's decision regarding enforcement of the Board order. Thus, the Board should apply *Compuware* to the present facts, as the ALJ did, or the Board's analysis in *Manimark's*, and find that Hentz had engaged in concerted activities. See *Manimark Corp.*, 307 NLRB 1059, 1059 (1992); *Compuware*, 320 NLRB at 101.

⁴ Likewise, the Board does not require an employee to divulge to management the names of employees with whom he or she has engaged in Section 7 activities in order to have engaged in protected concerted activities.

Nonetheless, even a review of *Manimark* supports the ALJ's decision that Hentz's discussions were concerted. Respondent cites *Manimark*, stating that the court has "never held that an employee's action in merely repeating the jointly held concerns of other employees, standing alone, suffices for a finding of concerted action." *Id.* at 551. However, Respondent conveniently omits the preceding sentence, which states that there is a "need for proof that an employee was acting "with or on the authority of," other employees, or at least on their behalf." *Id.* Hentz clearly acted on behalf of other employees by relaying their concerns to Respondent, some that personally affected him and some that only benefited the concerned employees. (T. 115:5-116:13; 123:3-127:7) Even according to *Manimark*, Hentz' "walk and talk" discussions were concerted.

Notwithstanding that *Manimark* supports the ALJ's finding, the Board's case in *Alton H. Piester* should assuage Respondent's anxiety regarding Hentz' concerted activities. *Alton H. Piester, LLC*, 353 NLRB 369, 370 (2008). In *Alton H. Piester*, the employer was aware that employees were concerned about its fuel surcharge policy, but refused to address those concerns. *Id.* at 369. Employees "frequently complained among themselves" about the issue. *Id.* Then, three months later, the employer discharged the discriminatee after he raised the fuel surcharge issue in an individual meeting with two management representatives. *Id.* at 369-370. The Board reversed the ALJ's decision, finding that the employer had discharged the discriminatee for conduct that "amounted to a continuation of the earlier concerted employee complaints about the adverse change to the fuel surcharge." *Id.*, at 372.

This case is analogous. Respondent was well aware of employees' staffing concerns, as evidenced by Morrison discussing the short-staffing issue at staff meetings and his concern on "numerous occasions" that CNAs had blamed short staffing for their inability to timely care for

residents. (T. 461:19-462:3, 504:11-14) Respondent's Activities Director Amy Ferguson also told Mervin that her department was short staffed during Mervin's racial discrimination investigation. (T. 360:13-15; R. Ex. 9) As noted by the ALJ, Respondent regularly dismissed employees' staffing concerns. (ALJD 9:28-10:28; T. 461:19-462:3) Hentz then would have been the natural person for employees to go to regarding staffing concerns because he was the scheduler. (T. 94:3-95:18) When Hentz individually discussed with Morrison his and fellow employees' work-related concerns, Respondent disciplined, demoted, and discharged Hentz because of those discussions. (ALJD 51:10-15) Board law supports the ALJ's decision that Hentz engaged in concerted discussions.

5. The ALJ Correctly Concluded that Hentz Called Respondent's Corporate Office After Speaking with Employees Lucinda Brinson and Danielle Jeter

(Respondent exception 13)

Respondent's fifth argument mirrors a portion of its first argument — an alleged discrepancy in the ALJ's credited timeline of events. (R. 15) Respondent argues that Hentz could not have told Morrison that other employees had concerns because Hentz testified at hearing that he told Brinson and Jeter he had already called corporate. (T. 139:9-13) As previously discussed in Counsel General Counsel's response section 1, the totality of the evidence, including Hentz' credited testimony and Respondent's November 9, 2016 notes, support the ALJ's timeline of events and establishes that Hentz first spoke with Brinson and Jeter, and then with Morrison, before calling Respondent's corporate hotline. (GC Ex. 6; T. 134:22-136:9) Thus, the ALJ correctly credited Hentz' firm timeline of events based on the preponderance of the evidence.

6. The ALJ Correctly Concluded that Respondent's Failure to Listen to Employee Concerns Was a Condition of Employment

(Respondent exceptions 24 and 25)

In his decision, the ALJ correctly found that Hentz told Mervin that employees did not feel that management listened to their concerns, and those concerns constituted a condition of employment. (ALJD 15:24-26; T. 406:14-16) Respondent raises two arguments regarding the ALJ's finding, both of which fail.

First, Respondent mistakenly concludes that whether employees feel "heard" by management is not a condition of employment. (R. 28) The Board has held that terms and conditions of employment "are fixed not by rigid formulas or stipulations but by the relationship between the employer and the employees. It is the normal foreseeable expectations arising out of the relationship...which constitute the terms and conditions of employment." *Liberty Telephone*, 204 NLRB 317, 317-318 (1973). Morrison testified that Respondent has an "open door policy," and expects employees to "follow the chain of command" in utilizing that policy when raising issues to management. (T. 463:22-464:6) Since Morrison expects employees to use his policy, it stands to reason that Respondent's failure to "hear" employees who raise concerns would be a "normal foreseeable expectation arising out of the relationship," and thus a term of their employment under established Board law. *Liberty Telephone*, 204 NLRB at 317-318.

Second, Respondent reiterates its flawed position that General Counsel must establish that the third-party speaker had a "sincere" feeling or belief in what they expressed to Hentz. (R. 29) As previously articulated in Counsel for General Counsel's response sections 2 and 3, and as inferred by the ALJ in his decision, the *Interboro* "reasonable and honest belief" standard does not apply in cases outside of a collective-bargaining context and certainly not to third-party

speakers. (ALJD 28:24-25) See *Interboro Contractors*, 157 NLRB at 1298. For these reasons, the ALJ did not err.

7. The ALJ Correctly Concluded that Hentz and Other Employees Shared Racial Discrimination Concerns and Correctly Applied Board Law Regarding Those Concerns

(Respondent exceptions 14-18, 20, 21, and 23)

In his decision, the ALJ consistently found that Hentz expressed his fellow employees' concerns to Respondent's corporate-level management. (ALJD 11:35-12:36, 16:19-21) Respondent disputes the ALJ's finding, taking three misguided positions. (R. 30-33)

In its first two positions, Respondent again argues that third-party speakers should be held to an honest belief standard and that Hentz' call to the corporate hotline was only "his own gripe," not a concerted action. (R. 30-31, 33) Regarding third-party speakers, as argued in Counsel for General Counsel's response sections 2 and 3, the ALJ correctly states "Section 7 does not include any requirement that an employee have a good faith belief in the merits of his complaint."⁵ (ALJ 28:24-25) Respondent misapplies the *Interboro* doctrine. See 157 NLRB at 1298. Regarding Hentz' actions being concerted, as argued in Counsel for General Counsel's response section 3, his discussions with Morrison were an outgrowth of earlier employee conversations about an issue well known to Respondent. See *Amelio's*, 301 NLRB at 183, fn. 4

⁵ Respondent briefly argues that the ALJ erred by using a hearsay statement from Williams to Hentz to prove the truth of the matter asserted; that she believed the facility was short-staffed. However, the ALJ specifically stated that "the truth of the matter she asserted...is irrelevant to the issue under consideration." Instead, Respondent hopes to use its misunderstanding of Board law regarding third-party speakers to claim ALJ dishonesty where none occurred.

Further, Respondent incorrectly argues that the ALJ failed to reconcile the contradictory testimony between Corporate Regional Human Resources Manager Della Mervin and Hentz regarding Brinson. (R. 31-32) The ALJ left no ambiguity regarding credibility between Mervin and Hentz. Mervin testified that employee Brinson denied any race-related concerns, while Hentz claimed that Brinson previously shared concerns with him. (T. 138-139, 361) The ALJ was not impressed with Mervin's testimony, stating "Mervin's tone of voice and demeanor lead me to conclude that she had not come to the courtroom to make Hentz look good but rather to make her company look good." (ALJ 14:36-37, 42:44) When comparing Hentz and Mervin, the ALJ "ha[d] more confidence in the accuracy of Hentz' testimony than that of Mervin." (ALJ 14:34-36) Respondent's allegation that the ALJ failed to reconcile conflicting evidence is disingenuous, and the Board should defer to Respondent's credibility findings based on his observations at hearing. See *Standard Dry Wall*, 91 NLRB at 545

8. The ALJ Correctly Found that the Preponderance of the Evidence Supports that Hentz and Other Employees Had Racial Discrimination Concerns and Shared Those Concerns With Each Other

(Respondent exception 23)

In his decision, the ALJ referenced that Hentz provided the names of other employees that had "seen things that have happened" during his investigation interview with Mervin. (ALJD 14:39-40) The ALJ determined that Hentz, by providing names, was not solely complaining about his November 9, 2016 ice cream reprimand, but was "most reasonably understood as meaning that these witnesses had seen other things which also demonstrated the presence of racial prejudice in the workplace...that he was not the only employee who perceived an atmosphere of racial bias at the nursing home." (ALJD 15:7-8) Respondent's argument that the

ALJ failed to identify which of the employees “perceived an atmosphere of racial bias at the nursing home,” is wrong. (ALJD 15:7-8; R. 33)

The ALJ reached his conclusion after considering the record evidence of Hentz’ November 9, 2016 call to Respondent’s corporate hotline and Hentz’ conversation with Mervin on November 21, 2016. (ALJD 11:35-15:5) The ALJ credited Hentz’ testimony regarding both the corporate hotline call and his conversation with Mervin. (ALJD 15:6-10) Hentz testified that he mentioned Brinson and an employee named Danielle during his corporate hotline call, and later relayed to Mervin the concerns he heard from other coworkers like Williams, Johnson, Robinson, Fleming, Black, Davis, Brinson, and Jeter. (ALJD 12:35, 15:17-19; T.137:8-139:13, 145:3-155:7; GC Ex. 6) The ALJ could only be referencing those employees when he made his finding that “these witnesses had seen other things” and that others “perceived an atmosphere of racial bias.” (ALJD 15:7-8)

Also, despite Respondent’s diatribe regarding Horton’s testimony, her clear and unequivocal testimony that Morrison did “have prejudice” provides evidence that at least one other employee felt that race was a factor in Respondent’s decision-making. (ALJD 16:31, fn. 11) Horton’s credited testimony, in addition to Hentz’, supports the ALJ’s conclusion that multiple employees shared concerns about Respondent’s “atmosphere of racial bias,” and should be upheld. (ALJD 15:7-8) See *Standard Dry Wall*, 91 NLRB at 545.

9. The ALJ Correctly Concluded That Hentz’ Complaints to Respondent’s Corporate Level Management Were an Extension of His Earlier Concerted Activities.

(Respondent exceptions 12, 19, 20, and 22)

The ALJ found that Hentz engaged in protected concerted activity by complaining to Respondent’s corporate-level management, in part, because “Hentz’ coworkers were assisting

him in providing him information about instances of apparent racial prejudice. In turn, he assisted them by voicing their complaint to corporate-level management.” (ALJD 13:35-37) Respondent relies on two inaccurate presumptions in arguing against the ALJ’s finding of mutual aid and protection.

First, Respondent reiterates its factual argument that Hentz’ discussions with Brinson and Jeter occurred after his call to the corporate hotline. (R. 35-36) As articulated in Counsel for General Counsel’s response sections 1 and 5, the totality of the evidence, including Hentz’ credited testimony and Respondent’s November 9, 2016 notes, support the ALJ’s timeline of events and establishes that Hentz first spoke with Brinson and Jeter, and then with Morrison, before calling Respondent’s corporate hotline. (GC Ex. 6; T. 134:13-135:20) Thus, the ALJ correctly credited Hentz’ firm timeline of events based on the preponderance of the evidence, and the ALJ’s credibility findings deserve deference. See *Standard Dry Wall*, 91 NLRB at 545.

Second, Respondent argues that Hentz’ failure to take the stand to refute Mervin should bolster her credibility. (R. 36) Respondent takes issue with the ALJ’s finding that Mervin “summarize[ed] the substance” of Hentz alleged comment “I’m not here to talk about them. I’m here to talk about me.” (ALJD 14:20-22) Instead Respondent asserts that Mervin’s statement must be truthful, not just a summary, because Hentz didn’t climb over the desk at hearing to refute it. (R. 36) There are a number of reasons why an attorney may not recall a discriminatee to refute all alleged statements attributed to him, including a belief that the testifying witnesses is so unbelievable that she cannot be credited. The ALJ certainly believed as much, deciding that he had “more confidence in the accuracy of Hentz’ testimony than that of Mervin...Mervin’s tone of voice and demeanor lead me to conclude that she had not come to the courtroom to make Hentz look good but rather to make her company look good,” and refusing to place trust in her

testimony. (ALJD 14:35-37) The Board should give great deference to the ALJ's credibility findings based on his own observations at hearing. See *Standard Dry Wall*, 91 NLRB at 545. Thus, Mervin's testimony carries little weight to disprove that Hentz acted to mutually aid and protect his coworkers.

Moreover, even assuming that Hentz told Mervin that he was only there to "talk about me," the ALJ still appropriately concluded that Hentz engaged in protected concerted activity. As pointed out by the ALJ, Mervin acknowledged that Hentz raised other employees' concerns during his meeting with her. (ALJD 15:12-26; R. Ex. 9; T. 406:14-16) Although each employee may have experienced a different incident of racial prejudice, the group concern of racial discrimination at Respondent's facility intertwined those incidents into a single narrative. (T. 151:16-154:7; R. Ex. 9) Hentz raised that single narrative to Respondent's attention and was a motivating factor in its decision to discipline, demote, and discharge him.

10. The ALJ Correctly Credited Hentz' Testimony Over Regional Partner Services Manager Tammy Ellis' Testimony Regarding Hentz' Racial Discrimination Complaint

(Respondent exception 33)

Although the ALJ incorrectly attributed Respondent's corporate call note to Ellis, the error does not affect the ALJ's credibility finding. (ALJD 28:9; GC Ex. 6) Hentz testified that when he called the corporate hotline, he first spoke with a corporate representative named Genice Campbell. (T. 145:8) Hentz later received a call from Ellis to discuss the racial

discrimination call. (T. 146:4) In his decision, the ALJ cites the corporate call note as “her [Ellis’] notes,” despite that Campbell likely authored the corporate call note. (ALJD 12:17)⁶

Despite the ALJ’s labeling error, the corporate call note’s authorship plays little role. Ellis testified that Campbell sent her a phone message and email regarding Hentz’ initial call. (T. 420) Presumably, the phone message and/or the email would have provided Ellis with the corporate call note, or the information contained in the corporate call note, in order to prepare Ellis for the call. (T. 420:7-10, GC. Ex. 6) Ellis would then have been aware that Hentz referenced other employees’ issues during the call. Thus, who authored the document is less important than who knew the information contained in the document. The Board imputes a manager or supervisor’s knowledge of an employee’s protected concerted activities onto the decision maker, unless the employer affirmatively establishes a basis for negating that imputation. See, e.g., *G4S Secure Solutions (USA), Inc.*, 364 NLRB No. 92, slip op. at 4 (August 26, 2016), enf. *G4S Secure Solutions v. NLRB*, 707 F. App’x 610 (11th Cir. Sept. 1, 2017); See also, *Vision of Elk River, Inc.*, 359 NLRB 69, 72 (2012), reaffirmed and incorporated by reference in 361 NLRB No. 155 (2014). Thus, regardless of who authored the corporate call note, the document establishes Respondent’s knowledge of Hentz’ concerted activities.

Notwithstanding that Respondent has imputed knowledge, the corporate call note does not weigh heavily in the ALJ’s credibility determination between Ellis and Hentz. In his decision, the ALJ mentioned that Ellis and the corporate call note contradict in areas. (ALJ 28;9) However, the ALJ determined that Ellis, Hentz, and the notes “do not disagree much,” and “form

⁶ Although Respondent attempts to confuse the issue by claiming the ALJ’s reference to “Ellis’ notes” could refer to multiple documents, the ALJ clearly acknowledges that “Ellis’ notes” is the corporate call notes by citing the notes verbatim. (ALJD 12:17; GC Ex. 6)

a consistent picture of their conversation.” (ALJ 25:35-38, 27:36-37) The ALJ decided that his “observations of the witnesses lead me to resolve [any] such conflict by crediting Hentz’ account.” (ALJ 27:37-38) Therefore, although the ALJ erred by referring to the corporate call notes as “Ellis’ notes,” the error was insubstantial and his credibility determination based on his observation of the witnesses deserves substantial deference. See *Standard Dry Wall*, 91 NLRB at 545

11. The ALJ Correctly Concluded that Hentz Engaged in Protected Concerted Activity During Communications with Respondent’s Corporate Office and During its Subsequent Investigation

(Respondent exceptions 19, 26, 27, 32, and 34-38)

In its argument, Respondent’s initially attempts to distinguish the present case from *Fresh & Easy Market*, before arguing a change in Board Law. See *Fresh & Easy Market*, 361 NLRB No. 12 (August 11, 2014). Neither argument is persuasive. First, Respondent correctly cites *Fresh & Easy Market* as applicable Board law, but incorrectly argues that Hentz’ call to corporate was not concerted because it is factually distinct from the facts in *Fresh & Easy Market*. In *Fresh & Easy Market*, the discriminatee discussed her own sexual harassment incident with other employees and subsequently, alone, reported the incident to the employer. Id at 2. The Board found that the discriminatee engaged in concerted activity, for the mutual aid and protection of other employees, when she made the report. Id. at 4-6. In so deciding, the Board recognized its history of finding that employees who solicit other employees regarding discrimination do so for mutual aid and protection “even where the issue appears to concern only the soliciting employee, the soliciting employee would receive the most immediate benefit from a favorable resolution of the issue, and the soliciting employee does not make explicit the employees’ mutuality of interests. Id at 7.

The present case is analogous to *Fresh & Easy Market* in almost every respect. Hentz had a personal incident that he believed to be racially discriminatory. (T. 131:11-133:24, 137:21-138:6) Hentz communicated his concern to other employees, while also asking about their experiences and whether they believed Respondent had a practice of racial prejudice towards African Americans. (T. 138:21-139:6, 140:24-141:15) After hearing the concerns of other employees, Hentz took it upon himself to report the racial issue to Respondent's corporate hotline, referencing that other employees felt the same way.⁷ (T. 145:3-147:18, GC. Ex. 6) Respondent's attempts to distinguish this case from *Fresh & Easy Market* fail.

Similarly, Respondent's argument that the Board should overturn *Fresh & Easy Market*, in favor of former member Miscimarra's dissent analysis, is flawed. General Counsel mirrors the Board's position regarding Miscimarra's dissent, as articulated in its majority opinion, and the ALJ's well-reasoned analysis of the issue. See, *Id* at 4-11 (ALJ 15:28-16:22). More specifically, "concertedness is not dependent on a shared objective or on the agreement of one's coworkers with what is proposed," and that position is consistent with decades of Board precedent. *Id* at 5-6; See also, *El Gran Combo*, 284 NLRB 1115, 1117 (1987), *enfd.* 853 F.2d 996 (1st Cir. 1988). The Board has long held that "efforts to invoke the protection of statutes benefitting employees are efforts engaged in for the purpose of mutual aid or protection... proof that an employee action inures to the benefit of all is proof that the action comes with the mutual aid or protection clause of Section 7. *Fresh & Easy Market*, 361 NLRB at 7; citing *Meyers Industries*, 281 NLRB 882, 887 (1986) (*Meyers II*), *affd.* sub nom. *Prill v. NLRB*, 835 F.2d 1481

⁷ As argued above in General Counsel's response sections 1 and 5, the preponderance of the evidence proves that Hentz called Respondent's corporate hotline after he spoke with several employees, including Jeter and Brinson.

(D.C. Cir. 1987), cert denied 487 U.S. 1205 (1988). As the ALJ correctly stated, there is no need for Hentz to circulate a petition, plan with other employees to take a specific concerted action, or articulate a specific, written policy for his activities to be concerted. (ALJ 13:42-14:13) The Board will find an employees' actions concerted where he discusses working conditions with other employees and then speaks to the employer about those concerns. See *Compuware Corp.*, 320 NLRB at 101. Therefore, the Board should not overturn well-established Board law in favor of Respondent's position.

12. The ALJ Correctly Attributed Respondent's Knowledge of Hentz' Protected Concerted Activities as a Whole to its Individual Agents, Including Morrison, Based on Board Law

(Respondent exceptions 34-38)

Respondent's argument that Morrison had no knowledge of Hentz' protected concerted activities fails. The Board imputes a manager or supervisor's knowledge of an employee's protected concerted activities onto the decision maker, unless the employer affirmatively establishes a basis for negating that imputation. See *G4S Secure Solutions*, 364 NLRB No. 92, slip op at 4; See also, *Vision of Elk River*, 359 NLRB at 72. For two reasons, Respondent failed to provide a sufficient basis for negating the imputation of knowledge.

First, Respondent's witnesses' denials alone are insufficient. When a judge discredits the supervisor's testimony, the Board will still impute the supervisor's knowledge of the discriminatee's activities. See, e.g., *Vision of Elk River, Inc.*, 359 NLRB at 72. Further, courts give great deference to an ALJ's findings, particularly with respect to credibility. See *Standard Dry Wall*, 91 NLRB at 545; See also *Universal Camera Corp., v. NLRB*, 340 U.S. 474, 496 (1951) Here, the ALJ discredited Morrison's testimony as disingenuous (ALJ 7:5), unbelievable (ALJ 18:29), vague, self-serving, greatly exaggerated (ALJ 19:8-10), not reliable (ALJ 36:11-

12), and contradictory to credible evidence (ALJ 45:29-32). The ALJ also discredited Mervin, stating “Mervin’s tone of voice and demeanor lead me to conclude that she had not come to the courtroom to make Hentz look good but rather to make her company look good,” and that he “ha[d] more confidence in the accuracy of Hentz’ testimony than that of Mervin.” (ALJ 14:35-37, 42:44-43:1) Similarly, the ALJ chose to credit Hentz’ testimony over Ellis. (ALJ 27:37-38) Based on the ALJ’s credibility resolutions, the record evidence demonstrates that Respondent knew about Hentz’ concerted activities.

Second, credited testimony establishes that Morrison knew Hentz called corporate about racial discrimination allegations and his other concerted activities. The ALJ specifically found Horton and Hentz’ testimony credible and reliable. (ALJ 11:3-4, 14:35-37, 16:31, fn. 11) Horton testified that Morrison approached her on November 21 and asked if she “thought he was racist... apparently, Ricky [Hentz] thinks so.” (T. 281-282) Horton also testified that later the same day, Morrison told her he “was tired of Ricky’s shit. It’s always something with him,” while Dickens admitted that “Corporate had told them to let [Hentz] go slowly because he can be dangerous...” (T. 286-287) Hentz testified that Morrison also approached him the same day, asking what the investigation was about. (T. 148) Morrison became visibly upset when Hentz told him that staff had concerns, but denied specific knowledge about the investigation. (T. 149) Aside from raising issues about racial discrimination, Hentz had face-to-face conversations with Morrison about staffing issues and an employee’s desire to be placed on an “as-needed” work status, which were also protected and concerted discussions. (T. 118-119, 122-125) Beyond the mere inference of knowledge, Hentz and Horton’s testimony establish Morrison’s actual knowledge, including communications between Respondent’s corporate office and Morrison on

the same day Mervin came to investigate Hentz' corporate hotline call. For these reasons, the ALJ correctly imputed knowledge to Morrison.

D. Conclusion

The record evidence and extant Board law demonstrates that Respondent violated Section 8(a)(1) of the Act by directing employees not to discuss their wages, directing employees not to engage in concerted activities for mutual aid and protection by telling employees, "Stay in your lane," and by disciplining, demoting, and discharging Hentz because of his concerted activities. Counsel for General Counsel respectfully requests that Respondent's exceptions be rejected as without merit.

Respectfully submitted this 29th day of June 2018.

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Certificate of Service

I hereby certify that copies of the foregoing Counsel for General Counsel's Answering Brief to Respondent's Exceptions to Administrative Law Judge's Decision have this date been served by electronic mail and first-class mail upon the following parties:

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