

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 9

In the Matter of:

COMPREHENSIVE POST ACUTE NETWORK, LTD	:	
	:	Case 09-CA-213162
Respondent	:	
and	:	
	:	
CHARLETTE VIOLE SMITH, AN INDIVIDUAL	:	
	:	Honorable Andrew Gollin
	:	Administrative Law Judge
Charging Party	:	

COMPREHENSIVE POST ACUTE NETWORK, LTD'S POST-HEARING BRIEF
TO THE ADMINISTRATIVE LAW JUDGE

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This matter comes before the National Labor Relations Board (“NLRB”), Region 9, for determination of an unfair labor practice charge filed by Charlette V. Smith (“Smith”) against Respondent, Comprehensive Post Acute Network, LTD (“CPAN”), an Ohio limited liability company. The General Counsel alleges that CPAN violated Sections 8(a)(1) and (4) of the National Labor Relations Act (“Act” or “NLRA”) by suspending, changing the work conditions, and terminating Smith in retaliation for Smith threatening to file charges with the NLRB. According to the General Counsel, the only statutory protected activity at issue is references Smith made regarding the Labor Board.¹

Administrative Law Judge Andrew Gollin (“ALJ”) held a hearing in Cincinnati, Ohio on August 1, 2018. Pursuant to the ALJ’s instruction at the close of the hearing, CPAN submits this post-hearing brief.

I. Introduction

CPAN’s conduct in relation to Charlette V. Smith (“Smith”) was motivated by legitimate business purposes. The fact Smith threatened to file a charge against CPAN with the NLRB was immaterial in CPAN’s decision to suspend Smith on January 2, 2018, change Smith’s job duties on January 2018, and terminate employment with Smith on January 16, 2018. After taking into consideration the undisputed legitimate business justifications for each of CPAN’s actions, the ALJ should conclude that the Complaint allegations are subject to dismissal because no violation has occurred.

After reviewing the undisputed objective facts, it is clear CPAN did not restrain Smith’s protected rights. After Smith made a threat to go to the “Labor Board” in the October 12, 2017

¹ The transcript of the hearing in this matter is cited as “Hearing” followed by the relevant page number(s). The Exhibits are cited “GC Ex.,” “Jt. Ex.,” or “Res. Ex.” followed by the exhibit number and, in some cases, a pin cite to the relevant portion of the exhibit.; Hearing 199:22 – 200:19

meeting, Carol A. Turni (“Turni”), the CEO of CPAN, gave CPAN two additional PTO days and let her keep 4 hours of PTO that was mistakenly paid to Smith.² Smith even admits she received more PTO days than she thought she deserved and was appreciative for CPAN’s actions.³

CPAN did not discharge or otherwise discriminate against Smith for her threat to file a claim against CPAN with the NLRB. The General Counsel never established that Smith’s threat to file a claim to the Labor Board was a “motivating factor” in CPAN’s decision to suspend Smith, change Smith’s job duties and/or terminate employment with Smith. Even if this was established, CPAN presented evidence to meet its burden that it would have suspended Smith, changed Smith’s job duties, and terminated Smith even in the absence of the protected conduct.

The fact Smith made a threat to go to the “Labor Board” was immaterial in CPAN’s decision to suspend Smith, change Smith’s job duties, and terminate Smith’s employment. CPAN did not have discriminatory intent in regards to its reactions to Smith’s conduct, for all of CPAN’s conduct in relation to Smith was motivated by legitimate business purposes.

First, CPAN suspended Smith because she threatened Turni and Kimberly Davis (“Davis”), Smith’s supervisor, in a meeting on January 2, 2018. This suspension was done after Karen Colbert (“Colbert”), another CPAN employee, told Davis that Smith stated to Colbert on December 19, 2017 that Smith wanted to “...whoop her (Davis) stupid ass!”⁴ The suspension on January 2, 2018 was done in compliance with CPAN’s Employee Handbook, for according to CPAN’s handbook it is a Class II violation to exhibit insubordinate behaviors and/or use abuse/foul language or verbal arguing toward other employees or supervisor.⁵ Even though

² Hearing 232:15-233:7; Hearing 279:6 – 280:23

³ Hearing 143: 24 – 144:13

⁴ Hearing 309:8-11; *see* Res. Ex. 1 at 30 for Colbert’s statement

⁵ *See* Res. Ex. 2 at 11-14

Class II violations allowed CPAN to terminate Smith for her conduct, Turni instead decided to use progressive discipline and suspended Smith for three days.⁶

Second, CPAN changed Smith's job duties because during her suspension absence it was discovered that Smith had severely delinquent and backlogged files and was inefficient in her position compared to Clara Eisnaugle ("Eisnaugle"), the employee that completed Smith's job duties in her absence. Eisnaugle was more productive in completing Smith's work compared to Smith and completed all of Smith's delinquent and backlogged files.⁷ Because Eisnaugle performed better than Smith, upon Smith's return to CPAN, Smith was assigned different job duties. The change in job duties was a lateral change and it did not change Smith's hours worked or compensation.⁸

Third, Smith was terminated from CPAN for just cause and a legitimate business purpose after Smith once again violated CPAN's Employee Handbook with her improper conduct in a meeting on January 15, 2018. Marky Williams, a CPAN employee and the only witness to this meeting, stated Smith was "insubordinate in the way that she (Smith) responded to Kim (Davis) and would not calm down."⁹ Smith exhibited this conduct even though Turni told Smith on January 8, 2018, after Smith returned from her suspension, that if Smith exhibited any more insubordinate behavior, she would be terminated.¹⁰

Of note, CPAN could have terminated Smith for violating CPAN's attendance policy, for Smith had over six unscheduled absences from August 30, 2018 to January 12, 2018.¹¹ In accordance with CPAN's Attendance Program, an employee will be terminated if they have five

⁶ Hearing 290:20 – 290:25

⁷ Hearing 229:23 – 231:10

⁸ Jt. Ex. 1 at Paragraph 9

⁹ Hearing 327:4-328:20; Hearing 329:3-330:115; Res. Ex. 1 at 38 for Williams' statement;

¹⁰ Hearing 88: 3-10; Hearing 291: 1-14

¹¹ Hearing 126:7 – 128:20

unscheduled absences. Because Smith had six unscheduled absences within five months, CPAN could have terminated Smith for violating the attendance policy by having in excess of five unscheduled absences.

The fact CPAN did not terminate Smith for conduct on December 19, 2017 or January 2, 2018 or terminate her for attendance violations, even though CPAN could have terminated Smith according to CPAN's Attendance Policy and CPAN's Employee Handbook, proves CPAN was not acting in a retaliatory manner against Smith for her threatening to file an action with the NLRB.

II. Statement of Facts

CPAN provides case management services to nursing facilities.¹² As a part of this process, CPAN serves as a liaison between insurance companies and nursing facilities and assists nursing facilities in verifying they are correctly being compensated by insurance companies for services they perform to patients.¹³ On March 28, 2016, CPAN hired Charlette V. Smith. ("Smith").¹⁴ Smith was an administrative assistant that was supervised by Kimberly Davis ("Davis").¹⁵

A. CPAN Employee Handbook

On March 28, 2016, Smith received CPAN's Employee Handbook and signed a written acknowledgement that she received the employee handbook and that it was her responsibility to

¹² Jt. Ex. 1 at Paragraph 2

¹³ *Id.*

¹⁴ *Id.* at Paragraph 3

¹⁵ *Id.* at Paragraph 4

read, understand, and comply with the policies contained in the handbook.¹⁶ Important provisions of the Employee Handbook that are at issue are briefly described below.

i. PTO

The Employee Handbook states that full and part-time employees at CPAN receive PTO in the place of sick, absence, and personal time.¹⁷ PTO shall be used when an employee is absent from CPAN due to sickness or illness.¹⁸ PTO is automatically applied when there is an absence.¹⁹ PTO shall be used in minimum of four-hour increments.²⁰ Davis enforces the PTO policy.²¹ This policy applies to every employee.²²

ii. Class II Violations

The Employee Handbook states the following regarding Class II violations:

Class II violations are considered serious and could result in discharge/ termination for the first offense. If discharge/ termination is not appropriate, the employee will be subject to progressive discipline, with the severity of the corrective action to be determined by the seriousness or history of violations.²³

The Employee Handbook goes on to list illustrative examples of what is considered a Class II violation. The following are examples of Class II violations that are applicable to the present situation which are detailed in the Employee Handbook: (i) exhibiting insubordinate behavior, including, but not limited to, refusing by words or actions to immediately carry out a

¹⁶ Res. Ex. 1 at 13

¹⁷ Res. Ex. 2 at 10.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ Hearing 204: 3-8

²² Hearing 285:24 – 286:7

²³ Res. Ex. 2 at 13.

supervisors' instruction or to perform job duties;²⁴ (ii) using abusive / foul language or verbal arguing towards other employees or supervisory personnel;²⁵ (iii) disorderly, immoral, or indecent conduct;²⁶ and (iv) conducting oneself improperly in other instances not specifically listed.²⁷ The illustrative examples are not meant to be all-inclusive.²⁸

B. CPAN Attendance Program

On March 28, 2016, Smith signed an acknowledgement of CPAN's Attendance Program ("Attendance Policy") which details the attendance policy.²⁹ The Attendance Policy states "[a]ll absences (whether paid or unpaid) are considered an occurrence and 'count' as an occurrence unless you are entitled to jury duty, bereavement policy, and scheduled PTO."³⁰ Furthermore, an "occurrence" is defined as one unscheduled absence from work and includes sickness/illness days.³¹ If an employee has five or more occurrences, the Attendance Policy states that CPAN's corrective action is termination.³² Davis enforces the Attendance Policy.³³

C. Smith's Attendance

During the final five-months of Smith's employment, Smith had the following unscheduled absences from CPAN (each day is the entire day unless otherwise noted): (1) August 30, 2017, (2) August 31, 2017, (3) September 1, 2017, (4) a part day on September 5,

²⁴ Res. Ex. 2 at 13.

²⁵ *Id.*

²⁶ *Id.*

²⁷ Res. Ex. 2 at 14.

²⁸ Res. Ex. 2 at 11.

²⁹ Res. Ex. 1 at 10;

³⁰ *Id.*

³¹ *Id.*; Hearing 208:18 – 209:23

³² *Id.*

³³ Hearing 204: 3-8

2017, (5) October 2, 2017, (6) a part day sometime between November 6, 2017 and November 17, 2017, (7) December 14, 2017, (8) January 5, 2018, and (9) January 12, 2018.³⁴

D. Smith's Employment Violations Prior to the Alleged Protected Activity

On July 13, 2016, Smith was written-up by CPAN for an attendance policy violation.³⁵ On July 14, 2016, Smith was written-up by CPAN for a Class II Violation.³⁶ On October 3, 2017, Smith was written-up by CPAN for an attendance policy violation.³⁷

E. October 2017 Meeting

On October 12, 2017, Smith had a meeting with Turni and Davis.³⁸ This meeting occurred because Smith claimed that CPAN was incorrectly calculating and paying her PTO.³⁹ In the meeting Davis and Turni explained CPAN's PTO policy to Smith and reviewed all of Smith's payroll records with her.⁴⁰ After reviewing Smith's payroll records, it appeared to Davis and Turni that Smith was actually overpaid by 4 hours.⁴¹ The only items discussed during the meeting were payroll matters as they specifically related to Smith.⁴² The parties never discussed other employees' conditions and/or terms of employment in the meeting.⁴³

When the PTO issue was not resolved to Smith's satisfaction, Smith stated "I'll just talk to the labor board. I'll go to the labor board, and we'll talk about it and see if someone can figure it out."⁴⁴ This is the first time Smith made a threat to CPAN to go to the "Labor Board",

³⁴ Hearing 126:7 – 128:20

³⁵ Res. Ex. 1 at 27.

³⁶ Res. Ex. 1 at 28.

³⁷ Res. Ex. 1 at 29.

³⁸ Jt. Ex. 1 at Paragraph 5

³⁹ Hearing 138:22-25 and 139: 1-23

⁴⁰ Hearing 215:11 – 217:14;

⁴¹ Hearing 215:11 – 217:14;

⁴² Hearing 138:22-25 and 139: 1-23

⁴³ *Id.*

⁴⁴ Hearing 141: 1-17

for Smith stated that prior to October 2017 “there wasn’t anything going on prior to October.”⁴⁵ Of note, when Smith made the statement to go to the “Labor Board” she did not mean the National Labor Relations Board, for at the time of the threat in the October meeting she “...had no idea actually until I (Smith) came to this agency (NLRB) that it even existed.”⁴⁶ Also, even though October 2017 was the first time Smith testified there was an alleged employment violation, Rhonda Spears testified that Smith told her starting in 2016 that she wanted to sue CPAN.⁴⁷

Smith alleges that Turni stated “Charlette, I don’t think that is a good idea that you tell your CEO that you are going to the Labor Board because you could be terminated for that” in the meeting. Turni denied she said this and instead states she told Smith it is her choice whether she wants to go to the Labor Board.⁴⁸

Immediately after Smith’s threat to report CPAN to the Labor Board, Turni gave Smith two additional PTO days and allowed her to keep the four hours that CPAN thought it overpaid Smith.⁴⁹ Turni gave Smith two additional PTO days even though, based on CPAN’s calculations, it did not appear Smith was owed this PTO time.⁵⁰ Turni gave Smith additional PTO time in order to placate Smith and make her feel more valued.⁵¹ Smith admitted that Turni gave her even more PTO time than she thought she was entitled.⁵² According to Turni and

⁴⁵ Hearing 171: 7-25

⁴⁶ Hearing 141: 18-23

⁴⁷ Hearing 188: 6-25

⁴⁸ Hearing 281: 4-11

⁴⁹ Hearing 142:19 – 143:23

⁵⁰ Hearing 232:15-233:7; Hearing 279:6 – 280:23

⁵¹ Hearing 219:7 - 220:18

⁵² Hearing 143: 24 – 144:13

Davis, the October meeting was the only time Smith mentioned filing a claim with the “Labor Board” or any other labor agency.⁵³

F. Smith’s PTO Issue

CPAN charged and paid Smith four hours of PTO for Smith being absent from work for two hours sometime between November 6, 2017 to November 17, 2017.⁵⁴ Smith did not want to use her PTO for this two hour absence.⁵⁵ Davis told Smith that it is CPAN’s policy that PTO is used in minimum four hour blocks and that PTO is automatically applied when an employee is absent.⁵⁶ In order to resolve this issue, Turni allowed Smith to leave work two hours early one day without pay even though it was contrary to the CPAN Employee Handbook.⁵⁷ Smith and Davis agreed that Smith would leave two hours early on December 14, 2017 to solve this issue.⁵⁸ Smith did leave early on December 14, 2017.⁵⁹

G. Smith’s Threat Regarding Davis to Colbert

In December 2017 Smith became upset with Davis after Davis and Smith had a meeting in which Davis discussed Smith’s job performance and effort.⁶⁰ On the evening of December 19, 2017, Smith said the following to Karen Colbert (“Colbert”), a nurse case manager at CPAN, in regards to Davis: “I know that’s your friend, but I can’t stand that bitch! She better be glad that I don’t want to lose my job today, because I want to whoop her stupid ass! That she is fucking with my money, and I don’t fuck around when it comes to my money!”⁶¹

⁵³ Hearing 232:15-233:7; Hearing 295:22 – 296:1

⁵⁴ Hearing 58:12-20; Hearing

⁵⁵ Hearing 61:11-62:3

⁵⁶ Hearing 63:8 – 64:9

⁵⁷ Hearing 67:11-14

⁵⁸ Hearing 67:8-68:6

⁵⁹ *Id.*

⁶⁰ Hearing 220:19 – 221:9

⁶¹ Hearing 309:8-11;

Colbert relayed this threat to Davis the next morning. Davis asked Colbert to write a letter regarding what Smith told her.⁶² Smith was not disciplined for this statement, because Davis felt it was hearsay, it was around Christmas, and she did not have time to deal with the issue at the time.⁶³

Despite Colbert's testimony and Colbert's contemporaneous letter drafted the following morning, Smith denies the exchange detailed in Colbert's testimony and statement, or anything similar, took place.⁶⁴

H. January 2, 2018 Meeting

On January 2, 2018, Turni, Davis, and Smith had another meeting regarding Smith's PTO.⁶⁵ The reason for the meeting was because Smith was upset and once again felt her PTO was being incorrectly calculated.⁶⁶

Smith was upset that four hours of PTO was deducted from her PTO account even though she was only absent from work for two hours (worked six hours). Because CPAN policy requires PTO to be used in four-hour increments, Smith was charged four PTO hours.⁶⁷ Smith admits that she was paid for ten hours on this day (6 hours worked plus 4 hours of PTO).⁶⁸

In this meeting, Smith displayed a misunderstanding of CPAN PTO policy and stated "I've never heard of anyone receiving four hours of PTO when they only have been – when they

⁶² Hearing 309:14 – 311:12; see Res. Ex. 1 at 30 for Colbert's statement;

⁶³ Hearing 222:21- 223:11

⁶⁴ Hearing 149 15:24

⁶⁵ Hearing 151: 9-11

⁶⁶ Hearing 152:5 – 153: 14

⁶⁷ Res. Ex. 2 at 10

⁶⁸ Hearing 60:16-20

only took off two hours.”⁶⁹ Smith thought it was “wrong” that CPAN used four hours of PTO time when she showed up for work two hours late.⁷⁰

Turni and Davis again explained in detailed CPAN’s PTO policy and explained to Smith that the CPAN Employee Handbook requires PTO to be used in a minimum of four hour increments and that it is automatically applied.⁷¹ This PTO policy applies to all employees.⁷²

Smith disagreed with the use of her PTO and began yelling and threatening Davis and Turni. Smith stood-up and yelled at Davis and Turni in a threatening manner – “I am going to come in 15 minutes late and we will see what happens then!”⁷³

Davis stated Smith was very aggressive and raised her voice, and pointed her finger at Davis and Turni. Davis felt Smith threatened Davis’s life especially considering Smith’s comments to Karen Colbert reported to Davis.⁷⁴ Turni stated that Smith was erratic and was yelling and was coming at her desk with her face all red.⁷⁵ Turni likewise felt threatened considering Smith’s prior comments to Colbert.⁷⁶ Of important note, Smith admits Turni and Davis were calm in the January 2, 2018 meeting.⁷⁷

Turni immediately suspended Smith for three days without pay for verbally arguing and threatening a supervisor, which Turni and Davis deemed a Class II violation.⁷⁸ Even though according to CPAN’s Employee Handbook an employee can immediately be terminated for a Class II violation, Turni decided not to terminate Smith for this conduct but instead suspended

⁶⁹ Hearing 78:15-18

⁷⁰ Hearing 135 :2-6

⁷¹ Hearing 78: 19-23

⁷² Hearing 206:13-16; Hearing 285:19-286:7

⁷³ Hearing 225:6-16; Hearing 286:8-23;

⁷⁴ Hearing 225:5 – 226:9

⁷⁵ Hearing 286:11 – 287:2

⁷⁶ Hearing 287:4 – 287:11

⁷⁷ Hearing 225:5 – 226:9

⁷⁸ Res. Ex. 1 at 31-32

her for three days.⁷⁹ Turni did not immediately terminate Smith because at this time it was believed the relationship could be salvaged.⁸⁰

Turni and Davis deny Smith threaten to make a complaint to the NLRB, or any other entity, at this meeting.⁸¹ Smith only claims that she made a threat to go to the Labor Board in this meeting after Turni already suspended Smith for her threatening conduct.⁸²

Turni and Davis escorted Smith out of the office after this meeting and put CPAN on lock down and locked all outside doors due to their fear Smith might come back to CPAN that day and harm them and/or other employees.⁸³ In the evening, Davis had her husband pick her up for the first time ever after work due to the fear that Smith might wait for her in the parking lot and harm her.⁸⁴ Davis's husband also made sure Turni was safe walking to her car.⁸⁵

I. 3 Day Suspension

When Smith was severing her suspension, Clara Eisnaugle ("Eisnaugle") completed Smith's job duties. When Eisnaugle performed Smith's job duties, several delinquent and backlogged files were found in Smith's office.⁸⁶ Some of the files were more than three months delinquent.⁸⁷ CPAN was previously unaware this work was not completed.⁸⁸

Smith's delinquent files were an issue, because CPAN required Smith to complete her files timely, because nursing facilities submit claims to insurance companies based on templates

⁷⁹ Hearing 290:20 – 290:25

⁸⁰ Hearing 227:9-15

⁸¹ Hearing 232:15-233:7

⁸² Hearing 157: 1-18

⁸³ Hearing 227:16 – 228:15; Hearing 289:7 – 289:24.

⁸⁴ Hearing 227:24 – 228:15

⁸⁵ Hearing 289:7-289:24

⁸⁶ Hearing 230:4-231:10; Hearing 317: 9-13

⁸⁷ Hearing 230:4-231:10

⁸⁸ Hearing 246:24 – 247:21

CPAN supplies nursing facilities. The templates could not be completed until Smith's work was completed. When files are delinquent nursing facilities are delayed from getting paid.⁸⁹

During Smith's absence, Eisnaugle was able to complete all of Smith's outstanding delinquent and backlogged files and all other files that needed to be processed.⁹⁰ Eisnaugle stated that there were four to five stacks of files in Smith's office when she stated Smith's job duties and was able to complete all of Smith's delinquent and other backlog files within the week.⁹¹ Since taking over Smith's job duties, Eisnaugle is able complete all files on a daily basis and never has a backlog.⁹²

J. Smith's Return from Suspension

When Smith returned from her suspension, Turni told Smith that if Smith was insubordinate again she would be terminated.⁹³

Because during Smith's absence it was discovered Smith was not timely completing files, CPAN changed Smith's job duties after Smith returned from her suspension. CPAN wanted Eisnaugle to continue completing Smith's old job duties because she was doing such a good job with billing and was getting out the bill templates quickly to nursing facilities.⁹⁴ Even though Smith's job duties changed, her compensation and hours worked remained the same.⁹⁵

Smith's new job duties were to contact nursing facilities and get patient discharge dates so that CPAN could close out the respective patient files.⁹⁶ With Smith's new job duties, she was required to keep a log which was a list of patients that were called and their actual discharge

⁸⁹ Hearing 231:11- 232:14

⁹⁰ Hearing 229:23 – 231:10

⁹¹ Hearing 315:16 – 316:7

⁹² Hearing 317:19 -319:10.

⁹³ Hearing 88: 3-10; Hearing 291: 1-14

⁹⁴ Hearing 233:13-233:21

⁹⁵ Jt. Ex. 1 at Paragraph 9

⁹⁶ Hearing 235:11-235:16

date from the nursing facility. After Smith obtained this information, Smith gave the information to Eisenaugle so that she could close out the respective patient file.⁹⁷

Vicki Connell, the individual that previously completed Smith's new job duties, did not keep a log, because she was more skilled and experienced and was able to complete the whole process and actually close out the file in the system.⁹⁸ Because of Smith's inexperience, Smith was only capable of completing a portion of Vicki Connell's job duties, namely calling nursing facilities and verifying patient's date of discharge.⁹⁹

Davis determined a log of Smith's work was required for two reasons: (i) the discharge date needed to be documented in order to make sure another individual could close out the files and (ii) monitor Smith's status and/or production given it was recently discovered her production was not at the standard expected.¹⁰⁰

In order to give Smith a quota or goal, Davis determined Smith should receive 60 discharge dates per day.¹⁰¹ This productivity goal was determined based on Davis' experience because Davis previously performed this job duty with CPAN.¹⁰²

Many employees at CPAN have production logs.¹⁰³ Many of the production logs are automated inside CPAN's Patient Care system. The Patient Care system can be queried by a number of date ranges and by employee to see how many re-certifications each employee completed during a certain time frame. This query function has been standard since CPAN had

⁹⁷ Hearing 237:23 - 238:23

⁹⁸ Hearing 235:17 - 236:11

⁹⁹ Hearing 236:11-237:19

¹⁰⁰ Hearing 272:20 - 273:15

¹⁰¹ Hearing 238:24-239:23; see Res Ex. 1 at 41-52 for the log Smith was required to complete;

¹⁰² Hearing 267:3-267:8

¹⁰³ Hearing 239:24 - 241:13; see Res Ex. 3 for examples of logs completed by CPAN employees;

PatientCare.¹⁰⁴ Smith had to keep a manual paper log, because her job duties were not yet automated into Patient Care.¹⁰⁵

K. January 15, 2018 Meeting

Smith missed work on January 12, 2018 (Friday). On January 15, 2018 (Monday), Davis gave Smith a write-up for violating the attendance policy. During this meeting, Davis discussed with Smith the CPAN attendance policy and her attendance policy violation on January 15, 2018.¹⁰⁶

Smith refused to sign the write-up. She became very upset with Davis, raised her voice and started yelling at her, for Smith disagreed with Davis regarding whether an absence for sickness deserves a write-up.¹⁰⁷ In a loud and insubordinate manner, Smith refused to discuss the facts surrounding the issue and started arguing about her PTO time again. Davis stated that in this meeting Smith became agitated and twisted her head, pointed her finger at Davis, raised her voice, and yelled at Davis.¹⁰⁸ Davis stated that Smith had an aggressive tone and did not act in the manner a reasonable person would when asked by a supervisor to follow company policy.¹⁰⁹ Smith never threatened to bring a NLRB action at this meeting.¹¹⁰

The only other individual that witnessed the meeting was Margaret ('Marky') Williams ("Williams"). Williams shared an office with Smith.¹¹¹ Williams said Smith was unprofessional and that "Charlette (Smith) was insubordinate in the way she responded to Kim (Davis) and

¹⁰⁴ Hearing 239:24-241:13; see Res Ex. 3 for examples of logs completed by CPAN employees;

¹⁰⁵ Hearing 240:19 – 241:1

¹⁰⁶ Hearing 241:25 – 242:25

¹⁰⁷ Hearing 163:19 – 165:3

¹⁰⁸ Hearing 242:16 - 243:3

¹⁰⁹ Hearing 257:1-257:9

¹¹⁰ Hearing 232:15-233:7; Hearing 295:22 – 296:1

¹¹¹ Hearing 323:20 – 324:3

would not calm down.”¹¹² Williams stated Davis was calm and very business-like in this meeting.¹¹³

L. Smith’s Termination

On January 16, 2018, Turni returned to work from vacation.¹¹⁴ Turni was made aware of the January 15, 2018 meeting and Smith’s behavior. Turni investigated the situation to see if anybody else heard the argument between Smith and Davis. Turni discussed the situation with Williams, who was the only witness, and Williams confirmed Smith was insubordinate and displayed improper conduct.¹¹⁵

Because Turni told Smith on January 8, 2018 that another instance of insubordination would result in her termination, and Smith again showed improper behavior on January 15, 2018, Turni terminated employment with Smith on January 16, 2018.¹¹⁶

III. Argument

As set forth in detail below, each of the provisions at issue in the Complaint are lawful under Section 8(a)(1) and (4) of the Act. For these reasons, the General Counsel is not entitled to her requested remedy and the Complaint should be dismissed in its entirety.

A. CPAN did not threaten Smith for reprisals or discharges for threatening to report CPAN to the NLRB.

¹¹² Hearing 327:4-328:20; Hearing 329:3-330:115; Res. Ex. 1 at 38 for Williams’ statement;

¹¹³ Hearing 326:24 – 327:3

¹¹⁴ Hearing 291:19 – 292:22

¹¹⁵ Hearing 291:19 - 292:22

¹¹⁶ Res. Ex. 1 at 39-40.

CPAN did not violate Section 8(a)(1) of the NLRS by threatening Smith with reprisals or discharges for engaging in protected activity. After reviewing the objective facts it is clear CPAN did not restrain Smith's protected rights, since immediately after Smith threatened to report CPAN to the NLRB, Smith received an economic gain.

The test for determining whether CPAN violated section 8(a)(1) is whether CPAN's conduct tended to be coercive or tended to interfere with Smith's exercise of her rights.¹¹⁷ In making this determination, the Board considers the total context in which the challenged conduct occurs and is justified in viewing the issue from the standpoint of its impact upon the employees.¹¹⁸ This assessment should take into account "the economic dependence of the employees on their employers, and the necessary tendency of the former, because of that relationship, to pick up intended implications of the latter that might be more readily dismissed by a more disinterested ear."¹¹⁹

There is no factual basis that CPAN threatened Smith with reprisals or discharges for threatening to report CPAN to the Labor Board. No evidence was ever presented that CPAN punished Smith for threatening to report CPAN to the Labor Board. The only time it is uncontested that Smith threatened to report CPAN to the Labor Board was in the October 12, 2017 meeting.¹²⁰ In this meeting, after Smith made the threat, in reviewing the context of the meeting and the objective facts, it is clear that CPAN's conduct did not restrain Smith's protected rights.

¹¹⁷ NLRB v. Norbar, Inc., 752 F.2d 235, 238 (6th Cir. 1985)

¹¹⁸ NLRB v. Okun Bros. Shoe Store, Inc., 825 F.2d 102, 105-106; NLRB v. E.I. DuPont de Nemours, 750 F.2d 524, 528 (6th Cir. 1984)

¹¹⁹ Peabody Coal Co. v. NLRB, 725 F.2d 357, 363 (6th Cir. 1984)

¹²⁰ Hearing 232:15-233:7; Hearing 295:22 – 296:1

After Smith's threat, CPAN tried to work with Smith so there could be a successful employment relationship. After reviewing all the payroll records, CPAN determined Smith's PTO time was correctly calculated.¹²¹ Nonetheless, Turni gave Smith more paid time off in order to make Smith happy.¹²² Smith did not suffer an economic loss after making the threat, but received an economic gain; namely Smith received two extra PTO days and was able to keep the four hours of PTO that CPAN mistakenly overpaid her.¹²³

Turni vehemently denies that she ever told Smith that she could be terminated for threatening to report CPAN to the Labor Board. Because Smith never presented any corroborated testimony of a non-interest party to back-up her allegation, Smith did not substantiate evidence of an unfair labor practice.¹²⁴

Since there is a different interpretation of what Turni said, the objective facts should be reviewed.¹²⁵ In reviewing the objective facts, it is clear Turni never told Smith she could be terminated for threatening to report CPAN to the Labor Board. The only time it is uncontested Smith threatened to report CPAN to the Labor Board, immediately after this threat Turni gave Smith a substantial material benefit – more PTO time. Smith admitted that Turni gave Smith even more PTO time than she thought she was entitled.¹²⁶ Smith's testimony is not credible for it defies logic that Turni would threaten to fire Smith and then immediately give Smith more PTO time.

¹²¹ Hearing 215:11 – 217:14;

¹²² Hearing 219:7 - 220:18

¹²³ Hearing 232:15-233:7; Hearing 279:6 – 280:23

¹²⁴ See *NLRB v. Otsego Ski Club-Hidden Valley, Inc.*, 542 F.2d 18, 19 (6th Cir. 1976) (holding that normally the uncorroborated testimony of an interested party does not amount to substantial evidence of an unfair labor practice)

¹²⁵ *NLRB v. Gissel Packing Co.*, 395U.S. 575, 618-20 (1969) (holding predictions or opinions concerning the effect of unionization must be based on objective fact in order to insulate an employer from a charge of violation of the Act).

¹²⁶ Hearing 143: 24 – 144:13

The only other time Smith testified that she mentioned the Labor Board to Turni was in the January 2, 2018 meeting. Turni denies Smith mentioned the Labor Board in this meeting.¹²⁷ Regardless, Smith testified that she only mentioned the Labor Board after Turni already decided to suspend Smith for her insubordinate conduct.¹²⁸ Even if Smith is telling the truth, that fact Turni suspended Smith for her conduct before Smith allegedly brought-up the NLRB proves Turni was notreprising Smith for her protective conduct. As further detailed below, CPAN had legitimate business reasons for each of its actions, including without limitation, suspending Smith.

It appears it has always been Smith's intention to sue CPAN for some violation, and that Smith is using the NLRB to complete that goal. Rhonda Spears ("Spears") testified that Smith told her starting in 2016 that Smith wanted to sue CPAN.¹²⁹ Even though Smith told Spears starting in 2016 she wanted to sue CPAN, Smith testified that prior to October 2017 there was not any employment issues at CPAN, for "there wasn't anything going on prior to October."¹³⁰ The fact Smith discussed with another employee her desire to sue CPAN well before Smith testified being the alleged victim of an employment violation shows Smith has bad intentions and that her testimony is not credible.

B. CPAN did not discharge or otherwise discriminate against Smith for her threat to file a claim against CPAN with the NLRB.

CPAN did not violate Section 8(a)(4) for it did not discharge or otherwise discriminate against Smith because she threatened to file, or filed, charges against CPAN under the NLRA.

¹²⁷ Hearing 295:22-296:1

¹²⁸ Hearing 157: 1-18

¹²⁹ Hearing 188: 6-25

¹³⁰ Hearing 171: 7-25

The General Counsel never established that Smith's threat to file a claim to the Labor Board was a "motivating factor" in CPAN's decision to suspend Smith, change Smith's job duties and/or terminate employment with Smith. Even if this was established, CPAN presented ample evidence to meet its burden that it would have suspended Smith, changed Smith's job duties, and terminate Smith even in the absence of the protected conduct.

Section 8(a)(4) requires the NLRB to distinguish CPAN's pre-textual and retaliatory conduct from conduct motivated by its legitimate business purposes.¹³¹ A Section 8(a)(4) violation ordinarily requires a finding of adverse action plus discriminatory intent; that is, it must be found that the employer has retaliated against an employee because she filed unfair labor practices or otherwise participated in the Board's processes.¹³²

In cases alleging violations of Section 8(a)(4) turning on employer motivation, the NLRB will use the following "causation test": (1) General Counsel must make prima facie showing sufficient to support inference that protected conduct was a "motivating factor" in employer's decision; (2) once this is established, employer has the burden of demonstrating that same action would have taken place even in absence of protected conduct.¹³³

The fact Smith made a threat to go to the "Labor Board" was immaterial in CPAN's decision to suspend Smith, change Smith's job duties, and terminate employment with Smith. CPAN did not have discriminatory intent in regards to its reactions to Smith's conduct, for all of CPAN's conduct in relation to Smith was motivated by legitimate business purposes. First,

¹³¹ *Grand Rapids Die Casting Corp. v. NLRB*, 831 F.2d 112 , 126 LRRM 2747 , *reh'g denied* , 833 F.2d 605 , 127 LRRM 2215 (6th Cir. 1987);

¹³² *See N.L.R.B. v. Scrivener*, 405 U.S. 117 (1972); *see also N.L.R.B. v. Retail Store Employees Union, Local 876*, 570 F.2d 586 (6th Cir.1978).

¹³³ *Wright Line, Wright Line Div.*, 251 NLRB 1083 , 105 LRRM 1169 (1980), *enforced* , 662 F.2d 899 , 108 LRRM 2513 (1st Cir. 1981), *cert . denied* , 455 U.S. 989 , 109 LRRM 2779 (1982).

CPAN suspended Smith because she threatened Turni and Davis in a meeting on January 2, 2018. Smith's improper conduct was a Class II violation as defined in CPAN's Employee Handbook. Smith was suspended in compliance with CPAN's Employee Handbook. Second, CPAN changed Smith's job duties because, during her suspension absence, it was discovered that Smith had delinquent and backlogged files and was inefficient in her position compared to another employee. The position change was a lateral change and did not harm Smith from a financial standpoint since that change did not change Smith's hours worked or compensation. Third, CPAN terminated employment with Smith after she once again violated CPAN's Employee Handbook by exhibiting improper conduct in a meeting with Davis on January 15, 2018. Smith's improper conduct was witnessed and affirmed by Marky Williams, who was the only witness to the meeting.

i) CPAN suspended Smith for improper conduct on January 2, 2018 for conduct that was a violation of CPAN's Employee Handbook.

General Counsel alleges Smith was suspended in retaliation for her threat to file a charge with the NLRB. Evidence fails to establish that Smith's suspension was motivated by Smith's threat to report CPAN to the NLRB. CPAN's action to suspend Smith for her insubordinate and improper conduct in a meeting on January 2, 2018 was a reasonable, justified, and well-articulated response to Smith's behavior made in accordance with CPAN's Employment Handbook.

CPAN suspended Smith for improper conduct because Smith yelled and threatened Turni and Davis in a meeting on or about January 2, 2018.¹³⁴ In this meeting, Smith disagreed with the use of her PTO and became very aggressive and erratic and started raising her voice to Davis and Turni and stated - "I am going to come in 15 minutes late and we will see what happens

¹³⁴ Res. Ex. 1 at 31-32.

then!”¹³⁵ Considering Smith told Karen Colbert, another CPAN employee, on December 19, 2017 that Smith wanted to “...whoop her (Davis) stupid ass!”¹³⁶ both Turni and Davis reasonably felt that Smith might physically harm them with this threat. Because of Smith’s threatening behavior, Turni immediately suspended Smith for three days without pay for her improper conduct in the January 2, 2018 meeting.¹³⁷

The suspension was in no way motivated by Smith’s threat to report CPAN to the NLRB Board, for CPAN’s conduct was reasonable and justified based on a legitimate business purpose.¹³⁸ With Smith’s improper conduct in the January 2, 2018 meeting, Turni determined Smith violated a CPAN employment policy in which Smith had prior notice.¹³⁹ Smith had prior notice of employment policy violation, for pursuant to the CPAN Employee Handbook, it is a Class II Violation to use abusive language towards another employee or supervisor, exhibit insubordinate behaviors or disorderly conduct, or conducting oneself improperly.¹⁴⁰ Smith previously signed a written acknowledgement that she received the CPAN Employee Handbook, and that it was her responsibility understand and comply with the policies contained in the

¹³⁵ Hearing 225:6-16; Hearing 286:8-23;

¹³⁶ Hearing 309:14 – 311:12; see Res. Ex. 1 at 30 for Colbert’s statement;

¹³⁷ Hearing 290:20 – 290:25

¹³⁸ See *Raymond Eng’g*, 286 NLRB 1210 (1987) (noting Employer did not violate LMRA when it suspended employee or when it denied him and another employee overtime, since evidence fails to establish that suspension was motivated by suspended employee’s union activity or that denial of overtime was due to both employees’ attendance at NLRB representation hearing. Employer’s actions were reasonable, justified, and well-articulated responses to employees’ behavior, where (1) employer had information that suspended employee used profane and abusive language in course of argument with another worker, and (2) both employees clearly had failed to work minimum amount of hours required to work overtime).

¹³⁹ See *Joseph Schlitz Brewing Co.*, 240 NLRB 710, 100 LRRM 1323 (1979) (holding an employer did not violate Section 8(a)(4) when employees had prior notice of the employment policy relied upon).

¹⁴⁰ Res. Ex. 2 at 11-14.

handbook which includes the Class II Violation from which Smith was suspended.¹⁴¹ The suspension was done in compliance with CPAN's Employee Handbook, for as detailed in CPAN's Employee Handbook, Class II Violations are considered serious and could result in discharge / termination for the first offense.¹⁴² Even though Class II violations allowed CPAN to terminate Smith for her insubordinate conduct, Turni instead decided to use progressive discipline and suspended Smith for three days.¹⁴³

There is no showing that in suspending Smith that CPAN gave any thought to Smith's threat to report CPAN to the "Labor Board" in the October 12, 2017 meeting. There was no proximity in time between Smith's suspension and Smith's protected activity of threatening to file a charge with the NLRB. Prior to Turni informing Smith she was suspended, the last time Smith threatened to file a charge with the NLRB was over 2.5 months ago in the October 12, 2017 meeting. Smith testified she only mentioned the NLRB on January 2 after Turni already told Smith she was being suspended for insubordinate conduct. Both Turni and Davis deny that Smith ever brought up the NLRB in the January 2, 2018 meeting.¹⁴⁴

The fact Turni immediately suspended Smith for her insubordinate conduct and the last mention of NLRB was more than 2.5 months prior to Turni informing Smith she was suspended proves CPAN had a legitimate business purpose for doing so, for an employer does not generally violate Section 8(a)(4) when it acts as soon as it learns of an employee's violation on an employment policy.¹⁴⁵

¹⁴¹ Res. Ex. 1 at 13

¹⁴² Res. Ex. 2 at 11

¹⁴³ Hearing 290:20 – 290:25

¹⁴⁴ Hearing 246:3-7; Hearing 295:22-296:1

¹⁴⁵ *McKesson Chem. Co.*, 246 NLRB 584 , 102 LRRM 1629 (1979); *Summitville Tile*, 245 NLRB 863 , 102 LRRM 1552 (1979)

- ii) **CPAN changed Smith's job duties because it was discovered during Smith's absence that she had severely delinquent and backlogged files and another employee could complete Smith's job duties more quickly and efficiently.**

Smith alleges that on January 8, 2018 CPAN transferred Smith to a different position and required her to perform tasks not previously required of others in that position in retaliation of Smith threatening to go to the NLRB. Provided, however, General Counsel never provided evidence that Smith's threat to go to the NLRB was a "motivating factor" in CPAN's decision to change Smith's job duties. CPAN did not have a discriminatory intent in changing Smith's job duties, for CPAN changed her job duties solely due to Smith's job performance.

CPAN changed Smith's job duties as of January 8, 2018 for a legitimate business purpose, for during Smith's suspension absence it was discovered Smith had a large backlog of files and several severely delinquent files with some files more than three months delinquent.¹⁴⁶ CPAN was previously unaware Smith had delinquent files.¹⁴⁷ Smith's delinquent files were a large business concern to CPAN, because CPAN requires Smith to timely complete her files. Smith's work has to be timely completed because nursing facilities (CPAN's customers) submit claims to insurance companies based on templates CPAN supplies to nursing facilities.¹⁴⁸ The templates cannot be completed until Smith's work is completed.¹⁴⁹ When files are delinquent, this delays nursing facilities from getting paid, which reasonably and naturally makes nursing facilities upset.

During Smith's absence, Clara Eisnaugle ("Eisnaugle"), a new employee at CPAN, completed Smith's job duties in a quicker and more efficient manner. Eisnaugle was able to

¹⁴⁶ Hearing 230:4-231:10; Hearing 317: 9-13

¹⁴⁷ Hearing 231:11- 232:14

¹⁴⁸ *Id.*

¹⁴⁹ *Id.*

complete all of Smith's outstanding delinquent files and backlogged files that needed to be processed.¹⁵⁰ Eisnaugle testified there was a backlog of four to five stacks of files in Smith's office when she started Smith's job duties.¹⁵¹ In hindsight, it is not surprising Smith had delinquent and backlogged files, for as Rhonda Spears testified, Smith often refused to do work, Smith stated to Spears several times "I'm only doing this much today because I don't want to do anything else."¹⁵²

During Smith's absence, Eisnaugle was able to complete all of Smith's delinquent and backlog files.¹⁵³ Since taking over Smith's job duties, Eisnaugle testified she (unlike Smith) never has a backlog of files and is able complete all files on a daily basis.¹⁵⁴

Because of Smith's substandard work performance compared to Eisnaugle, CPAN reasonably determined that Smith would be re-assigned to a different administrative position upon her return. Smith was not financially harmed by the position change, for it was a lateral change that did not change Smith's hours worked or compensation.¹⁵⁵

There is no connection between Smith's threat to file a claim with the NLRB and requiring her to keep a productivity log with her new job duties. Evidence fails to establish that Smith's requirements to keep a production log were due to Smith's threat to file a claim with the NLRB.

¹⁵⁰ Hearing 229:23 – 231:10

¹⁵¹ Hearing 315:16 – 316:7

¹⁵² Hearing 192: 5-15.

¹⁵³ Hearing 315:16 – 316:7

¹⁵⁴ Hearing 317:19 -319:10.

¹⁵⁵ Jt. Ex. 1 at Paragraph 9

Production logs are a common requirement for employees at CPAN, for many CPAN employees maintain “production logs.”¹⁵⁶ CPAN provides case management services to nursing facilities.¹⁵⁷ As a part of this process, CPAN serves as a liaison between insurance companies and nursing facilities and assists the nursing facilities in verifying they are correctly being compensated by the insurance companies for services they perform.¹⁵⁸ As part of this process, CPAN has automated processes and procedures in which employees have to record in the CPAN IT system their progress and productivity for each patient case. Supervisors regularly review these “production logs” to verify all cases are being correctly handled.¹⁵⁹ The reason Smith had to keep a written “productivity log” was that this process was not yet automated into CPAN’s IT system.¹⁶⁰

Vicki Connell, the prior employee that performed this task, did not have to keep this exact written “productivity log” because Vicki Connell was more seasoned and skilled than Smith.¹⁶¹ Vicki Connell, after discovering a patient was discharged, pulled the respective patient’s file and marked in the file that the individual was discharged.¹⁶² Because of the additional skill of Vicki Connell, she then took the next required steps to close out the file. At this time, Smith did not have the skills to close out the file so a written “productivity log” was required for there to be a record regarding the status of each patient case. After Smith discovered

¹⁵⁶ See Res. Ex. 3 for the “production logs” for every case manager at CPAN for the time period 1/1/2018 to 1/5/2018. The attached production logs were extrapolated from CPAN’s IT system and represent only a small sample.

¹⁵⁷ Jt. Ex. 1 at Paragraph 2

¹⁵⁸ *Id.*

¹⁵⁹ Hearing 267:3-267:8

¹⁶⁰ Hearing 240:19 – 241:1

¹⁶¹ Hearing 235:17 – 236:11

¹⁶² *Id.*

a patient was discharged, another employee would take that information and close-out the respective patient's file.

CPAN also had a legitimate business reason to require a production log so that CPAN could monitor Smith's status and/or production, given it was recently discovered her production was not at the standard expected.¹⁶³ A production log was reasonably warranted, given CPAN discovered for the first time during Smith's suspension absence that Smith was not timely completing her job duties.

iii) CPAN terminated employment with Smith after Smith repeatedly violated CPAN's employment policies.

General Counsel alleges that CPAN terminated employment with Smith on January 16, 2018 in retaliation for Smith threatening to go to the NLRB. General Counsel never established that Smith's threat to file a claim to the Labor Board was a "motivating factor" in CPAN's decision to terminate employment with Smith.

Section 8(a)(4) is not violated if CPAN terminated employment with Smith for just cause.¹⁶⁴ As the evidence shows, Smith was terminated from CPAN for just cause and a legitimate business purpose after Smith once again violated CPAN's Employee Handbook by exhibiting improper conduct in a meeting on January 15, 2018. In the January 15, 2018 meeting, Smith again displayed improper conduct to Davis, for Davis testified that Smith in the

¹⁶³ Hearing 272:20 – 273:15

¹⁶⁴ *Finlay Bros. Co.*, 282 NLRB 737 (1987) (holding an employer did not violate LMRA when it fired employee and refused to rehire him, since evidence fails to establish that these actions were due to filing of unfair labor charges or his protected concerted activity of protesting, along with co-workers, work-uniform rule. (1) Employee became insubordinate when he disobeyed rule after having been urged to comply with it and given several opportunities to do so; (2) evidence of employer's attitude showed not animus but desire to terminate disruptive situation and implement its policy; (3) employee's refusal to comply with rule was reason for his discharge; (4) there is no persuasive evidence that refusal to rehire employee is traceable to his filing of charge).

meeting was agitated, twisted her head, pointed her finger at Davis, raised her voice, yelled at Davis, and overall did not act in the manner a reasonable person would when asked by a supervisor to follow company policy.¹⁶⁵ There is no evidence that Smith mentioned the NLRB in this meeting. Smith exhibited this conduct, even though Turni told Smith on January 8, 2018, after Smith returned from her three-day suspension, that if Smith exhibited any more insubordinate behavior, she would be terminated.¹⁶⁶

Turni was absent from work on January 15, 2018. After Turni returned to work on January 16, 2018, Turni investigated the facts surrounding the meeting and spoke with Marky Williams, the only witness to the meeting, to determine if Smith was insubordinate to Davis. Marky Williams stated Smith was “insubordinate in the way that she (Smith) responded to Kim (Davis) and would not calm down.” After Williams’ confirmation, Turni terminated employment with Smith, for Smith’s behavior on January 15, 2018 was a violation of CPAN’s Employee Handbook as it was a Class I violation since Smith’s behavior showed gross insubordination or refusal in words or actions to comply with CPAN policy and/or major improper misconduct.¹⁶⁷ A Class I violation is defined in the CPAN Employee Handbook as a major violation that could result in a suspension or termination for the first occurrence.¹⁶⁸ Turni decided to terminate Smith at this time because Turni told Smith on January 8, 2018 that if Smith exhibited another instance of insubordination, she would be terminated. Smith was again insubordinate and thus violated CPAN’s Employee Handbook.

The fact that Smith threatened on October 12, 2018 that she would report CPAN to the NLRB is in no way causally related to, or a “motivating factor”, in CPAN’s decision to terminate

¹⁶⁵ Hearing 242:16 - 243:3

¹⁶⁶ Hearing 88: 3-10; 291: 1-14

¹⁶⁷ See Res. Ex. 1 at 37-38.

¹⁶⁸ See Res Ex. 2 at 11.

Smith. The fact Smith made this threat was immaterial in the decision-making process to terminate Smith. In fact, after the October 12, 2018 threat, CPAN tried to work with Smith so there could be a successful employment relationship between the parties. First, after Smith's threat in the October 12, 2018 meeting, CPAN granted Smith 2 additional PTO days even though CPAN had no obligation to do so.¹⁶⁹ Second, CPAN allowed Smith to take PTO in two-hour increments contrary to CPAN's policy that PTO must be used in minimum four-hour increments to clear-up a misunderstanding.

All discussions related to Smith's attendance and use of her PTO time is a red herring, because Smith's violations of the attendance policy and/or her use of her PTO played no role in Smith's suspension, change of job duties, and/or termination. Smith was written-up for attendance violations well before there was any mention of the NLRB.¹⁷⁰ Smith herself admits that CPAN did not retaliate against Smith by enforcing and writing her up for attendance policy violations.¹⁷¹

CPAN could have terminated Smith for violating CPAN's attendance policy, for Smith had over six occurrences from August 30, 2018 to January 12, 2018. In accordance to CPAN's Attendance Program, which Smith signed on March 28, 2016, an employee will be terminated if they have five occurrences. Because Smith had six occurrences in her prior 5 months of employment, it was within CPAN's right to terminate employment with Smith for violating the attendance policy by having in excess of five occurrences.

Additionally, instead of terminating Smith immediately for her unprofessional and insubordinate behavior on December 19, 2017 and January 2, 2018, CPAN used a progressive

¹⁶⁹ Hearing 232:15-233:7; Hearing 279:6 – 280:23

¹⁷⁰ See Res. Ex. 1 at 27-29

¹⁷¹ Hearing 133:10- 134:21

discipline system and allowed her another opportunity to change her conduct and comply with CPAN's employment policies.

The fact CPAN did not terminate Smith for her improper conduct on December 19, 2017 or January 2, 2018 or terminate Smith for her attendance violations, even though CPAN could have terminated Smith according the Attendance Policy and CPAN Employee Handbook, proves CPAN was not acting in a retaliatory manner against Smith for her threatening to file an action with the NLRB.

IV. Conclusion

For these reasons, the Administrative Law Judge should dismiss the Complaint allegations against Respondent Comprehensive Post Acute Network, LTD.

Date: September 5, 2018

Respectfully submitted,



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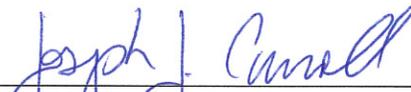
The undersigned certifies that the foregoing Post-Hearing Brief to the Administrative Law Judge has been duly served upon the following parties or counsel in the following manner this 5th day of September, 2018:

- (i) Electronically to the Agency through the Agency's website and by email:

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