

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

CSC HOLDINGS, LLC

and

COMMUNICATION WORKERS OF AMERICA

Case 29-CA-190108

**GENERAL COUNSEL'S ANSWERING BRIEF
TO RESPONDENT CSC HOLDINGS, LLC'S EXCEPTIONS
TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE**

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I. PRELIMINARY STATEMENT

On July 6, 2016, in the midst of an active union organizing drive among its Long Island sales employees, Respondent CSC Holdings, LLC (“Respondent”) – a company that is unabashedly opposed to unionization of its employees – discharged employee Michael Wills, the outspoken and well-known union supporter and leader of the organizing campaign. Following a protracted unfair labor practice hearing, Administrative Law Judge Kenneth W. Chu (“ALJ”) issued a Decision and proposed Order¹ finding that Respondent violated Section 8(a)(1) and (3)² of the National Labor Relations Act (“Act”) by discriminatorily discharging Wills because he engaged in protected concerted and union activities and in order to discourage employees from engaging in these activities. [ALJD 33-34, Errata; GCX 1(H)]

Respondent takes exception to the ALJ’s Decision and urges the National Labor Relations Board (“Board”) to overturn the ALJ’s credibility determinations that were based on his extensive, direct observation of the witnesses at trial and his conclusions of law based on the inherent probability of the evidence presented. There is no basis for the Board to make such a reversal, as the ALJ’s findings in this case are grounded in substantial evidence and sound reasoning set forth in his Decision and more fully explained herein. Accordingly, the Board should reject Respondent’s Exceptions and adopt the ALJ’s findings and proposed Order.

A. Procedural History

Based upon an unfair labor practice charge filed by Charging Party Communication

¹ References to the ALJ’s Decision will be noted herein as “ALJD” followed by a number referencing the page cited; references to the official hearing transcript are denoted as “Tr.” followed by a number noting the page(s) of the record cited; “GCX” and “RX” shall respectively refer to General Counsel exhibits and Respondent exhibits admitted into the official record, followed by a number indicating the exhibit(s) cited; references to Respondent’s Brief in Support of Exceptions are denoted as “R. Br.” followed by a number specify the age referenced.

² The ALJ on May 3, 2018 issued an Errata and Order Modifying the CSC Holdings, LLC Decision in which the ALJ modified the Conclusions of Law section of his Decision to state that Respondent violated Section 8(a)(1) and (3) of the Act. The Errata also modified the language of the ALJ’s proposed Notice to Employees to substitute an erroneous reference to threatening discipline or discharge for a reference to discharging employees because they engaged in protected concerted and union activities. Accordingly, Respondent’s Exception No. 35 addresses a moot point and should be rejected.

Workers of America (“Union” or “CWA”) on December 16, 2016 and as subsequently amended [GCX 1(A), 1(c)], the Regional Director for Region 29 of the Board on July 27, 2017 issued a Complaint and Notice of Hearing (“Complaint”) alleging, *inter alia*, that Respondent violated Section 8(a)(1) and (3) of the Act by discharging Wills in retaliation for the assistance he provided to the Union in organizing Respondent’s employees and because he engaged in other protected concerted activities. [GCX 1(H).]

The case was litigated before the ALJ beginning on October 4, 2017 and continuing on November 2 and 3, November 6, November 14 and November 29, 2017. [Tr. 3, 20, 223, 385, 490, 653] The ALJ heard extensive live testimony from various witnesses presented by the General Counsel and by Respondent. After the trial concluded, the ALJ received and considered post-hearing briefs submitted by the General Counsel and Respondent, respectively. In full consideration of the evidence adduced at trial, his assessment of the credibility of the witnesses, and the parties’ arguments and contentions set forth in the post-hearing briefs [ALJD 1], the ALJ on April 27, 2018 issued his Decision correctly finding that Respondent violated Section 8(a)(1) and (3) of the Act by discharging its employee Michael Wills because he engaged in union activity and other protected concerted activities. [ALJD 33] The ALJ recommended that the Board remedy these unfair labor practice violations by ordering Respondent to reinstate Wills to his former position of employment, make Wills whole for any lost earnings suffered as a result of Respondent’s unlawful actions against him, and post a notice to employees assuring them of their rights under the Act and that Respondent will not violate those rights in the manner it did with respect to Wills in this case.

In its Exceptions and supporting Brief, Respondent contends that the Board should reverse the ALJ’s Decision and overrule his well-founded credibility determinations based on the demeanor of the witnesses. Respondent also urges the Board to disregard the substantial record

evidence establishing Respondent's animus against the Union and Wills' protected activities in order to overturn the ALJ's accurate conclusion that the manner in which Respondent disparately treated Wills in relation to another employee who engaged in similar misconduct and the close proximity of Wills' discharge to his Union organizing activity demonstrates the unlawful motive underlying Respondent's decision to terminate Wills' employment. Contrary to Respondent's contentions, well-settled Board law holds that the credibility resolutions of the ALJ should not be disturbed in this case, and the substantial evidence of Respondent's animus is more than adequate to establish by a preponderance of the evidence that Respondent violated the Act as found by the ALJ.

II. FACTS

The relevant and material facts of the case are accurately set forth in the ALJ's Decision. [ALJD 2-24] However, it is necessary here to briefly recount the record evidence that led the ALJ to conclude that Respondent violated the Act, especially the facts establishing Michael Wills' extensive protected concerted activities and Respondent's animus against those activities, in light of Respondent's transparent attempt to marginalize these crucial aspects of the record in the recitation of facts in Respondent's Brief.

A. Respondent Was Satisfied with Wills' Performance before He Engaged in Protected Concerted Activities in 2016

Respondent devotes much of its Brief to describing largely irrelevant facts relating to disciplinary actions it took against Wills years before his discharge. In a desperate attempt to creatively paint Wills as a problem employee who routinely flouted important company policies, Respondent calls the Board's attention to supposed misconduct by Wills dating back as far as 2013 – three years before Will's discharge on July 6, 2016. However, the record reveals that Respondent's application of progressive discipline rendered such dated discipline stale or inactive. Respondent allowed employees to “start fresh” or achieve a “clean slate” after one year of

receiving discipline, if the employee received no additional discipline during that year. [ALJD 30; Tr. 690] Thus, discipline Wills received in 2013 and 2014 – more than a year before his termination – has little weight in evaluating Respondent’s motivation for discharging him in July 2016, as Respondent admits that those prior alleged infractions could not factor into its application of progressive discipline.

Indeed, Respondent showed little concern for Wills’ supposed history of misconduct when it last issued a written evaluation of his job performance in early 2016. [GCX 2; Tr. 69-70] In that “2015 Year End Review,” Respondent commended Wills for making a “Valuable Contribution” to the company, thus clearly expressing its overall satisfaction with Wills’ job performance at that time, despite the earlier alleged infractions. [GCX 2 at p. 12] The record establishes that Wills began engaging in protected concerted activities shortly after he received this positive performance appraisal in early 2016, and Respondent reacted by viewing his “contribution” to the company less favorably.

B. Wills Challenged Management Policies and Practices on Behalf of Himself and His Co-Workers, and Respondent Repeatedly Warned Him Not to Engage In Such Protected Activity

The record firmly establishes that Wills was an outspoken advocate for the interests of Direct Sales Representatives, and he openly challenged Respondent’s managers about various company policies and practices that were of collective concern to the employees. The ALJ noted Wills’ credible testimony establishing that Wills frequently raised issues at daily staff meetings (or “boost meetings,” as they were called) in support of the sales representatives and acted as the mouthpiece for employees’ collective concerns because other sales representatives rarely spoke out at these meetings. For example, the ALJ correctly observed Will was “very vocal” in expressing employees’ shared belief that management’s use of a GPS-enabled tracking system installed on sales representatives’ company-issued iPads harmed the employees’ ability to perform their jobs successfully. [ALJD 3]

Another salient example of Wills' protected concerted activity to advance the interests of the sales representatives came at the boost meeting on February 17, 2016, when Wills challenged Direct Sales Manager Carmine Pero's statement that sales representatives were in a position of great trust and that they must not speak negatively about the company outside of the office because those conversations could be heard by potential customers. [ALJD 5; Tr. 90-91, 465] In challenging Pero, Wills did not "interrupt" the boost meeting, as Respondent disingenuously asserts in its Brief [R. Br. 10], but rather multiple witnesses confirmed that Wills raised his hand and spoke only after Pero acknowledged him. [Tr. 91093; 409-10] Wills then addressed an issue of common concern among his co-workers regarding management's policy requiring sales representatives to contact a supervisor before taking a bathroom break. [ALJD 4; Tr. 84-85, 91-93] Wills questioned Pero's statement about sales representatives being in a position of trust when management did not trust them enough to let them take a bathroom break without first contacting a supervisor. [ALJD 5; Tr. 91-93, 409-10] Wills further challenged Pero's admonition against employees speaking negatively about the company, telling Pero that employees had a right to "vent with each other, no matter what the venue is" and telling his co-workers at the meeting that "it's ok to speak negative and we all need to hear the good, bad and ugly." [ALJD 5; GC 18 at p. 11, GC 5] Pero responded by telling Wills to address the issue at another time. [*Id.*]

Pero was plainly disturbed by Wills standing up for employee rights in this manner. Within hours of the February 17 Boost meeting at which Wills raised collective complaints about management's bathroom break policy and the employees' right to speak amongst each other about workplace concerns, management directed Wills to stop his work in the field and come back to the office for a meeting with Pero and Human Resources (HR) manager Erica Simon. [ALJD 5; Tr. 97] During the meeting,³ Pero told Wills that his statements during the boost meeting that day

³ Wills used his cell phone to record his February 17, 2016 meeting with Pero and Simon. [Tr. 111-13] The parties to this case stipulated to a transcription of the audio recording that accurately reflects the dialogue during the meeting. [GCX 4]

were “unacceptable” and constituted misconduct that Respondent takes seriously. [GCX 4 at p. 1] Simon further warned Wills that Respondent found that some of his other communications with supervisors were problematic, and to illustrate her point, Simon referenced a February 5, 2016 email Wills sent regarding employees coverage for on-the-job injuries under Workers’ Compensation. [ALJD 5; GCX 4 at p. 8-10] On February 5, 2016, Manager Pero had sent a group email to all sales representatives in which he praised two employees for making sales on their days off. [GCX 3, Tr. 102.] In response to the message, Wills replied to all of the original recipients and asked whether sales representatives would be covered under the company’s Workers’ Compensation insurance if they sustained an on-the-job injury while they were pursuing sales leads on their days off. [*Id.*] Wills testified that he posed the question to the entire sales office because he knew that many sales representatives worked on their days off, so the question was one that affected him and all of his co-workers. [Tr. 110] Thus, in this instance, as he did at the February 17 boost meeting, Wills raised with Pero a workplace issue of common concern to him and his co-workers.

Respondent again deeply resented Wills for engaging in this form of protected concerted activity. In an email to HR manager Simon about Wills’ February 5 Workers’ Compensation question, an angered Pero fumed that Wills was only trying to “get a rise out of me or the Supervisors” and declared that Pero “will not be playing this game.” [GCX 15] In a subsequent email to Respondent Vice President Colleen Long about Wills’ Workers’ Compensation email, Pero stated that Wills “just wanted to cause friction, as always.” [GCX 16] Pero thus viewed Wills’ protected concerted comments as an affront to his managerial authority, and he openly emphasized that his “management team will not allow any negativity or criticism spreading through the office.” [GCX 17; ALJD 5-6]

Simon made sure to address the February 5 email exchange when she reprimanded Wills on February 17 that Respondent found his activities were unacceptable. Simon told Wills that it

was not appropriate “at all” for him to raise his Workers’ Compensation question to the entire office in a group forum and that such activity was not “perceived well” because “it looks like you’re trying to stir up trouble.” [GCX 4 at p. 9-10] Simon admonished Wills that, instead, the appropriate way for him to raise a workplace question like that was to direct the question to Manager Pero in a one-on-one setting, allow Pero to provide an answer, and then suggest that Pero discuss the matter with other employees during a boost meeting. [GCX 4 at p. 10, Tr. 109-10] When Wills replied that he saw no harm in simply asking a question that he knew others in the office also wanted answered, Simon responded that it was not up to Wills to decide whether to raise that issue before other employees, but rather it was up to management to decide “if everybody should know it, how everybody should know it and in what forum to let everybody know.” [*Id.*] Simon thus clearly enunciated Respondent’s policy in opposition to Wills exercising his Section 7 right to raise concerted workplace concerns with management.

Later during her meeting with Wills on February 17, Simon went on to explain that the reason Wills was getting in trouble with Respondent for his behavior and his communications was because management perceived Wills as “trying to stir up trouble.” [GCX 4 at p. 20] Simon advised Wills that if he would “just go with the flow” and “stop pushing back so much, this will stop.” [*Id.*] Conversely, Simon warned Wills that his problems with Respondent were “not going to stop if you keep pushing back.” [*Id.*]

On February 24, 2016, Respondent issued Wills a Final Warning for alleged “insubordination and disrespectful behavior.” [GCX 5] When Pero gave Wills the Final Warning, he expressly told Wills that the discipline resulted from Wills’ conduct at the February 17 boost meeting [Tr. 120-21], and the Final Warning document itself expressly condemned Wills for saying to his co-workers during the meeting that “it is ok to vent with each other, no matter what the venue is” and that employees had a right to discuss “the good, bad and ugly” regarding issues affecting the workplace. [GCX 5] Accordingly, the evidence establishes that the February 24,

2016 Final Warning – so heavily relied upon by Respondent to justify its decision to discharge Wills – is irredeemably tainted by Respondent’s animus against Wills’ protected concerted activities and serves as background evidence not of Wills’ misconduct, but of the company’s hostility towards Wills’ exercise of Section 7 rights.⁴

C. Wills Led a Union Organizing Drive and Explicitly Told Respondent of His Leading Role in the Union Campaign

Despite being reprimanded by Pero and Simon and despite having received the February 24 Final Warning, Wills did not heed Simon’s warning to “just go with the flow” and “stop pushing back so much.” To the contrary, Wills defiantly increased his Section 7 activity and began contacting the Communication Workers of America about forming a union among Respondent’s sales representatives.

1. Wills Initiated the Organizing Drive

On the same day he received the Final Warning, Wills called CWA organizer Zelig Stern to discuss how Wills could help bring the Union in as the employees’ bargaining representative. [ALJD 8-9; Tr. 138-40] As the ALJ correctly described in his Decision, Wills volunteered to lead the Union organizing campaign and proceeded to organize meetings between organizer Stern and Respondent’s sales representatives, to recruit co-workers to form an organizing committee and to engage other co-workers regarding how he believed the Union could improve employees’ terms and conditions of employment and whether the employees supported unionization. [ALJD 9; Tr. 139-45] Wills credibly testified that, from April 2016 through the end of his employment in July 2016, he had spoken with every one of the 35 to 45 sales representatives in his office about the Union. [Tr. 144-45] Multiple employee witnesses confirmed Wills’ leadership role in the Union campaign [Tr. 414-16, 445-47, 540-42], and there is no evidence rebutting Wills’ extensive union

⁴ Further illustrating Respondent’s animus and its commitment to infringing employees’ Section 7 rights, Pero ordered Wills not to discuss his Final Warning with his co-workers after Wills posted a copy of the document at his cubicle in order to show his co-workers the unfair treatment he was subjected to by management. [ALJD 8; Tr. 131-34, 466-67]

activity.

By May 2016, Respondent was well aware that a union organizing effort was afoot. On May 19, 2016, manager Pero received an email from a former colleague asking whether direct sales representatives had formed a union. [ALJD 14; GCX 19] Pero testified that he already knew that there was union organizing ongoing at the time he received that May 19 inquiry. [*Id.*; Tr. 473-77] Pero admitted that he forwarded the inquiry to HR managers, including Erica Simon, and specifically noted to HR that he did not respond to the question. [*Id.*] Pero further admitted that he spoke with Respondent Vice President Daniel Ferrara about union organizing among sales representatives in Pero's office and that he "might have" discussed Wills' organizing activity in particular with Ferrara. [Tr. 776-77; ALJD 14]

2. Wills Declared His Support for the Union during a Mandatory Meeting with Senior Managers

By late May, the nascent union campaign was so well-known to Respondent that the company felt the need to convene a special meeting with employees to address the matter and express management's views in opposition to the Union. On about May 25, 2016⁵ Respondent held a mandatory staff meeting for sales representatives at the Hauppauge office. Unlike the usual staff meetings, nearly all of Respondent's high-level executive managers who had oversight responsibility over the Hauppauge office attended the May 25 meeting, including HR Manager Simon, several company Vice Presidents, and Senior Vice President of HR Paul Hilber. [Tr. 145-47] This was the first time that Respondent had convened a meeting for the Hauppauge employees at which all of these upper-level managers were present together, and Senior Vice President Hilber had not previously visited the Hauppauge sales office. [Tr. 147-48, 419-20] Hilber spoke at length during the meeting about the company's views regarding unionization and emphasized several

⁵ The ALJ reported the date of this meeting as May 23, 2018 [ALJD 11], but contemporaneous notes made by manager Pero describing Wills' conduct during the meeting, recorded in the "Boss Timeline" for Wills, recorded the date of the meeting as May 25, 2016. [GCX 18 at p. 4]

negative consequences that could befall employees if they chose to be represented by a union. [ALJD 12-13] Hilber warned employees that if they signed a union card, then they would be bound by union rules and regulations and that employees would not earn more money by having union representation. [Tr. 148-50] Hilber specifically spoke about the Communication Workers of America and told employees that the Union had failed the group of Respondent's employees in Brooklyn whom it represented and that half of the Brooklyn employees wanted to decertify the Union. [*Id.*]

Hilber spoke about the Union for about 10 minutes before he took questions from the employees. Wills immediately raised his hand, and when Hilber acknowledged him to speak, Wills announced that he disagreed with everything Hilber had just said about unions and the CWA and declared that he was "100 percent for this Union." [ALJD 12; Tr. 150-53] In addition, Wills proclaimed to Hilber and all the other managers present that Wills was directly responsible for starting the organizing campaign – and that he intended to "finish it." [Tr. 150] Wills continued to speak about why he supported the Union and further addressed his co-workers to point out that the company had convened its upper-level managers at this meeting because the Union posed a threat to their power, and Management did not want to lose that power. [ALJD 12; Tr. 151-52] Hilber responded to argue against the points Wills raised in favor of unionization and said that the Union was not the answer to employees' problems. [*Id.*] Wills and Hilber went back and forth debating the merits of unionization for about 15 to 20 minutes. [*Id.*; Tr. 152-53] Hilber also admitted that he engaged in an "active dialogue" at this meeting during which Wills unmistakably declared his support for the Union. [Tr. 832-33]

At one point during his exchange with Hilber, Wills stated that employees were tired of "taking it in the ass" when referencing his belief that the Union campaign was happening because employees were fed up with unfair or abusive treatment by management. [ALJD 12; Tr. 153] In response to Wills' comment, Hilber said that there was no need for Wills to use that kind of

language, and Wills apologized and said that he agreed but was just trying to make a point. [*Id.*] The discussion between Wills and Hilber continued thereafter. [Tr. 423] No employee, aside from Wills, said anything in support of the Union during this meeting with Hilber.

Respondent was clearly disturbed by Wills' comments to Hilber in support of the Union. After the meeting, Manager Pero made sure to make a note of Wills' comments during the meeting in Respondent's "Boss Timeline" report for Wills – which was the system Respondent used to track matters of concerns and/or disciplinary actions it had regarding each employee. [ALJD 13; GCX 18 at p. 4; Tr. 468] On May 25, 2016, Pero wrote in Wills' Boss Timeline, "During a meeting with Paul Hilber, Mike Wills commented, 'what we have to take it in the a**?'" [ALJD 13; GCX 18 at p. 4]

Indeed, Wills' comments to Hilber caused such a stir among Respondent's managers that Commissions Analyst Elena Esposito, who was one of the management representatives present for the exchange between Wills and Hilber, felt the need to report Wills' comments to her supervisor in the nearby Jericho, New York office. [ALJD 12; Tr. 398-400] Wills' strident pro-Union comments to Hilber were so striking to Respondent that when Pero emailed Esposito on July 6, 2016 to notify her of Wills' discharge, Esposito immediately assumed that Respondent had fired Wills for his comments during the meeting with Hilber, and she replied to Pero's July 6 email stating, "Shocker!! Was it for the union mtg comment???" Tellingly, Pero did not respond to counter Esposito's stated understanding of what occurred.

3. Respondent's Supervisors Observed Wills Collecting Union Authorization Cards after He Publicly Declared His Leadership in the Union Campaign

Immediately after the meeting with Paul Hilber ended, Wills called Union organizer Stern and described what happened during the meeting. Stern told Wills that he should begin collecting signed Union authorization cards from his co-workers and instructed Wills to wear a Union wristband to work every day. [ALJD 13; Tr. 158-59] Wills complied with Stern's instructions and wore CWA wristbands every day at work throughout the remainder of his employment, and he

began obtaining signed authorization cards from other sales representatives. [*Id.*]

Wills began collecting cards on about June 2, 2016 – about one week after his verbal exchange with Paul Hilber concerning the Union. [*Id.*] The Union campaign intended to organize sales representatives in Wills’ Hauppauge office and sales representatives in the nearby Jericho, New York office. On one occasion in about the first week of June 2016, Wills visited the Jericho office to encourage employees there to sign Union authorization cards. In the cafeteria at the Jericho facility and wearing his Union wristbands, Wills met with approximately 7 to 10 newly-hired sales representatives. [ALJD 13-14; Tr. 165-68] Wills collected about 4 or 5 signed cards from the new employees at the time. [Tr. 168-69] Hugh Johnson – a direct sales supervisor in the Jericho office – was present when Wills was discussing the Union with the new hires and observed Wills in the cafeteria meeting with them. [ALJD 13; Tr. 169-70] Johnson approached Wills and said hello, but Wills said nothing back to Johnson. [*Id.*]

Later that same day, Wills spoke with another sales representative about the Union while in the parking lot outside the Jericho office. While they were talking, Jericho sales manager Matthew Haggerty approached Wills and the other employee and said “Hello.” [ALJD 13-14; Tr. 170-71] Wills and his co-worker greeted Haggerty in return. Then the other sales representative, in a joking manner, said to Haggerty that he was being held hostage, referencing Wills and the conversation they were having. Haggerty laughed, but did not say anything in response before he walked away. [*Id.*]

D. Respondent Indisputably Opposed the Union Organizing Campaign

Respondent was unambiguously hostile to the unionization of its workforce. [ALJD 33 at fn 10] Not only did Respondent convene the May 25, 2016 special meeting among Hauppauge employees at which senior company executives expressed their views in opposition to unionization, but Senior Vice President Hilber also explicitly testified that Respondent does not believe that having a union is productive for either the employees or the company. [Tr. 830]

Hilber stated the company's position against unionization, and in particular its opposition to the CWA, even more directly in an e-mail memorandum he wrote in about June or July 2016 [Tr. 845-46] in which he stated that Respondent's parent company, Altice, "prefers a union-free relationship with its employees. . ." and ". . . opposes the CWA coming into our union-free workplaces and seeking to represent our employees." [GCX 28] Hilber added in his memo that keeping the CWA from organizing Respondent's employees "remains a top priority" for the company. [*Id.*]

Hilber also made sure that the company's Direct Sales supervisors were fully aware of Respondent's opposition to unionization and the CWA and conveyed to supervisors the company's expectation that supervisors take steps to further Respondent's anti-union agenda. In a June 2016 memorandum addressed to Direct Sales supervisors and authored with Hilber's input, Respondent reminded local managers, including Hauppauge Sales Manager Pero, that the company intends to preserve its "direct relationship" with employees by keeping unions out of the workplace. [GCX 36, Tr. 777-78] In the memo, Respondent further asked its Direct Sales supervisors to help communicate the company's position on unions and the benefit of what it viewed as a "direct relationship" with employees. [*Id.*] In a separate e-mail setting forth Respondent's "labor talking points" on June 10, 2016, Hilber noted management's assiduous effort to "educate employees" about the "empty promises and false statements made by the union." [GCX 29]

E. **Respondent Seized upon a Benign Interaction between Wills and Supervisor Zimmermann During a June 23 Boost Meeting as Its Basis to Discharge Wills**

On June 23, 2016 – less than a month after Wills stridently declared his support for the Union and his leading role the organizing campaign, and a matter of days after Respondent's supervisors in Jericho observed Wills soliciting Union authorization cards – Wills attended a boost meeting at the Hauppauge office during which Respondent invited an outside vendor from the Starz premium cable network to speak to the sales representatives. [Tr. 188-89, 595-96] It was a relatively routine meeting, as Respondent regularly invited agents from its vendor partners to

address sales representatives regarding the programming the vendor offered in order to help the sales staff better sell the premium services to customers. [Tr. 190, 595]

During the Starz vendor's presentation, Wills received a text message on his cell phone from a potential customer about an issue relating to a sale. [ALJD 16; Tr. 190] While continuing to listen to the Starz presentation, Wills intermittently looked down at his phone to answer the text messages he received from the customer. [*Id.*] Multiple employee witnesses testified that it was commonplace for sales representatives to use their cell phones, iPads or computers during boost meetings, especially to interact with customers in furtherance of potential sales. [Tr. 60, 417, 439, 451-52] Respondent's supervisors not only tolerated employees' use of electronic devices to communicate with customers during staff meetings, but also actually encouraged them to do so if it would help them make sales. Specifically, former employee Anne Pacifico testified that supervisor Thomas Farina at some point during 2016 instructed her that if Pacifico were to receive a phone call or a text from a customer during a meeting, then she should take the call or respond to the text in order to avoid jeopardizing a potential sale. [Tr. 440]

Supervisor Zimmermann observed Wills using his cell phone during the Starz presentation. [ALJD 16; Tr. 600] Zimmermann leaned over and said something to Wills, but Wills at first did not hear what Zimmermann said. [ALJD 16; Tr. 191-94] Unaware that Zimmermann was addressing him, Wills continued texting with the customer. [*Id.*] About 15 to 20 seconds later, Zimmermann again leaned toward Wills and said, "Mike, I said pay attention." [*Id.*] This time, Wills heard Zimmermann and replied, "Eric, I am paying attention." [*Id.*] Zimmermann in turn replied, "No, you're not." Although Zimmermann did not explicitly tell Wills to put down his phone, Wills understood that Zimmermann believed he was not paying attention because Wills was using the phone, and upon coming to that realization, Wills put down the phone on his own volition. [*Id.*] Former employee Mario Madrigales, who was also at the meeting and observed part of the interaction between Wills and Zimmermann, confirmed that Wills was using his phone and

that Zimmermann tapped Wills on the shoulder, whereupon Wills acknowledged Zimmermann, turned around and faced the speaker. [ALJD 17; Tr. 424-26]

After Wills put down his phone in compliance with Zimmermann's instruction, Wills noticed that other employees were also using their phones or computers, or were otherwise not looking directly at the Starz presenter, yet Zimmermann was not stopping them. [ALJD 16-17; Tr. 194-95] Wills also observed Zimmermann using his own phone and not looking at the speaker – just moments after he had directed Wills to pay attention in reference to Wills' phone use. [Tr. 194-95] Wills concluded that Zimmermann was unfairly singling him out for conduct that other employees and even Zimmermann himself were engaged in, and he decided to make a complaint about Zimmermann to Manager Pero. [*Id.*, Tr. 213, 216] To support his intended complaint to Pero, Wills picked up his phone again and use it to record a 9-second video of Zimmermann using the phone. [ALJD 17; Tr. 195-96] The video, which was admitted into evidence, shows Zimmermann smiling and perhaps laughing at Wills as he used his cell phone to record Zimmermann. [ALJD 17; GCX 9] Zimmermann is then heard on the video taunting Wills, saying "You're taking a picture. Do you want me to pose for you?" [*Id.*] Wills then put away his phone and continued listening to the Starz presentation. [*Id.*]

Wills, however, continued to observe other sales representatives using electronic devices and not looking at the Starz presenter, but yet not being reprimanded for it. [Tr. 204-05, 213-14] About 2 minutes after he made the video of Zimmermann, Wills decided to document further evidence in support of his claim of harassment against Zimmermann, and he used his company iPad to take a photo of one sales representative looking at a computer screen while co-workers next to him looked at the Starz presenter.⁶ [ALJD 17; GCX 10] It is important to note here that

⁶ Seconds before or after Wills took the photo reflected in GCX 10, Wills took another photo of the same sales representative using the computer. [RX 15; Tr. 213-14] Unlike the first photo, the second photo does not show the employee in question facing the computer screen. [RX 15] However, Wills testified that he observed this employee looking at the screen and not at the presenter for the majority of the Starz presentation. [Tr. 213-14; 535-36]

there is no evidence that Respondent knew that Wills had taken these photos using his iPad at any time before it discharged Wills on July 6, 2016.

Despite the benign nature of the encounter between Wills and Zimmermann during the Starz presentation on June 23, Zimmermann nevertheless decided to escalate the situation. Claiming – without any basis – that Wills was loud, disruptive, threatening and belligerent towards him, Zimmermann not only reported the matter to manager Pero, but he also called the police against Wills. [Tr. 601-05; 608-09] A police officer came to the office, met with Zimmermann and made some kind of report, but the officer of course took no further action, as there was no violent or threatening situation presented. [Tr. 644-45]

1. Respondent's Vice President of HR Did Not Believe the Incident Was Serious Enough to Warrant a Suspension, Let Alone Termination

Respondent immediately began investigating the June 23 Starz presentation incident. [Tr. 607; RX 23] Mere minutes after Zimmermann first reported the incident to Pero, HR manager Erica Simon sent an email to her superior in HR, Vice President Judy Courtney, stating that Vice President of Sales Daniel Ferrara wanted to suspend Wills immediately. [GCX 22] Courtney, however, did not believe that Wills' purported conduct at the Starz meeting constituted sufficient grounds to remove Wills from the workplace. [*Id.*] Courtney replied to Simon's email regarding Ferrara's request to suspend Wills and stated that it was "hard" for her to see Wills' conduct at the June 23 meeting as being severe enough to warrant a suspension. [GCX 22] Instead, Courtney interpreted it as Wills "just being a jerk" and suggested that Respondent could "write him up for unprofessional behavior." [*Id.*] Courtney further questioned how Respondent could take such severe action against Wills for using his phone during the meeting when Zimmermann was also on his phone at the time – precisely the point that Wills intended to make and the reason that he took a photo of Zimmerman on his phone. [*Id.*]

Simon wrote back to Courtney explaining that Wills was "already on a final warning for

insubordination” and described Zimmermann’s allegation that Wills stared at him threateningly and scared other employees. [RX 30] Tellingly, however, there is no evidence that Courtney ever changed her stated opinion that Wills’ conduct at the Starz meeting was not severe enough to warrant any kind of discipline beyond a mere warning. [ALJD 31]

2. Respondent’s Investigation Revealed that Wills Did Not Act Threateningly or Disruptively, as Zimmermann Had Claimed

Respondent’s own investigation of the June 23 Starz meeting incident revealed that Zimmermann had grossly exaggerated the nature of Wills’ conduct during the meeting. While Zimmermann reported that Wills spoke loudly, scowled angrily at Zimmermann, made other people in the room uncomfortable and posed a safety threat to Zimmermann and others in the office [Tr. 601-05], Respondent found no witnesses to verify Zimmermann’s version of the event. Instead, when HR manager Simon and sales manager Pero interviewed employee Adam Morris, who was sitting right next to Wills during the incident and observed the interactions between him and Zimmermann, Respondent discovered that Wills did not disrupt the meeting and threatened no one.

According to Simon’s notes from the interview, Morris told her and Pero that although Wills became “a little belligerent” when Zimmermann told him to pay attention and questioned why Zimmermann was allowed to use his phone while Wills was not, Morris stated that he did *not* feel uncomfortable during the interaction between Wills and Zimmermann and did *not* believe that the situation “was going to turn into anything out of control.” [RX 29] Instead, Morris reported that he viewed the situation as Wills and Zimmermann merely being “annoyed” with one another. [*Id.*] According to Simon’s notes, Pero asked Morris about Zimmermann’s allegation that Morris was so disturbed by Wills’ conduct that he moved away from Wills, and Morris denied Zimmermann’s claims, explaining that he only moved his body slightly to make room for Zimmermann to speak to Wills. [*Id.*] Further undermining Zimmermann’s story that Wills spoke

loudly and disrupted the meeting, Morris reported to Simon and Pero that no other employees had mentioned anything to Morris about the interaction between Wills and Zimmermann during the Starz presentation, and Morris did not believe that anyone else heard it. [*Id.*] Morris further refuted Zimmermann’s account by denying that he saw Wills give Zimmermann any dirty looks or stares. [*Id.*] Morris was the only third-party witness Respondent interviewed as part of its investigation.

3. Respondent Reviewed Its Notes on Wills to Find Other Incidents of Alleged Misconduct to Justify Its Decision to Discharge Wills

Despite the fact that the only third-party witness Respondent interviewed during its investigation directly contradicted Zimmermann’s account of the Starz incident, Vice President Ferrara testified that he nevertheless decided to believe Zimmermann’s story. [Tr. 799] Ferrara – who made the final decision to discharge Wills [Tr. 787] – testified that “there was no choice but to terminate” in light of the information he received about Wills’ conduct during the Starz presentation. [Tr. 799] HR Manager Simon also testified that the Starz incident was the event that triggered Wills’ discharge. [Tr. 693, 696]

Apparently recognizing that the Starz incident alone constituted insufficient grounds upon which to base a termination decision, Respondent looked back at Wills’ employment history, as reflected in the Boss Timeline notes Respondent had compiled regarding Wills, to find additional grounds to justify the discharge. [Tr. 792-93, GC 18] Ferrara testified that he reviewed the entire Boss Timeline for Wills – including entries Pero had made concerning Wills’ protected concerted activities such as the May 25, 2016 entry in which Pero noted Wills’ comments “during a meeting with Paul Hilber” and Pero reprimanding Wills for posting a copy of his February 24 Final Warning at his cubicle. With assistance and input from both Simon and Pero, Ferrara prepared a “Termination Request” for Wills, setting forth in detail Respondent’s purported basis for discharging Wills. [Tr. 684-85, GCX 11]

In addition to the June 23 incident at the Starz meeting, Respondent cited Wills for a variety of alleged misconduct occurring in the time since his February 24 Final Warning for making protected concerted statements at a boost meeting. [GCX 11] Specifically, Respondent cited Wills for calling the wrong manager in order to obtain a required approval to complete a sale [*Id.*], even though Respondent had never explained to Wills the proper protocol he needed to follow when contacting supervisors for approvals, and despite the evidence establishing that the manager whom Wills supposedly called inappropriately to get the approval had encouraged Wills to contact him for that purpose and did not tell Wills he had done anything wrong when he called, but rather was “happy to help” Wills secure the sale. [Tr. 244-46, 255-57]

The Termination Request also cited Wills for allegedly ending work early on a certain day in April 2016 without notifying his supervisor [GCX 11], despite the evidence establishing that Wills did not in fact leave early, but instead told his supervisor exactly what he was doing and wound up staying at a customer’s home trying to complete a sale long after his scheduled stop time [Tr. 260-65]. Furthermore, when his supervisor Thomas Farina questioned Wills about the incident several days later, Wills reminded Farina that he had told him about the customer lead he was following that evening, and Farina simply replied, “Okay, I got it” and never mentioned the incident to Wills again. Respondent only made an issue of it when it later came time to justify its discriminatory decision to discharge Wills.

Respondent additionally cited Wills in the Termination request for sending a text message to supervisor Farina on June 6, 2016 requesting that Farina stop contacting him when Wills was off duty. [GCX 11] Respondent found the language Wills used in the text to Farina disrespectful. [*Id.*] However, the text message exchange between Wills and Farina came to Respondent’s attention not because Farina complained that Wills had disrespected him, but rather because Wills had lodged a complaint with HR about Farina supposedly harassing Wills when he was off duty. [GCX 13; Tr. 276-77] Respondent’s HR officials, including Erica Simon, heard Wills’ complaint but informed

him that Farina acted appropriately in contacting Wills during off-duty hours because Wills was an “exempt” employee. [Tr. 283-86, 675-76] A close review of the Boss Timeline notes shows that Farina’s entry on June 6, 2016 concerned a “discrepancy for a non-quality sale” that Wills had processed and did not mention any alleged disrespectful language used by Wills. [GCX 18 at p. 4] The entry concerning the language used by Wills in the text message did not appear in the Boss Timeline notes until June 29, when Pero put in the information concerning the alleged disrespectful language at the time when Respondent was making its determination to discharge Wills. [GCX 18 at p. 2]

Critically, as noted by the ALJ, none of the additional instances of purported misconduct by Wills relied upon by Respondent in the Termination Request resulted in Respondent issuing Wills any form of discipline. [ALJD 31] Moreover, none of these incidents caused Respondent to initiate an HR investigation. [*Id.*] Yet when Wills used his phone to take a video of Zimmermann at the June 23 Starz meeting, Respondent immediately launched a wide-ranging investigation and decided to discharge Wills. As recognized by the ALJ, this departure from past practice shows that the reasons for the discharge cited in Respondent’s Termination Request do not reflect the real reason why Wills was fired and instead demonstrates that Respondent “piled on” false justifications to mask the unlawful motive behind the discharge.

F. **Vice President Ferrara Made the Decision to Discharge Wills in Collaboration with Various Other Management Officials**

In its Exceptions Brief, Respondent contends that Vice President Daniel Ferrara “alone” decided to discharge Wills. [R. Br. 20] The record simply does not support Respondent’s argument in this regard, but rather the evidence is clear that the decision to terminate Wills resulted from a collaborative process involving several management officials. HR manager Simon admitted that she was involved in making the decision to discharge Wills and gave Ferrara guidance on what the appropriate company action should be in Wills’ situation. [Tr. 684] Simon’s testimony reveals that

both she and sales manager Pero collaborated with Ferrara to prepare Wills' "Termination Request" document. [Tr. 685] Ferrara himself admitted that he consulted extensively with Simon regarding what action Respondent should take against Wills following the incident at the June 23 Starz meeting. As Ferrara testified:

"So after Carmine [Pero] let me know about the incident . . . I called Erica [Simon], because she was the HR representative at the time, to . . . get from her, you know, what's in his file, and is there anything else, you know, that . . . we need to review . . . because generally, I – you know, we involve HR when we make [a] decision as to, you know, what the next step should be." [Tr. 791-92]

Indeed, the evidence establishes that multiple Respondent officials, including its attorneys, worked together to develop the company's "approach" with respect to Wills not long after the June 23 Starz meeting incident. On the morning of June 24, Simon received an email from her superior in HR, Jennifer Condoulis, regarding Respondent's investigation of Wills. [GCX 32, Tr. 709-10] Condoulis told Simon that they should confer with Respondent's in-house counsel Rochelle Noel⁷ to "confirm we are aligned on our approach" to Wills. [GCX 32] Simon replied to Condoulis that she wanted to first speak with "Dan" Ferrara to see if he had anything to add regarding Respondent's "approach" to the situation. [*Id.*] In her testimony, Simon confirmed that she had a phone call with attorney Noel, as discussed in the email between Simon and Condoulis, and that Simon had these discussions about "the approach" with Condoulis, Ferrara and Noel before she interviewed Wills in the Hauppauge office on June 24. [Tr. 711-13] Simon's testimony and the managers' own emails thus firmly establish that Ferrara certainly did not act "alone" in deciding to discharge Wills, as Respondent contends. Rather, the record is clear that numerous management officials and counsel collaborated on the decision.

⁷ The email [GCX 32] refers only to "Rochelle." The reference is to Rochelle Noel, in-house attorney for Respondent, who made an appearance in this case on behalf of the company. [Tr. 21, 24]

G. Respondent Treated Wills More Harshly than Another Similarly Situated Employee

The record establishes that Respondent treated Wills more severely than other employees who engaged in acts of arguable insubordination or unprofessional conduct. A prime example of this disparate treatment is the case of Hauppauge sales representative Ulysses Colon. As the ALJ correctly observed, Respondent issued Colon a “Documented Coaching” on November 19, 2015 for “unprofessional behavior” and disrespectful conduct towards his supervisors. [ALJD 32; GCX 20] Like the conduct that supposedly led Respondent to discipline and then discharge Wills, the evidence establishes that Colon disrupted a boost meeting by speaking to supervisor Zimmermann in a loud voice and raised his voice further when Zimmermann asked him to quiet down. [GCX 20] Pero had to interject to tell Colon to pay attention to the meeting, but Colon “kept huffing and puffing and rambled under his breath” at Pero, and then turned his back to Pero while the manager continued addressing the staff. [*Id.*] After the boost meeting, Colon continued his aggressive behavior towards Zimmermann and Pero, loudly interrupting Pero once again while Pero was trying to speak with other employees and then telling Zimmermann that he did “want to be doing this stupid paperwork.” [*Id.*] Despite this egregious behavior, Pero determined that the appropriate discipline for Colon was merely a documented coaching. [*Id.*; Tr. 478-79]

Colon continued to engage in misconduct after he received the November 2015 documented coaching. Colon received another documented coaching on March 29, 2016 for attendance issues. [GCX 35 at p.3] Then, on May 4, 2016, Respondent issued Colon a final warning for again violating the company’s attendance policy. [ALJD 32; GCX 37]

Again like Wills, Respondent found that Colon engaged in still more misconduct while under the final warning. On May 25, 2016, Respondent found that Colon engaged in a verbal exchange with a fellow sales representative that made the other employee feel uncomfortable. [GCX 35 at p. 3.] Respondent’s records show that Pero found the incident serious enough to

report it to HR manager Simon and make a Boss Timeline entry about it. [*Id.*] Furthermore, as noted by the ALJ, Respondent documented that Colon engaged in numerous perceived violations of company policy while under final warning, including using incorrect emails for a customer, failing to return calls to customers and his supervisors, failing to answer a call from a supervisor, and abusing the attendance and leave policy, among other infractions. [ALJD 32; GCX 35]

In a circumstance strikingly similar to the incident that Respondent claims triggered Wills' discharge, Colon on July 6, 2016 disrupted yet another boost meeting by objecting to supervisor Zimmermann telling Colon to put down his cell phone. [GC 35 at p. 3] The evidence shows that at the July 6 boost meeting, Zimmermann observed Colon using his phone while Pero conducted the meeting. When Zimmermann asked Colon to pay attention to the meeting, Colon acknowledged Zimmermann but still continued using his phone for about another 60 seconds. In response, Zimmermann walked back over to Colon and again directed Colon to pay attention. [*Id.*] Colon exclaimed in reply, "I am actively listening!" [*Id.*] Zimmermann waited a bit longer and still continued to see Colon using his phone while the meeting was ongoing. At that point, Zimmermann approached Colon and ordered him to leave the meeting with Zimmermann and go to the back of the office, where Zimmermann reprimanded Colon for not giving his undivided attention to the meeting. [*Id.*] Colon then returned to the meeting and faced the speaker. [*Id.*] Like Wills, Colon defied Zimmermann's direction to pay attention and stop using his phone, and he talked back to the supervisor while he was under a final warning and had engaged in other violations of company policy since receiving the final warning. Colon's conduct at the July 6 boost meeting was even more severe and disruptive than Wills' conduct at the June 23 Starz presentation, as Colon, unlike Wills, had to be removed from the meeting and reprimanded. However, in sharp contrast to Respondent's treatment of Wills, Colon received no discipline whatsoever for his conduct during this July 6 boost meeting and was still employed by Respondent at the time of the hearing in this case. [ALJD 32] As the ALJ correctly found, Colon's case

provides powerful evidence establishing Respondent's disparate treatment of Wills and reveals the true unlawful motive underlying Respondent's decision to terminate Wills.

III. ARGUMENT

A. Respondent Misstates the Applicable Legal Standard

Respondent alleges that the ALJ, in his Decision, "misstated and misapplied" the legal standards set forth by the board in *Wright Line, Inc.*, 251 NLRB 1083 (1980). [R. Br. 22] However, it is Respondent, not the ALJ, who has misinterpreted *Wright Line*.

Under the *Wright Line* burden-shifting framework, the General Counsel has the initial burden of establishing that an employee's protected activity was a motivating factor for the adverse employment action taken against him. The General Counsel meets this initial burden by showing: 1) that the employee was engaged in protected activity, 2) that the employer had knowledge of that activity; and 3) that the employer harbored animus towards the employee's protected activity. See, e.g. *Lee Builders, Inc.*, 345 NLRB 348, 349 (2005); *Willamette Industries, Inc.*, 341 NLRB 560, 562-63 (2004); *Donaldson Bros. Ready Mix, Inc.*, 341 NLRB 958, 961 (2004). Once General Counsel meets this initial burden, the burden of persuasion then shifts to the employer to prove that it would have taken the same adverse employment action, even in the absence of the employee's protected activity. *Shearer's Foods, Inc.*, 340 NLRB 1093, 1094 (2003) (citing *Wright Line*, 251 NLRB at 1089); see also *Hunter Douglas, Inc.*, 277 NLRB 1179 (1985) (employer must prove by a preponderance of the evidence that the challenged personnel action would have taken place regardless of employee's protected activity).

Respondent in this case, however, requests – without basis – that the Board attach an additional element to the General Counsel's initial burden. According to Respondent, *Wright Line* requires that the General Counsel affirmatively establish as part of its case-in-chief a certain undefined "link or nexus between the employee's protect activity and the adverse employment action . . ." [R. Br. 23] The Board, however, has repeatedly affirmed that "proving that an

employee's protected activity was a motivating factor in the employer's action does *not* require the General Counsel to make some additional showing of particularized motivating animus towards the employee's own protected activity or to further demonstrate some additional, undefined 'nexus' between the employee's protected activity and the adverse action." *Libertyville Toyota*, 360 NLRB 1298, 1301 fn. 10 (2014) (emphasis in original), *enfd. sub nom. AutoNation, Inc. v. NLRB*, 801 F.3d 767 (7th Cir. 2015); see also *Mesker Door, Inc.*, 357 NLRB 591, 592 fn. 5 (2011) (General Counsel's initial burden does not include a fourth "nexus" element); *The TM Group, Inc.*, 357 NLRB 1186, fn. 2 (2011) (same).

In *Libertyville Toyota*, the Board noted that there have been "a handful of instances in which Board panels, without purporting to modify or add to the longstanding *Wright Line* test, have in passing referred to a 'nexus' element." *Libertyville Toyota*, 360 NLRB at 1301, fn. 10. However, the Board made it abundantly clear that such cases do not alter the *Wright Line* standard and do not add an extra "nexus" element to the General Counsel's initial burden. *Id.* Accordingly, Respondent's reliance on *Jupiter Med. Ctr. Pavilion*, 346 NLRB 650 (2006) is misplaced.

As recently as May 31, 2018, the current Board has affirmed that there is no "nexus" element under the *Wright Line* test. *Kitsap Tenant Support Services, Inc.*, 366 NLRB No. 98, slip op. at 14, fn. 25 (May 31, 2018). There is no basis here to reverse the Board's holding on this point. Respondent's misguided attempt to raise the bar for the General Counsel's initial burden should thus be rejected in line with recent Board precedents.

Respondent further distorts the *Wright Line* standard in its recitation of the employer's burden once the General Counsel has established a *prima facie* case of discrimination. According to Respondent, the employer need only "succeed in demonstrating a lawful reason for the discharge . . ." [R. Br. 23] That is simply not the employer's burden under *Wright Line*, and Respondent is once again trying to lower the bar for what it has to prove to overcome the General Counsel's strong *prima facie* case in this matter.

The Board holds that an employer cannot meet its *Wright Line* burden merely by showing that it had a legitimate reason for the adverse employment action, but rather it must persuade, by a preponderance of the evidence, that the action would have in fact taken place even absent the protected conduct. *Williamhouse of California, Inc.*, 317 NLRB 699, 715 (1995) (citing *Roure Bertrand Dupont, Inc.*, 271 NLRB 443 (1984)). If the employer's asserted reasons are found to be false or pretext, the Board may infer that the reason for the discharge was unlawful and find a violation of the Act. *Id.*; see also *Yesterday's Children, Inc.*, 321 NLRB 766, 768 (1996). Thus, contrary to Respondent's wishful interpretation of the law, it cannot rebut the General Counsel's *prima facie* case by merely articulating a legitimate, non-discriminatory reason for discharging Wills, and the burden to establish pretext does not fall to the General Counsel. The law is clear that Respondent here must prove that Wills' protected activities had nothing to do with his discharge and that Respondent would have terminated him even absent his extensive union organizing and other protected conduct. See *Evans Products Co.*, 220 NLRB 1325, 1332 (1975) (affirming that employer violated the Act, despite having "reasonable ground" to discipline its employee, where its asserted basis for the action was found to be pretext and because the discharge was unlawful if union activity "played any part" in the employer's action).

B. The ALJ Correctly Found that the General Counsel Met Its Initial Burden Under *Wright Line*

In its Exceptions to the ALJ's Decision, Respondent contends that the ALJ erred in finding that the General Counsel established a *prima facie* case under *Wright Line*, because it asserts that there is no evidence that Vice President Daniel Ferrara knew about Wills' protected activities and because Respondent misinterprets the ALJ's Decision to conclude that the ALJ prematurely shifted the *Wright Line* burden to Respondent before finding that Respondent harbored animus against Wills for his union organizing and other protected concerted activities. [R. Br. 22, 24] As explained below, there is no merit to any of these Exceptions.

1. The Record Unequivocally Establishes Respondent's Knowledge of Wills' Protected Activities

Overwhelming record evidence establishes that Respondent knew at the time it fired Michael Wills that he had engaged in numerous protected concerted activities, particularly his leading role in the CWA organizing campaign among Respondent's sales representatives in Hauppauge and Jericho, New York. As the ALJ correctly found, Wills engaged in protected concerted activity at the February 17, 2016 boost meeting, when he spoke out in support of employees' right to discuss "the good, bad and ugly" concerning their terms and conditions of employment.⁸ [ALJD 26] During that same meeting Wills also engaged in protected activity by voicing a common complaint among his co-workers regarding the company's policy requiring sales representatives to call a supervisor before taking a bathroom break. [Tr. 91-93, 409-10] Wills also engaged in protected concerted activity when he emailed his co-workers and supervisors on February 5, 2016 about employees' coverage under Respondent's Workers' Compensation policy. [GCX 3; Tr. 102, 110] The ALJ further found that Wills was engaged in protected activity when, in April 2016, he paid his own way to go on a company retreat for high-performing sales representatives in the "president's club," in protest of Respondent denying his co-worker Alexia Agnant an opportunity to go on the trip. [ALJD 27]

Respondent unquestionably knew about these activities by Wills. Following his protected comments at the February 17 boost meeting, sales manager Pero and HR manager Simon specifically reprimanded him for his comments [GCX 4 at p. 1-2; Tr. 97-98] and told him that he was not allowed to address workplace concerns to his co-workers in a group e-mail as he did on February 5 concerning Workers' Compensation. [GCX 4 at p. 8-10; Tr. 101-03; 109-10] Wills' protected conduct at the February 17 boost meeting indeed caused Respondent to issue him a Final Warning on February 24, 2016 [GCX 5] – the same Final Warning that Respondent uses to justify

⁸ Respondent does not take exception to the ALJ's findings that Wills engaged in various forms of protected activity.

its decision to discharge Wills. Respondent, moreover, knew about Wills' protest trip to Aruba on behalf of his co-worker Agnant, as numerous supervisors saw him on the trip, and Wills discussed his support for Agnant with them. [ALJD 27]

More significantly, Wills spearheaded a Union organizing campaign, striking at the heart of Respondent's admitted opposition to the unionization of its workforce. The evidence affords no doubt that Respondent knew that Wills not only supported the Union but that he in fact was leading the organizing drive because Wills told the company that directly. During the May 25 staff meeting with Senior Vice President Hilber, Wills unequivocally told Hilber that Wills was "100 percent for this Union," that he was directly responsible for starting the Union organizing campaign, and that he intended to "finish it." [Tr. 150] Numerous other management officials were present at this meeting, including sales manager Pero and HR manager Simon. [Tr. 146] Indeed, Pero and Simon admitted that they were aware that Wills was engaged in union activity at the time he was discharged. [Tr. 478, 699]

Respondent also acquired knowledge of Wills' organizing activity when its supervisors at the Jericho office observed Wills soliciting employees there to sign Union authorization cards in about early June 2016. As the ALJ noted, direct sales supervisor Hugh Johnson was present when Wills sat in the Jericho cafeteria with a group of newly-hired employees talking about his support for the Union and encouraging the new employees to sign authorization cards. [ALJD 13, 27; Tr. 169-70] Later that same day, Jericho sales manager Matthew Haggerty saw Wills speaking to another employee about the Union in the parking lot of the Jericho facility. [ALJD 13, 27; Tr. 170-71] Although neither Johnson nor Haggerty said anything to Wills about his union activity at the time, the ALJ correctly inferred that they knew Wills was engaged in union activity, as he was visibly wearing Union wristbands at the time, and he did not work out of the Jericho office and had no other reason to be there. Furthermore, just days earlier, Wills had openly declared his leadership in the Union campaign to Hilber and the other managers in attendance at the May 25 meeting.

Thus, the inference that supervisor Johnson and manager Haggerty knew Wills was engaged in union activity at the Jericho office in early June is compelling.

a. *The Knowledge of Respondent's Supervisors Must Be Imputed to Ferrara*

Despite the multitude of evidence establishing that various Respondent supervisors had knowledge of Wills' union activity, Respondent argues that the General Counsel failed to establish knowledge under the *Wright Line* test simply because one of the managers involved in the determination to discharge Wills – Vice President Daniel Ferrara – implausibly denied that he knew. However, Board law makes clear that this argument lacks merit because the “Activities, statements, and knowledge of a supervisor are properly attributable to the employer.” *Pinkerton's Inc.*, 295 NLRB 538 (1989). Thus, direct knowledge of Wills' union activity possessed by Pero, Simon, Hilber and the numerous other Respondent management officials present when Wills forcefully proclaimed his support for the CWA and his leadership role in the Union campaign, as well as the inferred knowledge of supervisors Johnson⁹ and Haggerty based on their observations of Wills soliciting Union authorization cards at the Jericho office must be attributed to Respondent and its decision-makers, including Ferrara, unless Respondent has “affirmatively established” that none of these supervisors shared their knowledge with Ferrara. See *Ready Mixed Concrete Co.*, 317 NLRB 1140, 1146, fn. 18 (1995).

On this record, Respondent has not, and cannot establish that the supervisors did not share their knowledge of Wills' union activity with Ferrara. The only evidence purporting to establish this unlikely theory is Ferrara's own self-serving denial. However, Pero admitted under cross-examination that he “might have” discussed Wills' union activity with Ferrara, before catching himself and claiming that he could not recall specifically. [Tr. 777] The record also establishes

⁹ Contrary to Respondent's contention that Johnson is not a supervisor under the Act [R. Br. 26, fn. 12], it is undisputed that Johnson held the same position in the company – direct sales supervisor – as Thomas Farina and Eric Zimmermann, both admitted Section 2(11) supervisors. [GCX 1(H), GCX 1(O)] Thus, the record is clear that Johnson too is a supervisor under the Act.

that Ferrara consulted and collaborated with Pero and Simon, who were both indisputably aware of Wills' union activity, in deciding what action Respondent should take against Wills. [Tr. 684-85] Moreover, Respondent chose not to have either supervisor Johnson or manager Haggerty testify in this proceeding [ALJD 1, fn. 3], thus failing to "affirmatively establish" that these supervisors did not tell Ferrara about the union activity they observed Wills undertaking at the Jericho office in early June. Furthermore, Ferrara admitted that he reviewed Respondent's Boss Timeline report on Wills, including the Pero's May 25, 2016 entry describing Wills' comments to Paul Hilber during the anti-Union staff meeting that day. [ALJD 28, Tr. 792-93, 811-12] As the ALJ incisively observed, Ferrara's testimony that he did not recall seeing this Boss Timeline entry and did not know that it referred to Wills' pro-union comments to Hilber is simply not credible, given the close proximity of the May 25 event to Ferrara's investigation of Wills and the fact that Ferrara had attended a similar anti-Union meeting with Hilber in Jericho around the same time. [ALJD 28, Tr. 812] Thus, the evidence strongly supports the inference that Respondent's supervisors shared their knowledge of Wills' union activity with Ferrara and their knowledge is properly imputed to him.

b. *The Board Should Not Disturb the ALJ's Credibility Finding
Explicitly Discrediting Ferrara's Denial of Knowledge*

In light of the significant evidence establishing that Ferrara was aware of Wills' union activity at the time Respondent determined to discharge him, and in consideration of Ferrara's demeanor during his testimony, the ALJ appropriately found that Ferrara's testimony denying knowledge was not credible. [ALJD 28] "It is the Board's established policy to attach great weight to an administrative law judge's credibility findings, insofar as they are based on demeanor." *Longshoremen's Association, Local No. 307*, 257 NLRB 880 (1981) (citing *Standard Dry Wall Products, Inc.*, 91 NLRB 544 (1950)). It is well settled that the Board will not disturb an administrative law judge's credibility resolutions, "unless the clear preponderance of all of the relevant evidence convinces [the Board] that the resolutions are incorrect." *Standard Dry Wall*

Products, Inc., 91 NLRB 544.

Respondent contends that the ALJ's finding discrediting Ferrara's testimony was not based on his demeanor at trial. However, the ALJ expressly stated that the credibility findings in his Decision were based on his assessment of the witnesses' demeanor:

“The credibility resolutions herein have been derived from a review of the entire testimonial record and exhibits, with due regard for the logic of probability, the *demeanor of the witnesses*, and the teachings of *NLRB v. Walton Mfg. Co.*, 369 U.S. 404, 408 (1962).” [ALJD 24] (emphasis added)

In *Walton Mfg. Co.*, cited by the ALJ in describing his credibility determinations, the Supreme Court noted that the demeanor of a witness may establish “not only that the witness' testimony is not true, but that the truth is the opposite of his story; for the denial of one who has a motive to deny, may be uttered with such hesitation, discomfort, arrogance or defiance, as to give assurance that he is fabricating . . .” *NLRB v. Walton Mfg. Co.*, 369 U.S. at 408. Thus, clearly the ALJ considered the demeanor of the witnesses, including Ferrara, in resolving to discredit certain testimony. It is therefore incumbent upon Respondent to show by a “clear preponderance” of the evidence that the ALJ's demeanor-based credibility finding discrediting Ferrara's denial of knowledge was wrong. *Standard Dry Wall*, 91 NLRB 544. Respondent has made no such showing, and the Board should defer to the ALJ's credibility resolution regarding Ferrara.

It is crucial that the Board defer to an administrative law judge's credibility findings based on demeanor, such as those presented here, because, as the Supreme Court has observed, it is the “impartial, experienced examiner who has observed the witness and lived with the case” who is best positioned to evaluate credibility. *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 496 (1951). Board members “cannot seat [them]selves next to a judge at a hearing. [They] cannot watch and listen to witnesses testify. [They] must rely on a judge's assessment of the credibility of witnesses, and the judge's balancing of all of the many factors at work in deciding whether to believe or disbelieve witnesses.” *E.S. Sutton Realty Co.*, 336 NLRB 405, 410–11 (2001) (member

Walsh, dissenting). That is why various circuit courts have held that “Where credibility is of central importance, and the Board second-guesses the Examiner and gives credence to testimony which he has found . . . to be inherently untrustworthy, the substantiality of that evidence is tenuous at best.” *Ewing v. N.L.R.B.*, 732 F.2d 1117, 1120–21 (2d Cir. 1982) (citing *Ward v. NLRB*, 462 F.2d 8, 12 (5th Cir.1972)). In this case, there is no basis for the Board to take the extraordinary action of reversing the ALJ’s well-reasoned, demeanor-based credibility findings, and the Board should affirm the ALJ’s conclusion that Ferrara had knowledge of Wills’ union activity.

2. The ALJ Correctly Found that Respondent Bore Animus against Wills’ Protected Activity and Did Not Prematurely Shift the *Wright Line* Burden to Respondent

Respondent claims that the ALJ misapplied *Wright Line* by failing to find evidence of Respondent’s animus against Wills’ protected activity before shifting the burden of persuasion to Respondent. [R. Br. 27-28] To the contrary, the ALJ did not prematurely shift the *Wright Line* burden to Respondent, but rather analyzed the manner in which Respondent treated Wills’ discharge and found substantial indirect evidence of animus based on the timing of the discharge relative to Wills’ union activity and Respondent’s disparate treatment of Wills relative to a similarly-situated employee. [ALJD 30-33]

After correctly determining that Wills had engaged in extensive protected activity of which Respondent was aware, the ALJ stated that the “remaining question is whether Respondent terminated Wills because of discriminatory animus.” [ALJD 28] To answer that question, the ALJ proceeded to analyze Respondent’s purported reason for the discharge precisely because the evidence of animus relied upon by the ALJ was revealed by the pretextual nature of Respondent’s actions.

The ALJ properly found that his “close review of the investigation taken after the [June 23 Starz meeting] incident shows the reason for [Wills’] discharge is pretext for Respondent’s animus towards Wills’ support and activities on behalf of the Union.” [ALJD 30] The ALJ found that

Respondent's rationale for the discharge – that Wills had been insubordinate to supervisor Zimmermann during the Starz meeting – was false insofar as “Zimmermann never instructed Wills to put away his phone and therefore, [Wills] could not have been insubordinate to Zimmermann.” [Id.] The ALJ explicitly credited Wills over Zimmermann on this point and further credited Wills' testimony that he placed his phone on his lap and faced the speaker after he heard Zimmermann tell him to pay attention. As discussed above, these credibility determinations are based in large part on the demeanor of the witnesses and must not be disturbed by the Board. See *Standard Dry Wall*, 91 NLRB 544. Finding that Respondent's proclaimed basis for triggering a discharge investigation against Wills was false, it was appropriate for the ALJ to infer animus on that basis. See *Pro-Spec Painting, Inc.*, 339 NLRB 946, 949 (2003) (where an employer's reason for a discharge is proven false, it can be inferred that the real motive was unlawful discriminatory animus); see also *Approved Electric Corp.*, 356 NLRB 238 (2010) (evidence that the employer's purported reasons for the action were pretext properly used to establish General Counsel's initial *Wright Line* burden).

The ALJ found further evidence of animus in the way in which Respondent seized upon the June 23 Starz meeting incident to launch a wide-ranging investigation of Wills, where it had done no such thing in response to previous alleged instances of Wills violating company policy. [ALJD 31] As the ALJ noted, in between the time that Respondent issued Wills a Final Warning in February 2016 and the June 23 Starz meeting incident, Respondent supposedly determined that Wills had violated company policy numerous times, yet none of those violations triggered an investigation or caused Respondent to discipline Wills. However, as soon as supervisor Zimmermann falsely reported that Wills had been insubordinate and threatening during the Starz meeting, Respondent immediately initiated an investigation and moved to terminate Wills. [Id.] The ALJ keenly determined that such a clear departure from past practice demonstrates Respondent's animus, citing *JAMCO*, 294 NLRB 896 (1989). [Id.]

Crucially, the ALJ appropriately found animus based on the evidence establishing that Respondent's "disciplinary treatment of Wills was glaringly disparate compared to another sales representative who had continually violated company policy and shown disrespect/insubordination towards a supervisor." [ALJD 32] Citing the documentary evidence illustrating the long disciplinary history of employee Ulysess Colon, the ALJ correctly determined that Colon's conduct was remarkably similar to that for which Wills was supposedly discharged, yet Colon remained employed by Respondent. [*Id.*] This strong evidence of disparate treatment establishes Respondent's animus in support of the General Counsel's *prima facie* case under *Wright Line*. See *Shamrock Foods Co.*, 366 NLRB No. 107, fn. 1 (Jun. 22, 2018) (Respondent's animus demonstrated by disparate treatment).

Furthermore, the ALJ correctly found animus based on the timing of Wills' discharge – coming less than two months after Wills openly declared his support for the Union at the May 25 meeting with Hilber and only one month after Wills was seen by Respondent's supervisors soliciting Union authorization cards at the Jericho office in early June. [ALJD 33] See *Control Building Services, Inc.*, 337 NLRB 844, 845 (2002) (close proximity between employer's knowledge of employee's protected activity and the adverse employment action establishes inference of animus). The ALJ's Decision thus thoroughly supports his finding that Respondent harbored animus against Wills' union activity and that the General Counsel met its burden to establish that anti-Union discrimination motivated Respondent's decision to discharge Wills.

a. *The Record Also Establishes Significant Direct Evidence of Animus*

In addition to the substantial indirect evidence of animus found by the ALJ in the timing of Wills' discharge, Respondent's departure from past practice and disparate treatment of Wills, and the pretextual nature of Respondent's stated basis for its action, the record in this case further establishes considerable direct evidence of animus not relied upon by the ALJ. In February 2016, Respondent showed its animus against Wills' protected concerted activities by repeatedly

reprimanding him for raising concerted complaints or questions about workplace policies and for discussing Respondent's treatment of him with co-workers. [GCX 4 at p 1-2, 8-10, 20; GCX 5; Tr. 131-37, 466-67] That animus led Respondent to issue Wills the February 24 Final Warning, which it heavily relied upon to discharge Wills. [GCX 5; Tr. 800] Although Wills did not challenge the lawfulness of the Final Warning and it cannot form the basis of unfair labor practice under Section 10(b) of the Act, the Board holds that "conduct that occurred outside the 6-month period set forth in Section 10(b) may be considered to the extent that it sheds light on the conduct that occurred within that period." *Clark Distribution Systems, Inc.*, 336 NLRB 747, 762 (2001). Thus, Respondent's coercive statements and conduct restricting Wills' Section 7 activity in February 2016 may be considered as background evidence of Respondent's animus furthering the conclusion that unlawful considerations factored into its decision to terminate Wills. See *CSC Holdings, LLC*, 365 NLRB No. 68 (May 11, 2017) (relying on evidence of animus outside the 10(b) period to find that the same Respondent at issue herein discriminated against employees in 2014 by transferring them in retaliation for their union activities); see also *Kaunagraph Corp.*, 316 NLRB 793, 794 (1995).

Additionally, the record is clear that Respondent was openly hostile to the Union organizing campaign that Wills initiated. Senior Vice President Hilber explicitly testified that Respondent did not believe that employees having a union was productive for either the employees or the company. [Tr. 830] In a memo from June or July 2016, Hilber stated that the company "prefers a union-free relationship with its employees. . ." and ". . . opposes the CWA coming into our union-free workplaces and seeking to represent our employees" and that keeping the CWA from organizing Respondent's employees was "a top priority" for the company. [GCX 28] Led by Hilber, Respondent aggressively countered the Union organizing campaign emphasizing the company's opinion about the "empty promises and false statements made by the union." [GCX 29; ALJD 33, fn. 10] The Board has long held that such expressions of views or opinions against unionization may be used as background evidence of animus, even if it is not a violation in and of

itself. See e.g., *Mediplex of Stamford*, 334 NLRB 903 (2001) (citing *Affiliated Foods, Inc.*, 328 NLRB 1107 (1999)); *Gencorp*, 294 NLRB 717, 731, fn. 1 (1989). The record is thus replete with evidence establishing Respondent's profound animus against the Union campaign and against Wills protected activity in support of the Union and on behalf of himself and his co-workers. The Board should therefore affirm that the General Counsel met its *Wright Line* burden and established a *prima facie* case of unlawful discrimination against Wills.

C. **The ALJ Appropriately Found that Respondent's Stated Basis for Discharging Wills Was Pretext**

As discussed above, the ALJ properly found that the evidence did not establish that Respondent discharged Wills for legitimate reasons relating to his alleged insubordination and misconduct. [ALJD 29] Respondent takes exception to this well-reasoned conclusion, arguing (1) that the ALJ erred in finding that the timing of Wills' discharge suggests an unlawful motive behind the discharge [R. Br. 30]; (2) that the ALJ erred in finding disparate treatment of Wills [R. Br. 33]; and (3) that the ALJ somehow "substituted his own business judgment for that of the Company." [R. Br. 35] As explained below, none of these Exceptions has merit.

1. **The Close Proximity of Wills' Union Activity to His Discharge Shows Respondent's Discriminatory Motive**

Respondent asserts that the timing of Wills' discharge – again occurring approximately 6 weeks after Wills publicly declared his support for and leadership in the Union organizing campaign and only about 4 weeks after Wills was seen by supervisors soliciting Union authorization cards at the Jericho facility – was mere coincidence. [R. Br. 31] In support of this implausible theory, Respondent argues that Wills had engaged in protected concerted activities as far February 2016, yet Respondent took no disciplinary action against him until it discharged him on July 6. However, the evidence establishes that Respondent did in fact discipline Wills in response to his protected concerted activities in February when it issued Wills the Final Warning on February 24. That Final Warning explicitly states that Wills was disciplined, at

least in part, because he said during a boost meeting on February 7 “that it is ok [for employees] to vent with each other, no matter what the venue is” and that employees had a right “to speak negatively” because they “need to hear the good, bad and ugly” regarding their terms and conditions of employment. [GCX 5] Respondent’s contention that it did not discipline Wills in response to his protected activity going back to February 2016 thus flatly fails on its face.

There is no evidence that Respondent was aware that Wills engaged in further protected concerted activities between the time just after he received the Final Warning in late February and late May, when Wills proclaimed his leading role in the Union campaign during the anti-Union meeting with Paul Hilber. For this reason, Respondent’s argument that Wills was engaged in protected activity in April 2016, yet was not disciplined after he supposedly violated company policies in early May is a red herring. Respondent could not have disciplined Wills because of his protected activity following those alleged infractions in May because it did not know that Wills had initiated the Union organizing campaign at that time. To the contrary, as the ALJ observed, Respondent’s failure to take any action against Wills for these alleged incidents in May shows that Respondent did not consider them serious enough to warrant discipline until after Wills made it clear to Respondent that he was actively trying to organize employees with the Union. [ALJD 31]

Respondent further asserts that the timing of the discharge does not reflect its unlawful motive because Wills sent an inappropriate text message to supervisor Thomas Farina on June 6, 2016, after the meeting with Hilber, and yet Respondent did not discipline Wills at that time. However, it is important to note that the incident involving Wills’ June 6 text message to Farina came to the attention of Respondent’s HR managers not because Farina took offense with

Wills' language,¹⁰ but rather because Wills complained to HR about Farina allegedly harassing him by contacting Wills on his off duty time, despite Wills repeatedly asking him not to do so. In response to his complaint against Farina, Respondent arranged two separate meetings between Wills and HR officials, including Erica Simon, during which the HR managers explained to Wills that Farina had acted appropriately in contacting Wills when Wills was off duty because Wills was an exempt employees under applicable wage and hour regulations. [Tr. 277-80; 281-84; 675-76] It would have been incongruous for Respondent to suddenly discharge Wills in response to him making a complaint to HR about alleged harassment by his supervisor, just days after Wills declared his support for the Union on May 25. Thus, the fact that Respondent did not discharge Wills for his June 6 text message to Farina does not negate the ALJ's appropriate inference of animus based on the timing of the discharge relative to Wills' union activity.

Respondent contends that the ALJ's inference of animus based on timing is inappropriate merely because "Will's discharge was not simultaneous to his union activity," and that the cases relied upon by the ALJ in support of his finding regarding timing had much closer proximity between the employees' protected activity and the employer's adverse employment action than that presented in this case. [R. Br. 32] However, the Board has affirmed that a span of two months between an employer's knowledge of its employees' union activity and the adverse actions taken against them is more than sufficient to establish an inference of animus. See e.g., *The Sheraton Anchorage*, 363 NLRB No. 6 (2015) (finding employee's discharge occurring 2 months after he gave testimony against his employer inferred the employer's discriminatory motive); *United Parcel Service*, 340 NLRB 776, 777 fn. 10 (2003) (finding that a 6-month gap between employee's protected activity and his discharge not too long to establish animus based on

¹⁰ Although Respondent called Farina to testify in this case, it tellingly chose not to elicit any testimony from Farina regarding the June 6 text message from Wills. [Tr. 716-24]

timing). The Board recognizes that delays between an employee's protected activity and the adverse employment action taken against him may result because "[a]n employer might wait for a pretextual opportunity to discipline an employee for engaging in protected activity." *Naomi Knitting Plant*, 328 NLRB 1279, 1282-1283 fn. 18 (1999). The ALJ thus correctly found that the mere six-week lapse between Wills proclaiming his union activity and the termination sufficiently establishes Respondent's animus based on the timing of the action.

2. Strong Evidence of Disparate Treatment Gravely Undermines Respondent's Defense

As set forth above, overwhelming evidence establishes that Respondent treated sales representative Ulysess Colon far more leniently than it treated Wills in response to very similar circumstances of alleged misconduct engaged in by both employees. Respondent, however, ineffectually attempts to downplay the similarities between these two cases. Yet the parallels between Wills and Colon abound. Like Wills, Colon had a history of alleged misconduct, including numerous violations of company policy and instances of disrespectful or insubordinate behavior. [ALJD 32; GCX 20] Like Wills, Respondent continued to find Colon in violation of company policy after it issued him a disciplinary warning. [GCX 35] Colon, similar to Wills, subsequently received a final warning but continued to engage in conduct Respondent found inappropriate. [*Id.*; ALJD 32] While under final warning, Colon had a verbal altercation with a co-worker, used incorrect emails for a customer and failed to return calls from customers and his supervisors, among other infractions. [*Id.*] Strikingly, on July 6, 2016, while still under final warning, Colon engaged in conduct remarkably similar to that which triggered Respondent to discharge Wills when Colon disregarded supervisor Zimmermann's instruction to pay attention during a boost meeting while Colon was using his cell phone, and Colon argued with the supervisor over the issue. Colon's conduct on July 6 was actually more egregious than what Wills did during the June 23 Starz meeting, as Colon

was so disruptive that Zimmermann had to remove him from the boost meeting. [*Id.*] Nevertheless, Colon received *no discipline whatsoever* for his conduct, while Wills was terminated. The only factor that distinguishes these cases is that Wills was an open and active supporter of the Union organizing drive.

It is exceedingly rare that the disciplinary histories of different employees will coincide perfectly. Yet that appears to be what Respondent would have the Board require to substantiate a finding of disparate treatment. There is no basis for the Board to adopt such a wildly exacting standard. Thus, the minor discrepancies between Colon's and Wills' respective disciplinary records described by Respondent are unavailing, and the evidence strongly supports the ALJ's finding disparate treatment.

Respondent would further have the Board find that simply because Respondent did not discharge certain employees at the Jericho office who expressed their support for the Union, Respondent could not have fired Wills because of his union activity. [R. Br. 34] Respondent cites no Board law or other authority in support of this proposition because there is none. To the contrary, the Board holds that an employer may not counter evidence that it discriminated against one of its employees engaged in union activity by pointing to its failure to retaliate against other employees who engaged in such activity. *Igramo Enterprise, Inc.*, 351 NLRB 1337, 1339 (2007) (“a discriminatory motive, otherwise established, is not disproved by an employer’s proof that it did not weed out all union adherents”) (quoting *Nachman Corp. v. NLRB*, 337 F.2d 421, 424 (7th Cir. 1964)). As the Board affirmed in *C&L Systems Corp.*, 299 NLRB 366, 381 (1990):

. . . if an employer may disprove evidence of discriminatory motivation with respect to the discipline of some employees by failure to discipline others, it could defeat every case of alleged unlawful discrimination by the simple and calculated expedient of failing to discipline some union adherents. This would permit an employer to select just enough employees for discipline to defeat a

union movement, and yet avoid a finding that it had committed an unfair labor practice.

Such a perverse result is exactly what Respondent wishes to achieve here. The Board must not allow this to occur and must instead reject Respondent's specious contention that its failure to discharge some union supporters negates the substantial evidence that anti-Union animus motivated the decision to discharge Wills.

3. The ALJ Did Not Substitute His Own Business Judgment for that of the Company but Rather Found Respondent's Defense to Be Pretext

Respondent argues that the ALJ's Decision contravenes long-standing Board policy against substituting the Board's judgment for that of an employer in regard to what constitutes appropriate discipline. [R. Br. 35-37] However, the ALJ did not commit this error, but instead appropriately evaluated the totality of the record evidence and the demeanor of the witnesses to conclude that Respondent's stated basis for its decision to discharge Wills was pretext masking its unlawful anti-Union motive.

It is well settled that "Although the Board cannot substitute its judgment for that of an employer and decide what would have constituted appropriate discipline, the Board does have the role of deciding whether the employer's proffered reasons for its action is the actual one, rather than a pretext to disguise antiunion motivation. *Construction Products, Inc.*, 346 NLRB 640, 646 (2006) (citing *Detroit Paneling Systems*, 330 NLRB 1170 (2000)). That is what the ALJ did in this case. The ALJ correctly found that the event that triggered Wills' discharge – his conduct at the June 23 Starz meeting – was not as egregious as Respondent claimed in light of the evidence establishing that Wills initially put down his phone and obeyed supervisor Zimmermann's instruction to pay closer attention to the meeting, that Wills did not act threateningly towards Zimmermann or otherwise disrupt the meeting, that Zimmermann fabricated much of his version of Wills conduct during the meeting, and that Respondent's own Vice President of HR Judy Courtney did not see the incident as something warranting severe

discipline. [ALJD 30-31]

The ALJ also found pretext based on Respondent's failure to take any significant action in response to what it characterized as numerous violations of company policy perpetrated by Wills after he received the Final Warning in February 2016. The ALJ compared these repeated failures to take action in response to Wills' purported misconduct from February to June with the company's swift response following the Starz meeting incident and appropriately found that Respondent had deviated from its past practice with respect to handling Wills' perceived transgressions after it had acquired knowledge of Wills' extensive involvement in the Union organizing campaign. [ALJD 31] Respondent's misguided attempt to bolster its justification of the discharge with these alleged prior violations for which it took no action shows that Respondent "piled on" false justifications to conceal its unlawful motive underlying the termination. See *Atelier Condominium*, 361 NLRB 966 (2014) (citing *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966)) ("a 'piling on' of unsubstantiated reasons for disciplinary action taken against an employee is evidence of unlawful motivation").

Perhaps most significantly, the ALJ astutely determined that the Starz meeting incident and Wills' other prior alleged misconduct was not the real reason for the discharge because Respondent did not discharge sales representative Ulysess Colon, even though Colon had a comparable disciplinary history and engaged in conduct similar to that which Respondent claims led to Wills' termination. [ALJD 32] Thus, contrary to Respondent's wishful contention, the evidence clearly establishes the ALJ's conclusion that "acting in a disrespectful manner towards a supervisor would not have justified the Respondent discharging Wills" [ALJD 31], as Colon disrespected his supervisor while under a final warning and received no discipline.

In sum, the ALJ did not usurp Respondent's prerogative to determine appropriate discipline. Rather, the ALJ fulfilled his duty under the Act to determine, based on the

evidence, whether the reasons Respondent offered in support of its decision to discharge Wills were in fact what caused the termination. That the ALJ found the evidence established Respondent's stated rationale to be pretext does not mean that the ALJ improperly substituted his business judgment for that of the company. The Board should affirm the ALJ's well-reasoned conclusions.

D. The ALJ Was Properly Appointed in Accordance with the Appointments Clause of the Constitution

In a last-ditch effort to dissuade the Board from adopting the ALJ's Decision, Respondent argues that the Decision must be vacated because the ALJ was not appointed in accordance with the Appointments Clause of the United States Constitution. Here again, Respondent's argument plainly fails.

As an initial matter, Respondent's argument should be rejected as untimely. Appointments Clause challenges to administrative law judges are subject to ordinary principles of waiver and forfeiture. *See, e.g., In re DBC*, 545 F.3d 1373, 1377-81 (Fed. Cir. 2008) (litigant forfeited Appointments Clause argument by failing to raise it before agency); *see also Intercollegiate Broad. Sys., Inc. v. Copyright Royalty Bd.*, 574 F.3d 748, 755-56 (D.C. Cir. 2009). Indeed, the Supreme Court – in the very *Lucia* case relied upon Respondent – repeatedly observed that the petitioner had made a *timely* challenge to the administrative law judge's appointment. *Raymond J. Lucia Cos. v. SEC*, 138 S. Ct. 2044, 2055 (2018); *accord United States v. L.A. Tucker Truck Lines*, 344 U.S. 33, 37 (1952) (untimely challenge to authority of decisionmaker was waived); *Flex Frac Logistics, LLC v. NLRB*, 746 F.3d 205, 208 (5th Cir. 2014) (same); *NLRB v. Relco Locomotives, Inc.*, 734 F.3d 764, 796 (8th Cir. 2013) (same); *NLRB v. Newton-New Haven*, 506 F.2d 1035 (2d Cir. 1974) (same).

The applicable Board regulation in this case, 29 C.F.R. § 102.36, states that “Any party may request the Administrative Law Judge, at any time following the Judge's designation and before

filing of the Judge’s decision, to withdraw on grounds of . . . disqualification, by filing with the Judge promptly upon the discovery of the alleged facts a timely affidavit setting forth in detail the matters alleged to constitute grounds for disqualification.” Such allegations must be made in a timely fashion so that parties cannot hold such allegations in reserve, wait to see whether they prevail or the case develops favorably, and unleash the allegation only if dissatisfied with the result of the proceeding.¹¹

Here, all of the asserted “grounds for disqualification” have been public knowledge since at least June 2018, when *Lucia* issued, and arguably for several years before then. Nevertheless, Respondent proceeded to trial of this matter while asserting no more than a bare affirmative defense in its Answer.¹² [GCX 1(O)] Respondent did not even raise its current argument in its post-hearing brief to the ALJ. By adopting this “wait and see” approach, Respondent has forfeited its right to challenge the authority of the judge.

Respondent’s argument fails in any event. The Appointments Clause of the U.S. Constitution states that “Officers of the United States” may be appointed as follows:

By and with the Advice and Consent of the Senate, [the President] shall appoint . . . all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

U.S. Const., Art. II, § 2, cl. 2. Paraphrased, this requires “Officers” to be appointed (i) by the President with the advice and consent of the Senate; (ii) by the President alone; (iii) by courts, or (iv) by “Heads of Departments.” And the Supreme Court recently indicated that administrative

¹¹ *Roto Rooter*, 288 NLRB 1025, 1025 fn. 2 (1988); *Central Mack Sales*, 273 NLRB 1268, 1268 fn. 2 (1984); *Sanford Home for Adults*, 253 NLRB 1132, 1132 fn. 1 (1981), *affd. in relevant part*, 669 F.2d 35 (2d Cir. 1981); *cf. Early v. E. Transfer*, 699 F.2d 552, 558 (1st Cir. 1983); *Power v. FLRA*, 146 F.3d 995, 1002 (D.C. Cir. 1998) (quoting *Pharaon v. Board of Governors of the Fed. Reserve Sys.*, 135 F.3d 148, 155 (D.C. Cir. 1998), and *Marcus v. Director, Office of Workers’ Compensation Programs*, 548 F.2d 1044, 1051 (D.C. Cir. 1976)).

¹² Bare affirmative defenses not argued or developed at hearing are appropriately deemed waived. *See, e.g., Kaiser Foundation Hosps. & The Permanente Medical Group*, 365 NLRB No. 167, slip op. at 1 n.1 (2017); *Jack Cooper Holdings Corp.*, 365 NLRB No. 163, slip op. at 22 (2017).

law judges are indeed “Officers.” *Lucia v. SEC*, 138 S. Ct. 2044, 2051-55. Arguing that NLRB administrative law judges are “Officers,” Respondent would have the Board end the inquiry there and rule that its judges are not properly appointed on that basis alone. But there is an obvious second step to showing that the Board’s judges are improperly appointed, namely showing that they were actually appointed by some non-constitutional means—and this is a hurdle Respondent not only fails to clear, but makes no effort to clear.

The Board Members, acting collectively, are a “Head of Department” to whom appointing authority may constitutionally be entrusted. *Free Enterprise Fund v. Public Co. Acctg. Oversight Bd.*, 561 U.S. 477, 512-13 (2010) (explaining that for multimember independent agencies, the “Head of Department” with constitutional appointing authority is the members of the agency acting collectively). The Administrative Procedure Act generally grants agencies the authority to hire administrative law judges for the purpose of presiding over formal adjudications. 5 U.S.C. § 3105 (“Each agency shall appoint as many administrative law judges as are necessary for proceedings required to be conducted in accordance with sections 556 and 557 of this title.”) And Section 4(a) of the NLRA grants the Board authority to appoint “such attorneys, examiners, and regional directors, and such other employees as it may from time to time find necessary for the proper performance of its duties.” 29 U.S.C. § 154(a).¹³ Section 201 of the NLRB’s Statement of Organization and Functions confirms that “[t]he Board appoints administrative law judges.” See <https://www.nlr.gov/sites/default/files/attachments/basic-page/node-1717/organdfunctions.pdf>.

¹³ In 1947, the term “examiner” or “trial examiner” in the NLRA referred to what are now referred to as administrative law judges. Labor-Management Relations Act of 1947, Pub. L. No. 79-101, Title I, 61 Stat. 136, 139, 140, 147. In 1978, Congress codified the shift to the term “administrative law judge,” specifying that any law that used the term “hearing examiner” as appointed under Section 3105 of the Administrative Procedure Act shall be deemed to be a reference to an “administrative law judge.” Pub. L. No. 95-251, § 3, 92 Stat. 183, 184 (1978). Due to an apparent codification error, the U.S. Code version of the NLRA duly replaced six instances of the terms “examiner” and “trial examiner” with “administrative law judge” in Sections 3(d), 4(a) and 10(c) of the Act, 29 U.S.C. § 153(d), 154(a), 160(c), but failed to update a single instance of the term “examiner” in 29 U.S.C. § 154(a) to read “administrative law judge.” This is of no consequence, because it is well settled that errors or stylistic changes made as a result of recodification of the law have no substantive effect. See, e.g., *Fla. Agency for Healthcare Development v. Bayou Shores SNF, LLC (In re Bayou Shores SNF, LLC)*, 828 F.3d 1297, 1314 (11th Cir. 2016).

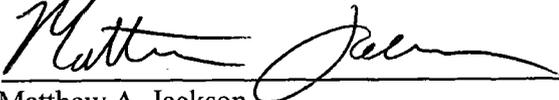
The Board itself recently confirmed that Judge Chu was so appointed. *Newark Electric Corp.*, 366 NLRB No. 145, slip op. at 1 n.1 (Jul 31, 2018).

Respondent's Brief thus misses the point completely, devoting the entirety of its argument to the now-uncontested proposition that NLRB judges are "inferior Officers," and failing to even argue (much less prove) the second element of a successful Appointments Clause challenge—actual appointment by a prohibited means. Since Judge Chu was, in fact, appointed by a "Head of Department," Respondent's argument necessarily fails.

IV. CONCLUSION

In light of the foregoing, Counsel for the General Counsel respectfully urges the Board to reject Respondent's exceptions in their entirety, to affirm the ALJ's Decision and to adopt the ALJ's Proposed Order.

DATED AT Brooklyn, New York, this 3rd day of August, 2018.


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